

Energy company paid \$43M for dirty bailout. Says it acted in a “legal way”

ohiocapitaljournal.com/2024/01/02/energy-company-paid-43m-for-dirty-bailout-says-it-acted-in-a-legal-way

By Marty Schladen

January 2, 2024



Natural gas meter with pipe on wall. Getty Images.

The energy company that was to receive that bulk of a corrupt \$1.3 billion bailout that has already imprisoned two is telling a federal court it acted in a “legal way.” It makes that statement even though it paid at least \$43 million to finance the scheme, part of which its executive chairman referred to as “black ops.”

Energy Harbor is now an independent company. But between 2017 and 2020 it was called FirstEnergy Solutions and it was a subsidiary of Akron-based FirstEnergy. That’s when FirstEnergy, former House Speaker Larry Householder, R-Glenford, and others engaged in one of the biggest bribery and money-laundering conspiracies in Ohio history.

Two nuclear plants owned by FirstEnergy Solutions were losing money and FirstEnergy’s top leadership wanted a ratepayer bailout to prop them up so they could send the subsidiary through bankruptcy, spin it off and get the nuclear plants’ financial and environmental liabilities off of FirstEnergy’s books.

The energy company and its subsidiary paid more than \$60 million to make Householder speaker, pass the bailout and defend it from a voter-initiated repeal. It all blew up in July 2020 when federal law enforcement charged Householder and four others with racketeering for their roles in the scheme.

Householder is now serving a 20-year prison sentence and FirstEnergy admitted wrongdoing in a deferred-prosecution agreement and paid a \$230 million fine. Energy Harbor, the company FirstEnergy Solutions became when it emerged from bankruptcy in early 2020, hasn’t been charged.

But federal prosecutors are continuing their probe, with Sam Randazzo, the former chairman of the Public Utilities Commission of Ohio, being indicted only weeks ago.

In addition, a group of large investors such as pension funds are suing FirstEnergy in civil court claiming securities fraud. As a part of that case, lawyers for the investors are seeking communications between executives with what was then FirstEnergy Solutions and their attorneys as the bribery conspiracy was taking place.

Normally, such communications can be kept secret under the doctrine of attorney-client privilege. But the plaintiffs in the civil case are seeking to pierce that privilege under the "crime-fraud exception." In other words, they're claiming that the lawyer-client communications were the part of actions which on their face could be seen as criminal activity.

A special master handling evidentiary disputes in the massive civil case ruled that the crime-fraud exception applies, so the company that used to be known as FirstEnergy Solution has to turn over thousands of attorney-client communications. The company, now known as Energy Harbor, has appealed, arguing that it shouldn't have to.

"In short, the evidence shows that Energy Harbor prudently and properly consulted with its lawyers to determine how to make contributions and advocate for legislation in a legal way, not to help it commit a crime," the company said in a Dec. 11 court filing. "There is no evidence from which the Special Master could reasonably infer that Energy Harbor's communications with its lawyers were intended to facilitate or conceal a crime or fraud."

However, lawyers for the plaintiffs said, that ignores several important facts.

For one, the company's lobbyist, Juan Cespedes, has pleaded guilty in the conspiracy. In court in early 2023, he admitted to corruptly steering a mountain of cash from FirstEnergy Solutions into a 501(c)(4) "dark money" group to finance the bailout conspiracy. Cespedes testified that conspirators funneled cash through the dark money group to conceal its source as it was used for an illegal purpose.

He started by describing contributions of \$500,000 and \$15 million he directed to the dark money group.

"After that, I again coordinated in the amount of over \$35 million, contributions from (FirstEnergy Solutions), my client, to (the dark money group), which was a (c)(4) again controlled by Jeff Longstreth (who also pleaded guilty) and Mr. Householder, all for the purpose of defending our legislation and protecting some of the representatives who we cared about at the time," Cespedes testified.

Lawyers for the plaintiff investors argue that lawyers for FirstEnergy Solutions gave legal advice about contributions that the company's lobbyist has admitted are illegal, so that advice is subject to the crime-fraud exception.

The plaintiffs' lawyers also noted how FirstEnergy Solutions lawyers reviewed drafts of the bailout legislation.

Randazzo, who is charged with taking a \$4.3 million bribe from FirstEnergy, and a recent PUCO employee worked on drafts of the bill even though Randazzo was supposed to be regulating its beneficiary. Cespedes, the lobbyist, shuttled printed copies of the drafts between the employee — who then worked for Householder — and attorneys for FirstEnergy Solutions. The use of printed drafts seems to have been intended to avoid creating an electronic trail, which might indicate a knowledge that the conduct wasn't legal.

In addition, attorneys for the former FirstEnergy Solutions are describing as innocent the company's participation in a xenophobic campaign to stop a voter attempt to repeal the corrupt bailout.

"Energy Harbor contributed to (the dark money group), after consulting with lawyers, with the clear understanding that the funds would be used for a media campaign in support of H.B. 6 and, later, to defeat the referendum," they told the court in the civil case.

However, the attempt to defeat the referendum involved a flood of commercials falsely claiming that it was really an attempt by China to take over the Ohio power grid. The fight against the repeal also featured thuggish harassment of people trying to circulate petitions that at times turned violent, witnesses testified during Householder's trial.

John Kiani was FirstEnergy Solutions' executive chairman through the bailout and he continues in that post now that the company is named Energy Harbor. During Householder's trial, Cespedes testified that a Kiani aide told him that Kiani would make \$100 million from the sale of FirstEnergy Solutions' nuclear plants.

Based on Kiani's communications during the failed repeal attempt, it would appear the executive chairman didn't think the fight against it was completely above-board, despite what the company's lawyers are arguing now.

"What happened to the black ops?" Kiani texted at the height of the repeal fight to former Ohio GOP Chairman Matt Borges, who is serving five years in federal prison for his role in the scandal. Cespedes testified Kiani's statement was a reference to Cespedes's attempt to spy on the repeal effort by paying an insider funds from the FirstEnergy entities.

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FirstEnergy audit leaves lobbying costs unclear

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The then-FirstEnergy Corp.'s Davis-Besse Nuclear Power Station in Oak Harbor, Ohio, is pictured in 2017. (AP Photo)

CHARLESTON — An auditing firm hired by the West Virginia Public Service Commission found evidence that electric companies owned by FirstEnergy Corp. adjusted for related costs connected to the Ohio House Bill 6 scandal, but full lobbying costs by FirstEnergy remain elusive. The PSC received a focus management audit report Thursday by Rhode Island-based Van Reen Accounting LLC of Monongahela Power Co. and Potomac Edison Co. Both companies are owned by Akron-based FirstEnergy Corp.

The PSC filed an order in March calling for a focused management audit of MonPower and Potomac Edison's lobbying and image building expenses that were included in expanded net energy costs (ENEC) cost recovery proceedings covering 2023 and going back to 2018. Van Reen was selected to conduct the audit in August and given a deadline of Dec. 31 to complete the audit. Part of the audit was to focus on whether FirstEnergy tried to charge MonPower and Potomac Edison ratepayers for lobbying and promotion expenses as part of base rate increase requests in connection with Ohio House Bill 6. According to federal court documents, FirstEnergy was accused of spending more than \$60 million between 2018 and 2020, funneling the money through Generation Now, a non-profit controlled by Former Republican Ohio House Speaker Larry Householder and others. The funds were allegedly used to help Householder become House speaker. Later, funds from the non-profit were used to bribe ballot initiative signature collectors to stop collecting signatures to reverse House Bill 6, a bill that charges Ohio ratepayers to keep the Davis-Besse and Perry nuclear plants operating, allowing for electric utility decoupling, and reversing energy efficiency mandates.

Householder, former Ohio Republican Party chairman Matt Borges, and three others were found guilty over the past year for their part in a bribery and racketeering scheme. In lieu of prosecution, FirstEnergy, which was charged with federal wire fraud, agreed to a settlement and \$230 million penalty and a three-year deferred prosecution agreement. Other investigations and lawsuits against FirstEnergy are pending. According to the Van Reen report, attorney-client privilege prevented them from inspecting FirstEnergy's lobbying and

building costs associated with HB 6. “FE’s legal investigation that included identification of HB 6 costs mischarged to (MonPower and Potomac Edison)...is attorney-client privileged,” the report stated. “As such, Van Reen Accounting’s procedures for HB 6 were limited to inquiries and review of the costs within the possession, custody, or control of MonPower and (Potomac Edison).” While Van Reen said it had obtained evidence that MonPower and Potomac Edison had adjusted for HB 6-related costs, the firm found no evidence that HB 6-related costs were included in the 2022 test year used in the companies’ 2023 rate case request. According to the report, more than \$871,000 in costs associated with HB 6 were mischarged to MonPower and Potomac Edison’s expense and capital accounts in 2012 and between 2014 and 2020. Correcting journal entries were posted in 2020 to remove these costs from the two companies’ operating expenses and capital accounts. “Because these costs were incurred prior to and after 2013 and the companies’ last base rates in West Virginia were based on a 2013 test year, these costs are not in current base rates,” the report stated. “In addition, because correcting journal entries were recorded prior to 2022 and the test year for the 2023 rate case is as of December 31, 2022, these costs are not in the proposed revenue requirement of Case No. 23-0460-E-42T.” MonPower and Potomac Edison have three pending electric rate increase requests before the PSC, including their annual ENEC request, where the companies are seeking an additional \$167.5 million, or an additional \$9.19 per an average residential customer’s power bill. They are also seeking \$207.5 million through an increase in base rates, and \$33.9 million over a two-year period beginning in 2024 for vegetation management. For non-HB 6 lobbying costs, MonPower and Potomac Edison reported a combined \$343,752 in external and internal lobbying costs accrued between 2015 and 2021 according to a September 2022 list of correcting journal entries to remove several non-operating and non-recoverable costs. But Van Reen auditors said both companies had a difficult time separating its normal lobbying costs from possible HB 6 lobbying costs. “...The companies stated that internal lobbying costs were not tracked with sufficient specificity to determine whether those costs were incurred as part of lobbying in support of HB 6,” according to the report. FirstEnergy did provide Van Reen with Excel spreadsheets containing information from the company’s internal Federal Energy Regulatory Commission investigation for external and internal lobbying costs, though the expenditures were redacted. However, the investigation did find that external and internal lobbying costs had been “misclassified, misallocated, or lacked sufficient supporting documentation across all of (FirstEnergy) and its subsidiaries.” According to the report, more than \$1 million in non-HB 6-related external and internal lobbying costs were recorded on MonPower and Potomac Edison’s books between 2015 and 2021 along with \$84,489 in internal lobbying ancillary costs, though correcting journal entries made in 2022 removed these costs. The audit also found \$229,115 in sports sponsorships mischarged to MonPower and Potomac Edison and included in the companies’ 2013 test year for its prior base rate case. The companies determined that customers are owed more than \$2.5 million in a refund, which will be credited to customers in July 2024. Another \$328,785 in non-recoverable costs was mischarged to MonPower and Potomac Edison between 2015 and 2022, and more than

\$875,000 in non-operating and non-recoverable costs on non-base rate surcharges. *Steven Allen Adams can be reached at sadams@newsandsentinel.com.*

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Mike Tony

January 2, 2024

FirstEnergy has conceded possible West Virginia ratepayer effects from what is believed to be the largest bribery scheme in Ohio history.

In a filing FirstEnergy's West Virginia utilities Mon Power and Potomac Edison submitted Dec. 22 in a case seeking a \$172.7 million rate increase, FirstEnergy Assistant Controller Tracy Ashton said it's possible that Ohio House Bill 6 costs could have applied to the companies' vegetation management and mercury and air toxic standard projects.

Ohio House Bill 6 of 2019 was a billion-dollar bailout of FirstEnergy nuclear plants. A federal jury found a former speaker of the Ohio House of Representatives and a former Ohio Republican Party chairman guilty of participating in a racketeering conspiracy to pass the measure.

Ashton had testified in June that no HB 6-related costs were passed through to any West Virginia surcharge or base rates.

But Ashton's latest testimony says that through a review of HB 6 costs and nonrecoverable and nonoperating costs allocated to Mon Power and Potomac Edison since their last base rate case in 2014, FirstEnergy estimated roughly \$53,000 in capitalized costs may have been applied to vegetation management and mercury and air toxics standard projects.

The jury found former speaker Larry Householder and former party chairman Matthew Borges guilty on March 9 of wire fraud, receipt of millions of dollars in bribes and money laundering in a racketeering enterprise that received roughly \$60 million from FirstEnergy and its affiliates to help secure HB 6.

In July 2021, FirstEnergy agreed in a deferred prosecution agreement to pay a \$230 million penalty upon admitting the utility and its subsidiary, FirstEnergy Service Company, conspired with public officials and other entities to pay and conceal millions of dollars through wire transfers to support passage of the legislation.

Ashton said that, although the estimated revenue requirement effect is expected to be minimal, Mon Power and Potomac Edison will determine an estimated amount and present it for the PSC's consideration before evidentiary hearings in the case.

An evidentiary hearing is scheduled for Jan. 24 through Jan. 26 in the case.

Lobbying expenses audit filedAn independent auditing firm has delivered a report on Mon Power and Potomac Edison lobbying expenses that recommends cost adjustments and acknowledges its own limited scope regarding HB 6.

Ordered by the West Virginia Public Service Commission, the audit report filed Thursday and conducted by Van Reen Accounting LLC, a Rhode Island-based firm, identified both lobbying and non-lobbying costs to adjust and made other recordkeeping recommendations.

The PSC ordered the audit in March, setting its scope to include lobbying and other costs of all FirstEnergy companies related to HB 6.

Van Reen Accounting's report says the firm found no evidence that HB 6-related costs were included in the 2022 test year used in a Mon Power and Potomac Edison 2023 rate case. A test year gives a baseline for utility operations when rates are being set.

But Van Reen noted Mon Power and Potomac Edison objected to providing information outside their custody due to attorney-client privileges in a broader FirstEnergy probe of misclassified and misallocated transactions in connection with the deferred prosecution agreement, limiting Van Reen's review.

FirstEnergy spokesperson Hannah Catlett said Friday the company had received the audit report and was reviewing it.

The PSC claimed in a Saturday afternoon press release the audit "revealed plans" for a \$2.5 million refund to customers based on sponsorship costs that had been misallocated to Mon Power and Potomac Edison over nine years. But the companies already had proposed the refund in June 2023 filings in a pending base rate hike request.

The utilities calculated that \$229,115 was inadvertently included in base rates to cover sports sponsorship costs misallocated to them in the year on which the base rate was based. They multiplied that across the nine-plus years of the base rate's implementation to determine that just over \$2.08 million owed to ratepayers — plus another \$463,302 in compounded interest — to total roughly \$2.54 million.

The companies have proposed issuing a one-time fixed bill credit to customers to address that liability.

Audit findings and recommendations

Van Reen found no errors or omissions that would affect non-HB 6 lobbying and image-building costs or expenses charged to accounts included in their fuel cost recovery proceedings for 2018 to 2022.

The PSC had made 2018 the start of its assigned audit review period.

Van Reen said the companies' computation of the \$2.54 million customer refund related to sponsorship costs as identified in a pending 2023 rate case was "reasonable."

Van Reen recommended Mon Power and Potomac Edison adjust an average calculation of a 2022 test year rate base to reflect non-recoverable cost adjustments made to plant accounts in September 2022. The firm said net adjustments recorded to plant accounts that month totaled \$641,052.

The firm also recommended Mon Power and Potomac Edison:

- Remove \$42,305 of pension costs for internal lobbyists from 2022 operating expenses.
- Remove \$1,730 of membership dues from 2022 operating expenses.
- Remove \$24,708 of nonlobbying legal fees allocated to the companies in 2022.
- Adjust for \$155,166 of duplicate payments identified within a 2022 fuel cost rate case.

Van Reen also said Mon Power and Potomac Edison should document and present how consultant fees paid to BCG Resources LLC apply to fuel inventory.

The firm's report states that between June 2018 and November 2020, the companies paid \$18.75 million to BCG Resources for management and advisory services on fuel sourcing and supply, coal blending, regulatory services related to fuel and ash requirements and economic development.

The firm notes that while consultant fees for fuel-related advisory services may be included in the cost of fuel inventory, the companies should formally document and present how all BCG consultant fees are applicable to fuel inventory.

A 2022 Federal Energy Regulatory Commission audit of FirstEnergy and its subsidiaries found that Mon Power failed to properly record the \$18.75 million it paid in consulting service fees from June 2018 to November 2020 to BCG Resources. That audit found Mon Power may have overcharged wholesale customers, including other FirstEnergy utilities, because it failed to account for monthly payments to BCG Resources as inventoried fuel stock in one account before charging it to another.

PSC Chairwoman Charlotte Lane, a former FirstEnergy lobbyist, indicated in the agency's Saturday press release the Van Reen audit's observations about misallocated sponsorship costs and BCG Resources would be considered in Mon Power's and Potomac Edison's pending base rate case.

The utilities noted in their Dec. 22 PSC filing they had revised their rate hike request from \$207.4 million to \$172.7 million mainly due to a change in depreciation rates stemming from a settlement in another case.

BCG Resources is registered as a limited liability company with the Florida Division of Corporations, which lists a Dublin, Ohio, principal address for the company and Wayne M. Boich as company representative.

Boich, chairman and CEO of Boich Companies, is the CEO of 'Company C' listed in the 2020 federal criminal complaint that charged Householder and four others with racketeering, the Columbus Dispatch reported in August 2020.

The complaint states that 'Company C' had "interests aligned with" 'Company A,' or FirstEnergy.

FirstEnergy and Boich Companies bought an underground coal mine in Montana in 2008 as a joint venture.

The complaint says the CEO of 'Company C' provided a \$25,000 deposit to Generation Now.

Generation Now was a purported social welfare organization whose real purpose was receiving undisclosed donations as a benefit to Householder, according to FirstEnergy's 2021 deferred prosecution agreement with the U.S. Attorney's Office for the Southern District of Ohio.

Dayton small businesses could be eligible for millions in Visa, Mastercard settlement claims

[bizjournals.com/dayton/news/2024/01/01/law-firm-secures-55b-settlement.html](https://www.bizjournals.com/dayton/news/2024/01/01/law-firm-secures-55b-settlement.html)

Keith Schubert



By Keith Schubert — Reporter, Minneapolis / St. Paul Business Journal
Jan 1, 2024

Small business owners in the Dayton region could get back millions of dollars in credit card fees in the nation's largest antitrust class action.

Nearly 20 years ago, a Twin Cities business owner and Minneapolis law firm Robins Kaplan teamed up to take on Mastercard and Visa over allegations of unfair credit card fees.

Earlier this summer, the suit was settled for \$5.54 billion — the largest settlement of a private antitrust action in the 130-year history of the Sherman Act, which prohibits anticompetitive prices.

The lawsuit alleged that Visa, Mastercard, and their member banks violated antitrust laws and charged merchants who accept credit and debit cards supracompetitive fees on card transactions. The two credit card behemoths did not admit any liability in the settlement.

As a result of the settlement, any company — from Best Buy Co. Inc. to the family-owned corner store — that accepted Visa or Mastercard credit or debit cards from Jan. 1, 2004 though Jan. 25, 2019 can submit a claim to receive a portion of the settlement. Claims are also open to businesses that went bankrupt or stopped operating between Jan. 1, 2004 and Jan. 25, 2019.

In the Dayton region, thousands of small business owners could be eligible for millions of dollars in those fees coming back to them. Businesses will see their information pre-populated on the claims site, and can talk with administrators if there are any questions about what their share might be.

Partners K. Craig Wildfang, Ryan Marth and Thomas J. Undlin of Robins Kaplan served as co-counsel on the litigation alongside Robbins Geller Rudman & Dowd and Berger Montague. The court approved \$523 million of the settlement to go to the litigation team.

"This is an historic antitrust class-action settlement that provides some relief for U.S. merchants after years of paying allegedly inflated Visa and Mastercard interchange fees," Wildfang said in a statement.

The case featured eight plaintiffs, three of which were from Minnesota: St. Louis Park-based Traditions Classic Home Furnishings, a boutique interior design company with locations in the Twin Cities and Naples, Florida; CHS Inc. headquartered in Inver Grove Heights.

Other plaintiffs include:

- ScanMyPhotos.com of Irvine, California
- Capital Audio Electronics Inc. of Jersey City, New Jersey
- Discount Optics Inc. of Boca Raton, Florida
- Leon's Transmission Service Inc. of Reseda, California
- Parkway Corp. of Philadelphia
- Payless ShoeSource Worldwide LLC of Topeka, Kansas

The case started when Mike Schumann, co-founder and president of Traditions Classic Home Furnishings, began getting fed up with the increasing fees, known as interchange fees, he had to pay to accept credit cards at his company.

"The amount of money that we were paying for credit cards that we were accepting was our third-highest cost of doing business," he said. "It just kept getting worse, and it got to a point where we just decided, OK, we got to put a stop to this."

In early 2005, he sought legal advice from Robins Kaplan, which serendipitously had already been investigating the same issue Schumann was up in arms about.

Before Schumann came along, Marth said the firm was looking for larger retailers with deeper pockets to help bring the case to court, but found no luck.

"A lot of the big merchants were afraid. ... They were afraid they had relationships with the banks. They were afraid about retaliation. No one wanted to be the first," Marth said.

So Schumann, along with seven other businesses led the charge. The case was filed in 2005 and originally settled in 2012, but the Court of Appeals for the Second Circuit rejected that settlement. After two more years of litigation, another settlement was reached and eventually given final approval in March.

T H E L I S T

Dayton-Area Banks

Ranked by Local deposits

Rank	Institution	Local deposits
1	Fifth Third Bank	\$8.28 billion
2	JPMorgan Chase & Co.	\$4.26 billion
3	PNC Bank	\$3.36 billion

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Details of Charleston Wipes Settlement Suit Released

 [nonwovens-industry.com/contents/view_breaking-news/2023-12-29/details-of-charleston-wipes-settlement-suit-released](https://www.nonwovens-industry.com/contents/view_breaking-news/2023-12-29/details-of-charleston-wipes-settlement-suit-released)

No liability found against makers and retailers of flushable wipes as they agree to testing and labeling requirements

12.29.23

Robbins Geller Rudman & Dowd LLP and AquaLaw PLC announced earlier this month December that proposed settlements have been reached in a class action suit with Costco Wholesale Corporation, CVS Health Corporation, The Procter & Gamble Company, Target Corporation, Walgreen Co. and Walmart Inc. regarding the manufacturing, design, marketing and/or sale of flushable wipes. Defendants deny the allegations about their flushable wipes and maintain that the products perform as advertised. There has been no finding of liability against any of the defendants; however, they have agreed to the settlements to avoid the uncertainties and expenses associated with continuing the case.

The Settlement Class includes owners or operators of a sewage or wastewater conveyance and treatment plant, such as a municipality, authority or wastewater district in the United States whose system was in operation between January 6, 2018 and November 21, 2023.

To settle the lawsuit, brought by the Charleston Water System, defendants have agreed to implement certain modifications to their business practices and have made certain representations and commitments with respect to their respective flushable wipes products.

These includes committing that the the flushable wipes they manufacture and/or sell do not contain plastic or polyester/polyolefin fibers andthat the wipes meed the current International Water Services Flushability Group specifications. The defendents also agreed to two years of confirmatory testing to ensure their respective flushable wipes comply with IWSFG 2020 as well as to labeling changes for non-flushable products. Costco, CVS, P&G, Target, and Walgreens agreed to meet the “Do Not Flush” labeling standards set forth in Chapter 590 of Assembly Bill No. 818 (“AB818”) of California State - considered the most stringent labeling law in the U.S. - nationwide to the extent their products are “Covered Products” as defined in AB818. Walmart has likewise agreed to implement consistent labeling nationwide for its non-flushable products, which will bring these products’ labeling in compliance with the

aforementioned state law throughout the country. The Wipes Defendants also agreed to include “Do Not Flush” symbols or warnings on not only the principal display panel, but also at least two additional panels of packaging for its non-flushable baby wipes products.

The proposed settlements do not affect class members’ individual claims against wipe sellers and manufacturers – including the Wipes Defendants – for damages or other monetary relief due to wipes-related blockages. However, if approved, the wipes defendants will implement certain modifications to their business practices with respect to flushable wipes, as well as labeling requirements for non-flushable wipes, and class members will release any and all claims for injunctive relief they may have against the Wipes Defendants arising from or relating to Plaintiff’s allegations. Class Members who own or operate wastewater treatment plants/systems should review the settlements in case they wish to submit comments about the settlements.

If you are part of the Settlement Class, you will automatically receive the benefits of the Settlements. You may also object to the Settlements and/or Class Counsel’s request for attorneys’ fees and expenses of up to \$1,900,000. You may retain and pay for an individual attorney, but you do not need to because Class Counsel is working on your behalf.

For more information: www.charlestonwipessettlement.com.

Fox Election Lies Shareholder Suit to Be Led by NYC Pension Fund

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- Leadership structure, expertise of NYC fund, gave team edge
- When “media scrutiny is inevitable” public officials are plus

Sprawling litigation against Fox News’ directors for decisions that led to a \$787.5 million defamation settlement with Dominion Voting Systems Inc. will be helmed by a legal team for the pension funds of New York City and Oregon public workers, the Delaware Court of Chancery ruled Friday.

That coalition with their lawfirms—including litigation boutique Friedlander & Gorris PA, Cohen Milstein Sellers & Toll PLLC, and Lieff Cabraser Heimann & Bernstein LLP—edged out a competing group of pension and investment funds represented by Robbins Geller Rudman & Dowd LLP, Bernstein Litowitz Berger & Grossmann LLP, Kessler Topaz Meltzer & Check LLP, Labaton Sucharow LLP, and Friedman Oster & Tejtell PLLC.

“Only one team of lawyers remained consistent throughout the process: the Friedlander firm, Cohen Milstein, and Lieff Cabraser,” Vice Chancellor J. Travis Laster said in his opinion. “The other team of lawyers (the ‘BLBG Team’) appears to have evolved on the fly.”

The decision could mean a huge payday for the winning lawyers if they can prevail in their claims that Fox leadership should be liable for the massive payout against Dominion as Fox sought to back former President Donald Trump’s false claims that the 2020 election was stolen from him. Another payout could also be coming down the pike, as larger voting system manufacturer Smartmatic pursues its \$2.7 billion suit against the broadcaster.

Laster said the Friedlander team’s formation was “intentional, client-initiated, and client-driven.” While there weren’t clear differences in the competence of the teams or the resources available to the firms, Laster said the Friedlander team had a stronger complaint and a clearer leadership structure.

The Friedlander team also had better proposed lead plaintiffs due to the expertise of the New York City and Oregon pension funds’ leadership. Antagonistic statements made by the funds’ leaders against Fox don’t overcome that advantage and won’t be a distraction due to the high-profile nature of the case, Laster said.

“The case involves one of the major American news networks, one of the world’s largest media companies, and one of the world’s richest families,” he said. “In a case where media scrutiny is inevitable, having lead plaintiffs who are public figures and who have experience with the media is a benefit, not a detriment.”

The case is In re Fox Corp. Derivative Litig. , Del. Ch., No. 2023-0418-JTL, 12/29/23 .

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Legal Profession Blog

lawprofessors.typepad.com/legal_profession/2023/12/and-the-winner-is.html

Friday, December 29, 2023

And The Winner Is...

The Delaware Court of Chancery has selected lead counsel in derivative suits against Fox arising out of defamation claims relating to its 2020 election coverage

In the wake of the 2020 presidential election, the Fox News network broadcast statements accusing two voting machine companies of facilitating election fraud. The voting machine companies sued for defamation. Fox Corporation (the “Company”) paid \$787.5 million to settle one lawsuit. Another remains pending.

Various stockholders filed derivative complaints that seek to shift the losses the Company suffered from the entity to the directors and officers who the stockholders say caused the harm. Those actions have been consolidated.

Two competing teams seek leadership roles. Each lead counsel team is well-qualified and could litigate the case. Each lead plaintiff team has strengths and weaknesses.

This is the first decision interpreting recently amended Rule 23.1, which now identifies factors for a court to consider when resolving a leadership dispute. After balancing those factors, this decision selects the Friedlander Team as lead counsel and the NYC/Oregon Funds as lead plaintiffs.

The court recounts the shareholder litigation and competing players for leadership

Only one team of lawyers remained consistent throughout the process: the Friedlander firm, Cohen Milstein, and Lieff Cabraser (collectively, the “Friedlander Team”). They appeared initially on behalf of the Oregon Funds. They applied for leadership on behalf of the New York Funds and Oregon Funds (jointly, the “NYC/Oregon Funds”).

The NYC/Oregon Funds had selected the Friedlander Team through a deliberative process. The public officials who oversee the NYC/Oregon Funds—the New York City Comptroller, the Oregon Attorney General, and the Oregon State Treasurer—decided to work together to investigate issues regarding the Company. The NYC/Oregon Funds requested proposals from multiple law firms with which they have relationships, and they selected the Friedlander Team. The NYC/Oregon Funds subsequently entered into a written engagement letter with the Friedlander Team that, among other things, places a negotiated cap on the fee award that the Friedlander Team can seek. The process of team formation was intentional, clientinitiated, and client-driven.

The other team of lawyers (the “BLBG Team”) appears to have evolved on the fly. Their leadership application calls for Bernstein Litowitz to serve as co-lead counsel with Kessler Topaz Meltzer & Check LLP and Robbins Geller Rudman & Dowd LLP. The latter two firms had not previously appeared in the case. Bernstein Litowitz initially appeared with Labaton and Friedman Oster, but the application relegates them to the role of additional counsel. It is not clear when or how Kessler Topaz or Robbins Geller joined the group, nor how the decision was made to have certain firms serve as co-lead counsel and others as additional counsel.

The BLBG Team applied for leadership on behalf of the Cayman Islands Fund and Sjunde AP-Fonden, one of the two Swedish funds that originally appeared (the “Cayman/Swedish Funds”). It is not clear how the Cayman/Swedish Funds became connected with the BLBG Team. It is not clear whether the funds or the lawyers started the discussions or whether the funds and any of the law firms had an existing relationship. The Cayman Fund and the two Swedish funds submitted a joint declaration stating that they “each individually began discussions with counsel” after the Dominion settlement and “each subsequently elected to be named plaintiffs.” After submitting the declaration, one of the Swedish funds dropped out. The declaration generally describes the funds’ willingness to work together and with counsel, but the language is formulaic. There does not appear to be any engagement letter between the BLBG Team and the Cayman/Swedish Funds, although the BLBG Team informed the Cayman/Swedish Funds about their ability to make a fee application and the legal standards that this court would apply.

Competence

At this stage of the case, the Friedlander Team appears to have prepared a stronger complaint. That complaint incorporates factual developments and incidents at Fox News that are not included in the BLBG Team’s complaint. It also includes a Massey claim that appears promising and is not found in the BLBG Team’s complaint. As noted, both complaints were well-crafted. The Friedlander Team’s complaint, however, is relatively stronger.

Performance

The Friedlander Team was more circumspect. They waited until after the Company actually suffered a corporate trauma in December 2022. By not starting earlier, the Friedlander Team avoided imposing costs on the Company unnecessarily. The Friedlander Team served a books and records demand on behalf of the NYC Funds on March 30, 2023 and a demand on behalf of the Oregon Funds on May 31, 2023. They synthesized the documents they received with the extensive information that was publicly available, much of which was generated by the Dominion litigation and posted on a Dominion website.

Both teams thus proceeded responsibly. This factor slightly favors the Friedlander Team, but not to a meaningful degree.

Structure

On this issue, the Friedlander Team's proposal is superior. The Friedlander Team consists of three firms. That is not too cumbersome a number. Having three firms also enables the team to combine the Friedlander firm's deep expertise in Delaware law with the more diverse competencies of Cohen Millstein and Lieff Cabraser.

The differences among the three firms and their practices suggest that the Friedlander Team can harness the benefits of diversity, which "is the most powerful method of becoming more innovative." Michael Muthukrishna, *A Theory of Everyone* 153 (2023). Research shows that cognitively diverse groups find solutions faster, and higher cognitive diversity correlates with better performance overall.

Contentions of the losing group

if it should turn out that the NYC/Oregon Funds (or the Friedlander Team) fall short of their obligations, then that can be remedied. The selection of a leadership team at the outset of the case is not a one-time event that gives the team a property right to pursue the litigation. "If a derivative plaintiff or derivative counsel fails to adequately represent the interests of the entity in pursuing the derivative action, then the Court may dismiss the derivative action without prejudice, replace the derivative plaintiff or derivative counsel, or make further orders as warranted." Ct. Ch. R. 23.1(c (4).

Ultimately, this is a decision that involves tradeoffs. The NYC/Oregon Funds have unique attributes. On the positive side of the ledger, they bring resources and expertise, an institutional commitment to the litigation, and the legitimacy of public officials doing their jobs. On the negative side, there are potential complexities of the type that the BLBG Team has cited. In my judgment, the former outweighs the latter.

(Mike Frisch)

Long Island cities lose challenge to N.Y. law that killed their opioid lawsuits

 legalnewsline.com/stories/653462166-long-island-cities-lose-challenge-to-n-y-law-that-killed-their-opioid-lawsuits

January 2, 2024

Opioids

Attorney General Letitia James | Attorney General Letitia James Official website

CENTRAL ISLIP, N.Y. (Legal Newsline) - A collection of Long Island cities that challenged a New York law ending their separate lawsuits against the opioid industry vowed to appeal a federal judge's decision dismissing their case, saying they have been denied their share of the multibillion-dollar opioid settlement pot.

The City of Babylon and eight others sought a declaratory judgment blocking New York Attorney General Letitia James from enforcing the New York Mental Hygiene Law, passed in June 2021, that extinguished opioid claims filed after June 30, 2019. The Long Island cities filed their lawsuits in December 2019.

They claimed the law was written to protect lawsuits filed before the deadline by municipalities represented by New York law firm Napoli Shkolnik, while cutting out cities represented by Georgia lawyer Mark Tate.

In a Dec. 19 decision, U.S. District Judge Kio Matsumoto rejected Babylon's arguments, saying that absent narrow exceptions, political subdivisions like cities and counties are barred from suing the state that created them. The judge dismissed claims based on the U.S. Constitution as well as claims New York violated its own home rule statute by passing the law, which was required to obtain \$1.1 billion in settlement money from opioid defendants.

Tate said he will appeal the decision, saying Judge Matsumoto "ignored binding precedent" allowing New York municipalities to sue over laws they believe unfairly single them out for different treatment.

"Instead of helping and recognizing the ability of the municipalities of Long Island to participate in recovery, she decided to bar them from recovery," Tate said, noting the judge "has a long and credible history of being reversed," including when the U.S. Supreme Court blocked a COVID-era executive order restricting religious gatherings that the judge had upheld.

In her ruling, the judge said New York lawmakers passed the bill in order to obtain more than \$1 billion in settlement funds dedicated to opioid treatment programs across the state. While New York's home rule law sets up a procedure for enforcing "special laws" that treat individual municipalities differently, the judge ruled, this law addressed "a substantial state-wide concern." Babylon and other cities didn't lose anything of value because their lawsuits had only the speculative promise of bringing them money, the judge ruled.

Babylon and the other cities argued the law unfairly singled them out, especially since Nassau and Suffolk Counties were able to settle separate opioid lawsuits, paying Napoli Shkolnik \$50 million in fees. In an amended complaint dismissed by Judge Matsumoto this week, Babylon claimed Napoli told Tate and several others when they complained about the effect of the law that they were "SH_T OUT OF LUCK."

Private lawyers recruited thousands of cities, counties, hospital districts and other government entities as plaintiffs at the outset of opioid litigation in a successful strategy to overwhelm defendants with lawsuits and force them to the settlement table. But as the New York federal court ruling shows, that strategy was based on the dubious premise that as political subdivisions, the municipal plaintiffs wouldn't ultimately be forced to accept settlements negotiated by the states. The defendant companies demanded state laws extinguishing municipal suits to achieve global peace, and lawmakers accommodated them.

ORGANIZATIONS IN THIS STORY

U.S. District Court For The Eastern District Of New York

This Week in Chancery Court: Edgio Deal, Inmediata Settlement

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news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThjLWI3MGYtZGNIMS1hMWVvLWl3NGY3M2U4MDAwMSIsImN0eHQiOiJTTE5XliwidXVpZCI6IiVnRWbGE2QVBuZ2JJbnJSMmpScVE9PU94V0RhUFNENXdNWkhIZFZ4NUdTc3c9PSIsInRpbWUiOiIxNzA0MTk3NzA5MDQzliwic2lnIjojSGICZWVtMUFRqSEQyT2N5cGpsOWw2TS9qRWVzPSIsInYiOiIxIn0=

Litigation

Delaware Chancery Court in Wilmington, Del.

Photographer: Jennifer Kay/Bloomberg Law

Edgio Inc.'s directors will go to bat for a rewritten “white squire” agreement to sell a stake of the digital media company to Apollo Global Management Inc. at a settlement hearing this week in the Delaware Court of Chancery.

Meanwhile, two SomaLogic leaders will argue for a preliminary injunction to block a shareholder vote on the company’s proposed \$1 billion merger with Standard BioTools Inc. Here’s more from the court’s calendar in the first week of the new year:

Tuesday: Ling Chai Maginn v. Robert Maginn Jr., Del. Ch., No. 2023-1140, hearing 1/2/24.

At issue: A founder of educational software company Jenzabar Inc., who sued her ex-husband and co-founder for control of a majority stake in the company, had her suit thrown out last October after Vice Chancellor Lori W. Will ruled that she couldn’t assert the majority interest she says she should own until the divorce was finalized. After Will granted Robert Maginn Jr.’s motion for summary judgment last October, Ling Chai Maginn filed a books and records complaint in the same court in her ongoing legal battle over control of the educational software company.

Court action: Hearing on Ling Chai Maginn’s motion for summary judgment and Robert Maginn and D. Quinn Mills’ cross-motion for summary judgment in Wilmington.

Tech Co-Founders’ Uneasy Truce Reinstated Pending Their Divorce

Wednesday: In re Edgio S’holders Litig., Del. Ch., No. 2022-0624, hearing 1/3/24.

At issue: A consolidated suit filed in 2022 against directors of digital media company Edgio alleged that the sale of a 35% stake to Apollo was structured to give the board a backdoor poison pill to stave off “stockholder rebellion” over underwhelming performance. The directors allegedly tried to boost their influence while only holding 2% of the company’s stock

by requiring Apollo to vote its stake with the board on important matters. Edgio seeks to end the litigation with a rewrite that would let the private equity firm vote freely in board elections, as described in a settlement proposal last September.

Court action: Hearing on proposed settlement in Wilmington.

Apollo, Edgio Rewrite White Squire Deal to End Investor Lawsuit

Wednesday: Gold v. SomaLogic Inc., Del. Ch., No. 2023-1249, hearing 1/3/24.

At issue: SomaLogic Inc. founder Larry Gold and another top executive sued the company under seal last November to block a \$1 billion proposed merger with Standard BioTools Inc. The suit, which became public last month, seeks to block the “arranged marriage” between the medical research technology companies, both of which are controlled by life sciences investor Eli Casdin, who allegedly ousted SomaLogic directors opposed to the deal and filled the board with loyalists. The suit seeks an injunction to block the shareholder vote scheduled for Jan. 4 until disclosures containing alleged misrepresentations are corrected. The all-stock deal would give 57% of the combined business to SomaLogic investors and the company would keep the Standard BioTools name.

Court action: Hearing on preliminary injunction in Wilmington.

SomaLogic’s \$1 Billion Standard BioTools Merger Draws Challenge

Wednesday: Del. v. Inmediata Health Group LLC, Del. Ch., No. 2023-1042, hearing 1/3/24.

At issue: Health care clearinghouse Inmediata Health Group LLC, which was alleged to have negligently allowed a web crawler to scrape the personal health information of more than 1.5 million people over a three-year period, will pay \$1.4 million to the 33 attorneys general who filed the suit last October. The company allegedly waited more than four months to notify patients that their information had been exposed after learning about the breach. In the consent judgment, Inmediata also agreed to implement a wide variety of data-security improvements including an incident-response plan and a designated officer responsible for data security oversight.

Court action: Hearing on proposed settlement via teleconference.

Inmediata Health to Pay \$1.4 Million Over Web-Crawler Breach

Thursday: Emp. Ret. Sys. of R.I. v. Marciano, Del. Ch., No. 2022-0839, hearing 1/4/24.

At issue: Directors of apparel company Guess? Inc. were sued by a pension fund in 2022, alleging that the board allowed co-founder Paul Marciano to treat models for the brand “as his personal harem,” turning a blind eye to harassment despite sexual misconduct

allegations leveled by model Kate Upton and others. The company's board agreed to a proposed settlement last September that would pay out \$22 million to settle the suit. Guess? is suing its insurers for \$8 million to reach a total settlement of \$30 million to resolve the pension fund's allegations.

Court action: Hearing on proposed settlement in Wilmington.

Guess? Board Agrees to Settle Marciano 'Personal Harem' Case (2)

Thursday: In re TransPerfect Global Inc., Del. Ch., No. 9700, hearing 1/4/24.

At issue: TransPerfect Global Inc. has spent more than seven years litigating the fallout of its forced sale in Delaware across several cases in the Chancery Court. Principal owner Phil Shawe bought out co-founder Liz Elting after the breakup of their romantic relationship, causing an irreconcilable management deadlock that prompted the Chancery and state supreme courts to order the translation services company be sold and placed under a custodianship. Now custodian Robert Pincus seeks to hold TransPerfect in contempt, his fourth time filing such a motion, after the company allegedly refused to pay fees ordered by the court within five days of a Nov. 1, 2023 ruling.

Court action: Hearing on contempt motion in Wilmington.

TransPerfect's 'Regurgitated' Skadden Fee Challenge Rejected (1)

Thursday: Buttonwood Tree Value Partners LP v. R.L. Polk & Co. Inc., Del. Ch., No. 9250, oral argument 1/4/2024.

At issue: Former investors in R.L. Polk & Co., an automotive industry trade publisher, allege the company's controlling family misled them into liquidating their stakes two years before it was sold at three times its valuation. R.L. Polk's motion to dismiss certain aspects of the third amended complaint, and plaintiffs' motion to set a trial date are pending after nearly a decade of ongoing litigation.

Court action: Oral argument via Zoom.

R.L. Polk Investors Win Class Action Status for Freeze-Out Case

Friday: HOPCo Intermediate Holdings Inc. v. Jones, Del. Ch., No. 2021-0688, hearing 1/5/24.

At issue: An Arizona surgeon allegedly entered into two agreements with parent companies of his former employer, which he breached by resigning from the HOPCo subsidiary to work at a direct competitor within a restricted territory. Defendant Clifford Jones allegedly received certain benefits from being a shareholder in his former employer by agreeing to restrictive

noncompetition, ownership, and nonsolicitation covenants for three years following a company merger. Jones filed a motion for summary judgment seeking to toss the suit last October.

Court action: Hearing on motion for summary judgment via Zoom.

ANALYSIS: Delaware Court Sees Three Noncompete Cases in Two Days

Friday: Hightower v. Carlson, Del. Ch., No. 2023-0482, hearing 1/6/24.

At issue: A former SharpSpring inc. investor sued the marketing automation company's ex-CEO, ex-CFO, and four other directors last May, alleging that they engineered a \$240 million buyout by Constant Contact Inc. to solely benefit company insiders. The deal allegedly placed priority on transaction-related bonuses for top executives rather than the sale price, and related regulatory filings told a "farcical tale that is nowhere close to what the contemporaneous record reflects," the complaint said. Defendants filed a motion to dismiss the suit in June.

Court action: Hearing on motion to dismiss in Wilmington.

SharpSpring \$240 Million Sale to Constant Contact Draws Lawsuit

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Judge certifies Johnson & Johnson shareholder class action over talc disclosures

 [reuters.com/legal/judge-certifies-johnson-johnson-shareholder-class-action-over-talc-disclosures-2023-12-29](https://www.reuters.com/legal/judge-certifies-johnson-johnson-shareholder-class-action-over-talc-disclosures-2023-12-29)

Jonathan Stempel

Bottles of Johnson & Johnson baby powder line a drugstore shelf in New York October 15, 2015. REUTERS/Lucas Jackson/File Photo Acquire Licensing Rights 

NEW YORK, Dec 29 (Reuters) - A federal judge said Johnson & Johnson (JNJ.N) shareholders may pursue as a class action their lawsuit accusing the company of fraudulently concealing how its talc products were contaminated by cancer-causing asbestos.

U.S. District Judge Zahid Quraishi in Trenton, New Jersey, on Friday allowed shareholders from Feb. 22, 2013 to Dec. 13, 2018 to pursue their securities fraud claims as a group.

He rejected J&J's argument that any class period be at least a year shorter because some events that allegedly caused its stock price to fall contained no "new" information.

J&J's talc products have included its signature baby powder. The company stopped selling talc-based baby powder globally this year, switching to corn starch as the main ingredient. It has said its talc products are safe and do not contain asbestos.

Neither J&J nor its lawyers immediately responded to requests for comment. Lawyers for shareholders including the lead plaintiff San Diego County Employees Retirement Association did not immediately respond to similar requests.

Class actions make it easier for shareholders to recover more money, at lower cost, than if they sued individually. A longer class period could increase the amount recovered.

Shareholders said J&J's stock price fell six times in late 2017 and 2018 following events that confirmed how the New Brunswick, New Jersey-based company and various executives hid the truth about asbestos in its talc products.

These events included a jury awarding \$4.69 billion in July 2018 to 22 women who said asbestos caused them to develop ovarian cancer, and a Reuters report five months later that said J&J knew about the asbestos risks for decades.

J&J said the six events could not have hurt its stock price because none contained new information that "corrected" its earlier disclosures.

It said the only new information from the verdict was that jurors accepted the women's arguments, and that all 56 internal documents mentioned in the Reuters report were already public.

Quraishi was unpersuaded. Addressing the Reuters report, he said its "careful analysis" and providing of "necessary context" made it more than a rehash of "stale information."

The share price fell 10% the day the report was released.

J&J also faces mass tort litigation encompassing more than 50,000 lawsuits over its talc products.

Courts have rejected two efforts by the company to use the bankruptcy process to limit its exposure to talc litigation.

The case is Hall v Johnson & Johnson et al, U.S. District Court, District of New Jersey, No. 18-01833.

(This story has been refiled to remove an extraneous word from paragraph 1)

Reporting by Jonathan Stempel in New York; Editing by Aurora Ellis

Our Standards: The Thomson Reuters Trust Principles.

Myovant, Sumitomo Defeat Suit Over Skadden's Alleged Conflicts

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news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThjLWI3OWEtZGNIMS1hMWVvKlWI3ZGUyZGQ2MDAwMSIsImN0eHQiOiJTTE5XliwidXVpZCI6Ikh1dldZUitWYjJRZXNqTU1CYzRzS1E9PjN5ZldVMGhyZ1h5QncxNjhZQ3hlUEE9PSIsInRpbWUiOiIxNzA0MTk3NzA5MDQ0Iiwic2lnIjoid3RmUFRqb0IIYnRlUzVsaG95ME80czlnNjk0PSIsInYiOiIxIn0=

- Alleged misstatements were public information during merger
- Negligence claim was overly conclusory and unsupported

Myovant Sciences Ltd. and Sumitomo Pharma America Inc. defeated a lawsuit alleging they misled investors during their merger by falsely stating the law firm that negotiated the deal had no conflicts of interest.

The US District Court for the Southern District of New York said the proposed class action filed by Joseph Zappia failed to adequately allege a false or misleading statement. The court also said the alleged misstatements were public knowledge when the proxy statement was distributed.

Myovant filed its proxy statement in January 2023, and Sumitovant acquired the company in March.

Zappia sued in September and alleged Skadden, Arps, Slate, Meagher & Flom LLP, the firm chosen as a legal adviser to Myovant's committee negotiating the sale price, had a conflict because it previously represented Sumitomo Banking, which financed the merger.

Judge Jed S. Rakoff said that even if it was true that Skadden represented Sumito Banking and other Sumitomo group members, the complaint didn't allege that the firm "ever represented Sumitovant, the actual counterparty in the merger transaction, or its corporate parent, Sumitomo Pharma."

He noted that the complaint's "own narrative" of the committee's negotiations "throws cold water on the assertion that Skadden somehow thwarted efforts for Myovant to receive the highest price it could."

The complaint alleged the committee, advised by Skadden, got Sumitovant to increase its initial offer of \$22.75 per share to \$27.

"The Amended Complaint also pleads facts that make implausible the suggestion that any conduct by Skadden is why the special committee did not solicit bids from other potential acquirers," Rakoff said. The complaint quoted statements from the proxy statement about

how the committee considered that Sumitovant, already a majority share owner, would have been unlikely to support a third-party sale.

Even if the court assumed the allegations about Skadden's conflict of interest were true, "a reasonable investor would not have found the proxy statement to be materially misleading in light of other public information," Rakoff said. The complaint didn't allege information about Sumitomo Group entities was secret or unknown. "Zappia washimself aware of that information—and was able to allege it in the Amended Complaint—precisely because it was reasonably available to the public."

Rakoff said the complaint also failed because it failed to allege facts supporting the negligence claim.

"The Amended Complaint's sole allegation pertaining to negligence is the conclusory statement that 'defendants were at least negligent in filing the Proxy with these material misrepresentations and omissions,'" Rakoff said. "That threadbare recital of an essential element" was inadequate.

Rakoff dismissed the complaint with prejudice.

Attorneys for the defendants declined to comment.

Zappia was represented by Wohl & Fruchter LLP, Weiss & Luri, and Weiss Law.

The defendants were represented by Freshfields Bruckhaus Deringer LLP.

The case is Zappia v. Myovant Scis. Ltd. , 2023 BL 470752, S.D.N.Y., No. 1:23-cv-08097, 12/28/23 .

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Delaware court revives opioid lawsuit against AmerisourceBergen directors

 legalnewsline.com/stories/653462167-delaware-court-revives-opioid-lawsuit-against-amerisourcebergen-directors

January 2, 2024

Opioids

Delaware chief justice Collins Seitz | <https://courts.delaware.gov/supreme/justices.aspx>

DOVER, Del. (Legal Newsline) - Delaware's highest court revived a derivative lawsuit against the officers and directors of AmerisourceBergen, saying there was plenty of evidence to support a claim they either fostered "a culture of non-compliance" or ignored "a tidal wave of red flags" suggesting it was distributing millions of suspicious orders for opioid pills.

The decision by the Delaware Supreme Court allows shareholders to sue in the name of the corporation itself over the failure of management to address mounting concerns AmerisourceBergen was contributing to the opioid crisis. Under Delaware's so-called Caremark doctrine, officers and directors can be liable for violating their fiduciary duties if they allow companies to engage in illegal behavior or fail to require and monitor systems to detect it.

A Delaware chancery court judge previously dismissed the suit, citing a ruling by a federal judge in West Virginia that dismissed similar claims and "knocked the stuffing" out of the plaintiffs' case. A week later, the U.S. Justice Department filed a civil complaint against AmerisourceBergen and plaintiff lawyers sought to reverse the dismissal based on "new evidence." But the judge refused, even though his original decision found the plaintiff claims otherwise plausible.

The Delaware Supreme Court reversed that ruling, saying it was a mistake to use facts from a different case, with different plaintiffs, to support a judgment in Delaware. It said there was more than enough evidence to support claims the AmerisourceBergen board failed to investigate unreasonably low numbers of suspicious orders the company reported to the Drug Enforcement Agency, just 176 out of 24 million orders in 2017.

"In the midst of the opioid epidemic and in the face of increasing public scrutiny, the board did not take action to address the microscopic number of reported suspicious orders," the court said.

Under the court's Caremark doctrine, directors can be liable if they consciously fail to monitor internal compliance systems, "thus disabling themselves from being informed of risks," the court said.

“We are not moved by the defendants’ handwringing claim” that allowing such a case to proceed will chill companies’ ability to defend lawsuits and attract directors, the court concluded. “We see no reason why companies with meritorious defenses to lawsuits will not raise them with vigor and directors who heed their fiduciary duties will not continue to serve on the boards of Delaware corporations.”

ORGANIZATIONS IN THIS STORY

Delaware Supreme Court

Business Law Prof Blog

lawprofessors.typepad.com/business_law/2023/12/amerisourcebergen-and-who-decides.html

Friday, December 29, 2023

AmerisourceBergen, and Who Decides?

By Ann Lipton

Delaware's *Caremark* cases continue to be catnip for me.

The latest is the Delaware Supreme Court's *Lebanon County Employees' Retirement Fund v. Collis*, reversing VC Laster's decision from last year.

Plaintiffs alleged that AmerisourceBergen's board of directors violated opioid drug laws by failing to monitor suspicious prescriptions, to the point where they altered their internal reporting systems so that fewer prescriptions would be flagged. Ultimately, this conduct causes severe damage to the company, through a \$6 billion global settlement, as well as other settlements and litigation costs.

VC Laster explored the allegations in detail, ultimately determining that, standing alone, the complaint stated a claim against the AmerisourceBergen board for a violation of *Caremark* duties.

But! Plot twist. Because in mid 2022, after the plaintiffs' complaint was filed, a federal West Virginia court cleared AmerisourceBergen of misconduct. The case was filed by a city and county in West Virginia – areas that were ground zero for the opioid crisis – and among thousands of similar cases consolidated for pretrial proceedings in a larger multidistrict litigation. After a bench trial, the judge found that the plaintiffs had failed to prove that AmerisourceBergen did not maintain an effective control system. According to Laster, that decision was enough to undermine the plaintiffs' claims that AmerisourceBergen's directors had caused the company to break the law. As he held:

In light of the West Virginia Court's thorough analysis, it is not possible to infer that the Company failed to comply with its anti-diversion obligations, nor is it possible to infer that a majority of the directors who were in office when the complaint was filed face a substantial likelihood of liability on the plaintiffs' claims.

Case dismissed.

On appeal, the Delaware Supreme Court held that Laster had improperly deferred to the factfinding of another court as to contested matters, namely, whether the AmerisourceBergen Board had complied with the Controlled Substances Act. As the Court put it:

the question whether the defendants in the West Virginia litigation engaged in wrongful conduct and failed to comply with the CSA was, it seems clear to us, a question of fact... This Court has not addressed whether a court can take adjudicative notice of the factual findings of another court. The weight of authority in the federal courts applying Federal Rule of Evidence 201, which is nearly identical to D.R.E. 201, indicates that a court may not do so when the underlying fact is reasonably disputed.

So, Laster was reversed, and the complaint sustained.

I've posted a lot about how common *Caremark* claims are becoming, and how they're becoming more successful. I think this trend is likely to create a lot of headaches for the Delaware courts and among those headaches – as this case demonstrates – is how Delaware's decisions are going to interact with the findings of other courts. After all, *Caremark* is predicated on the existence of illegal conduct. Other regulators are the ones who are primarily responsible for determining whether any illegal conduct occurred in the first place; Delaware's role is secondary to those primary findings of legality/illegality.

In other words, it would be kind of odd if a Delaware court held that a board violated its fiduciary duties by causing the company to break the law, if the company's primary regulator determined that the company had *not* broken the law.

Laster's original decision, then, has the air of trying to work out how Delaware courts will operate in tandem with these other legal systems in the context of *Caremark*. Laster treated the West Virginia decision as a legal declaration under Delaware Rule of Evidence 202, which thereby absolved AmerisourceBergen – and thus its board – of any wrongdoing.

The Delaware Supreme Court, however, rejected that attempt. In its view, the West Virginia decision was not, for evidentiary purposes, a legal declaration of the propriety of the board's conduct, but a factual determination of what had historically occurred – contested facts that Delaware is free to revisit ("To be sure, the findings of the West Virginia Court are recorded in the 'case law . . . of the United States[,] but they do not establish or recognize a rule or principle of law of the kind that is subject to judicial notice under D.R.E. 202"). And though the Delaware Supreme Court's decision, taken in isolation, certainly makes sense, I wonder if it will create more problems for Delaware going forward, if *Caremark* claims appear to be proceeding even where underlying regulatory actions fail. Or, as I put it previously, "Delaware really can't be in the business of functioning as a backup regulator for the entire United States."

Gap In Time

 10b5daily.com/2024/01/02/gap-in-time

January 2, 2024

To establish loss causation in a securities class action does the company's stock price have to decline immediately after the alleged corrective disclosure that revealed the truth to the market? In *Shash v. Biogen, Inc.*, 84 F.4th 1 (1st Cir. 2023), the court considered this question in a case involving a drug study and the FDA approval process.

In *Biogen*, the plaintiffs alleged that the truth about a drug study's results was revealed when Biogen and the FDA issued jointly prepared briefing materials on November 4, 2020 prior to an Advisory Committee meeting. The FDA commentary on the drug's effectiveness was favorable, but the materials also included a negative report from the agency's statistical reviewer that allegedly acted as a corrective disclosure. On that trading day, the company's stock price *increased* by 39%. The stock price then fell a day later and fell by even more the next trading day after the Advisory Committee voted negatively on several questions related to the drug's effectiveness. The FDA ultimately approved the drug in June 2021.

The plaintiffs argued that it took time for the market to fully understand the negative report from the FDA's statistical reviewer, which ultimately led to the price decline on subsequent trading days. The district court rejected that position, holding that "causation is not tied to when the market reacts to information, but rather when that information became available to the public." On appeal, Biogen argued in its brief that plaintiffs were putting forward the "novel theory that the market processed positive news several days faster than negative news in a single disclosure." The later stock price decline arguably was caused by the Advisory Committee decision, which did not reveal any new information about the alleged fraud. The First Circuit, however, rejected the idea that a "gap in time" rendered the plaintiffs' "theory of loss causation per se implausible." The court held that "the issue of when Biogen's stock price actually dropped is a question of fact" that would need to be resolved later in the litigation.

Holding: Dismissal affirmed in part and reversed in part.

Supreme Court to decide whether silence is golden or fraudulent

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Jan. 2, 2024

The case, *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No.-1165, centers upon a company's alleged failure to disclose the business-related information required by the Management and Discussion Analysis of Securities and Exchange Commission (SEC) Regulation S-K.



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The old adage advises that silence is golden. But the Supreme Court will soon decide whether silence by a public company can serve as a basis for fraud allegations in a private securities action. The decision will resolve a conflict among the Circuit Courts of Appeal and potentially clarify the distinction between a “pure” omission of fact and an omission that transforms an actual statement into a fraudulent “half-truth.”

The case, *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No.-1165, centers upon a company's alleged failure to disclose the business-related information required by the Management and Discussion Analysis of Securities and Exchange Commission (SEC) Regulation S-K, which requires management to provide its own analysis of the company's

business operations and prospects. With oral argument scheduled for Jan. 16 and a decision expected by late June, the Supreme Court will grapple whether such a purported omission violates Section 10(b) of the Securities and Exchange Act of 1934, and in particular, Rule 10b-5(b) thereunder.

During the relevant period, Macquarie was a public company that owned and operated a diversified group of infrastructure businesses, including International-Matex Terminals (IMTT), one of the largest providers of third-party bulk liquid storage services. IMTT's terminals stored or handled various chemicals and refined petroleum products such as No. 6 oil, a high-sulfur fuel oil. In 2008, the International Maritime Organization (IMO), promulgated IMO 2020, a proposed rule that would cap the sulfur content of fuel oil used in shipping, which raised questions about the continued use of No. 6 oil. In late 2016, the IMO formally announced the rule would become effective in 2020. In February 2018, Marquarie's stock price dropped after it announced that it was reducing 2018 dividend guidance due to, among other things, an unexpected decline in IMTT storage demand. Moab, a shareholder activist, became the court-appointed lead plaintiff in the ensuing securities class action lawsuit filed in the U.S. District Court for the Southern District of New York.

Moab alleged that during the class period Marquarie and the individual defendants made affirmative misstatements in financial statements, earnings calls and investor conferences. But the issue before the Supreme Court is Moab's claims that Marquarie failed to provide the disclosure required under Item 303 of Regulation S-K, which at the time required management to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." (The current version requires management to "[d]escribe any known trends or uncertainties that have had or that are reasonably *likely* to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.") (emphasis added). Moab asserted that Marquarie breached Item 303 by failing to disclose the expected adverse business impact of IMO 2020 and that such failure violated Section 10(b) and Rule 10b-5. The Second Circuit Court of Appeals, reversing the district court's dismissal of the complaint, held that Moab sufficiently alleged that defendants had made materially misleading "half-truths" and also – the issue before the Supreme Court – that the purported failure to comply with Item 303's disclosure obligations violated Rule 10b-5.

Marquarie's argument centers on the textual difference between Rule 10b-5 and Section 11 of the Securities Act of 1933, which provides an express private right of action for material misstatements and omissions in a registration statement filed with the SEC for a public securities offering. Section 11 creates liability when a registration statement omits "a material fact required to be stated," as well as when it omits a material fact "necessary to make the statements therein not misleading." Thus, a plaintiff can plead an omission under Section 11 by pointing to an SEC regulation, such as Item 303, that "required" the

disclosure. But Rule 10b-5(b) imposes liability for an omission of a material fact “necessary to make the statements made, in the light of the circumstances under which they were made, not misleading.” Therefore, argues Marquarie, Rule 10b-5(b) “does not impose liability for silence, even when the speaker should have disclosed the information under SEC regulations.” The Supreme Court previously has used a strict textual analysis to limit the reach of Section 10(b). See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (text limits standing to bring Section 10(b) claim to actual purchasers and sellers of securities); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1980) (text requires scienter for Section 10(b) claim).

Marquarie asserts that the Second Circuit went astray in two prior decisions, *Panther Partners, Inc. v. Ikanos Communications, Inc.*, 681 F.3d 114 (2d Cir. 2012), and *Litwin v. The Blackstone Group, L.P.*, 634 F.3d 706 (2d Cir. 2011). While those decisions focused principally on Section 11, they also focused on claims under Section 12(a)(2) of the Securities Act, which provides language similar to Rule 10b-5(b). According to Marquarie, *Panther* and *Litwin* assumed that because Section 12(a)(2) addresses misstatements and omissions in connection with a prospectus for a securities offering, it too creates liability for failing to disclose an SEC rule. The Second Circuit subsequently “compounded” the error by extending the logic to Rule 10b-5(b) because its text is similar to that of Section 12(a)(2).

Other Circuit Courts have rejected this analysis. Notably, the Ninth Circuit in *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046 (9th Cir. 2014) held that Section 11 liability “arises from ‘an omission in contravention of an affirmative legal disclosure obligation,’” whereas “[t]here is no such requirement under Section 10(b) or Rule 10b-5,” which is concerned with nondisclosure only when it “cause[s] other information that is disclosed to be misleading.” A central focus of *NVIDIA*, as well as Marquarie’s argument, is the different materiality standards for forward-looking information applicable to Item 303 and Rule 10b-5. The Supreme Court in *Basic, Inc., v. Levinson*, 485 U.S. 224 (1988), held that materiality of forward-looking information depends “upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.” But Item 303’s requirement to disclose information that is “reasonably likely” to have a material effect is much broader and requires disclosure not mandated by Rule 10b-5. The Eleventh Circuit in *Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307 (11th Cir. 2019) subsequently followed suit in holding that the disclosure obligations of Item 303 and Rule 10b-5 are materially different. Even earlier, the Third Circuit, in a decision by then Judge and later Justice Alito, had held that Item 303’s disclosure requirements did not provide a basis for a Rule 10b-5 claim. *Oran v. Stafford*, 226 F.3d 275 (3rd Cir. 2000).

Further, argues Marquarie, Item 303 is not suitable for a fraud claim (in contrast to Section 11, which essentially has a strict liability standard) because it often involves an inherently open-ended, subjective and complex matter of judgment in determining what is a “trend” or “uncertainty” that may “reasonably likely” affect a company’s future business. Such evaluations are easily susceptible to second-guessing with the benefit of hindsight. Also, Macquarie cites the Private Securities Litigation Reform Act of 1995 as evidence that Congress rejected a “pure omission” theory of fraud by requiring plaintiffs to “specify each statement alleged to have been misleading.” Lastly, Marquarie asserts that private securities enforcement is not necessary when the SEC is capable of ensuring compliance with its disclosure obligations.

Unsurprisingly, Moab – supported by the SEC in an amicus brief filed by the Solicitor General – rejects these arguments. Moab contends that it is not alleging a “pure omission” theory of liability, but rather that Marquarie’s omissions created fraudulent “half-truths.” Moab argues that the Supreme Court has held that nondisclosure is actionable when it violates a duty to disclose and causes other statements to become misleading. Moab asserts that because SEC rules contain many disclosure requirements, Marquarie’s position “would create broad immunity any time an issuer fraudulently omits information Congress and the SEC require it to disclose.” Additionally, any claim based on an Item 303 nondisclosure still must satisfy the scienter, materiality and loss causation requirements of a Rule 10b-5 claim.

The Court will have to ponder two significant arguments by Moab. First, Moab and the SEC assert that the Sarbanes-Oxley Act of 2002 requires a company’s Chief Executive Officer and Chief Financial Officer to certify that a periodic report filed with the SEC fully complies with the requirements of Section 13(a) of the Exchange Act, which in turn requires the report to contain all SEC-mandated information. Thus, the failure to provide the disclosure required by Item 303 renders the certifications materially misleading. In response, Marquarie asserts that such an “implied certification theory” would erase any meaningful distinction between pure omission and half-truth cases; ignores the text of Rule 10b-5(b) creating liability for those who “make” misleading statements; and would lead to “creative” pleading. While contending that it is relying on an actual certification requirement, Moab asserts that even an “implied certification” of completeness theory “tracks” the statutory language.

Moab’s arguments also invite the Supreme Court to clarify the scope of “scheme liability” under Rule 10b-5(a) and (c). Rule 10b-5(a) prohibits a person from engaging in any device, scheme or artifice to defraud, while 10b-5(c) bars engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person. The Court held in *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019), that these provisions are not mutually exclusive and that there is an overlap between Rule 10b-5(b) and the “scheme liability” provisions. Moab argues that Marquarie’s deliberate failure to provide the required

Item 303 disclosure should be considered a fraudulent scheme even if the omission fell outside of Rule 10b-5(b). By contrast, Marquarie asserts that scheme liability has never been based entirely on speech and that a plaintiff cannot use subsections (a) and (c) as an “escape hatch” to support “pure omission” liability.

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Bilzin Beats Rival Law Firm Repping Shareholders in Class Action Against US Century Bank

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By Jim Turner

What You Need to Know

- A class-action brawl was instigated by minority-owned shareholders of a historic community-owned bank.
- On the other side were the board of directors and the private equity funds they allegedly served.
- A state judge in Miami held that the class action had no merit, and dismissed the lawsuit with prejudice.

A Miami state court judge dismissed with prejudice a \$30 million federal class action by U.S. Century Bank shareholders against current and former corporate directors, in litigation that pitted attorneys from two of the top law firms in South Florida.

Michael Hanzman, senior counsel at Bilzin Sumberg Baena Price & Axelrod, is among the attorneys who represent the defendants, the current and former corporate directors. They were accused of a breach of fiduciary duty to enrich themselves and the “out-of-state people” at the private equity funds they represent that hold the financial institution’s preferred stock at the expense of the community they serve.

Michael Hanzman, senior counsel at Bilzin Sumberg Baena Price & Axelrod in Miami.
Courtesy photo

“When you have complex cases like this, you should try to identify dispositive issues early, and try to be concise and make them as understandable as possible,” Hanzman said. “There wasn’t anything remotely improper or illegal about the bank deciding to retire its debt through issuing and exchanging common stock. This case, like its predecessors, had no merit from the outset.”

Jorge Piedra, a partner at Kozyak Tropin & Throckmorton, is among the attorneys who represented the approximately 300 plaintiff shareholders, largely defined as all record holders of voting common stock in the bank before March 14, 2015, when the bank authorized the “exchange transaction” of Class C and Class D preferred stock for Class A voting common stock.

“The out-of-state hedge funds caused the directors to transfer control to them in what we believe is a violation of the bank’s bylaws and Florida law,” Piedra said. “We are considering all our options and will likely appeal the decision of Judge Thomas Rebull, who we greatly respect.”

The shares of Class A voting common stock that the bank issued in exchange for the retirement of certain shares of preferred stock came from the bank’s treasury and were issued pursuant to amendments to the bank’s articles of incorporation between February and July 2021. Plaintiffs claimed those amendments were made “in preparation for” the exchange transactions, court records show.

Ahead of the exchange transaction, court records showed that seven private equity funds held preferred stock and a \$114 million liquidation preference in the bank, which was their consideration for the \$65 million investment in the bank in 2015. By trading common stock to retire its preferred stock, the bank was able to extinguish its large debt to the funds.

The plaintiffs claimed that the transaction diluted their share value and voting power and “shifted the economic and voting power in the bank from local minority entrepreneurs to large out-of-state private equity funds.” The plaintiffs alleged ultra vires conduct under Section 607.0304 of the Florida statutes, and breach of fiduciary duty.

The plaintiffs claimed that to authorize the exchange transaction, the defendants were required to propose an amendment to the bank’s articles and submit it for plaintiffs’ vote of approval under Section 607.1004(1)(b), according to the order, which the bank did not do.

Miami-Dade Circuit Judge Thomas Rebull. Courtesy photo

However, Miami-Dade Circuit Judge Thomas Rebull pointed out in the order that the bank

did increase the authorized number of Class A voting stock shares, according to Section 607.0601(1) “in preparation” for the exchange transaction.

Rebull held that the exchange transaction “was a proper exercise of the bank’s express and implied powers under the articles and Florida law, and plaintiffs’ claim that the exchange transaction was ultra vires fails as a matter of law.”

Rebull also ruled that the plaintiffs lacked direct shareholder standing to assert their claims.

“In sum, plaintiffs’ attempts to lump together their interests and shares with those of the putative class members, on the one hand, and the collective interests and shares of the funds, on the other hand, are unsupportable as a matter of law,” Rebull ruled in the 15-page order.

Rebull added: “Plaintiffs’ argument that as a putative class, they went from collectively enjoying ‘majority’ control over the bank prior to the exchange transaction, to the funds collectively enjoying ‘majority’ control after the exchange transaction is a conclusory fiction, as nothing remotely suggests that the 300 plus putative class members ever ‘controlled’ anything.”

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- Pension fund alleged directors were “supine fiduciaries”
- Board was independent enough to rebuff all claims

Tech venture Insight Venture Partners isn’t liable for investor losses following a deal between two fintech firms it held stakes in because the directors who made a money-losing deal were too independent of Insight, the Delaware Court of Chancery ruled Thursday.

Cloud-based banking software firm nCino’s \$1.2 billion purchase in 2021 of app-based financial technology company SimpleNexus may have made Insight a 600% profit on the venture firm’s stake in SimpleNexus even as nCino’s shares plummeted after the purchase. But despite Insight’s large stakes in both companies, Insight isn’t liable for nCino shareholder losses because the board members executing the deal weren’t controlled by Insight, Vice Chancellor Morgan T. Zurn ruled.

The suit “paints nCino’s directors as supine fiduciaries,” Zurn said. “But the plaintiff failed to establish bad faith or a lack of independence.”

The case boiled down to whether the pension fund pleaded “demand futility.” To bring a derivative action, shareholders must either demand that the company sue or prove “demand futility,” which means corporate leadership would rebuff a call to sue because directors have a personal interest in the deal that springs the lawsuit, or the directors are controlled by another party with interest in the deal.

The pension fund argued that six nCino directors face liability for approving the acquisition in bad faith, and they all owe their current and future nCino director positions to Insight.

Zurn said the fund failed to allege facts backing up futility in all six of its claims, and that none of its allegations that the directors had business ties to Insight were enough to overcome the presumption that directors are independent.

Regarding bad faith, the available facts show the opposite of what the firm alleged, Zurn said. nCino thought having SimpleNexus’ better app and browser-based capabilities would help improve its sales; the directors negotiated extensively over the purchase price; and nCino hired big name outside firms—Bank of America, Sidley Austin, and Accenture—to assist with the valuation, legal implications, and due diligence aspects of the acquisition.

“Plaintiff accuses the Board of taking an ‘ostrich-like’ approach to the transaction,” Zurn said. “It is unreasonable to infer the directors on the Demand Board had their heads in the sand.”

The case is City of Hialeah Emp. Ret. Sys. , Del. Ch., No. 2022-0846-MTZ, 12/28/23 .

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Federal Court Securities Class Action Lawsuit Filings Increased in 2023

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January 1, 2024

Federal Court Securities
Class Action Lawsuit
Filings Increased in 2023

By Kevin LaCroix on January 1, 2024
Posted in Securities Litigation



D&O insurers closely track the annual number of securities class action lawsuit filings. The number of annual filings can provide some indication of the insurers' ultimate loss costs for the year. The current year's filing patterns can also inform the insurers' efforts to try to determine the profit-making price for their insurance product.

In 2023, the number of federal court securities class action lawsuits filed increased more than 7% compared to 2022, although the number of federal suit filings still remained well below the elevated levels seen in the recent past. Several factors contributed to the increased number of securities suit filings during the year, including disruption in the banking sector as well as the overall impact of macroeconomic factors.

According to my tally, 212 federal court securities class action lawsuits were filed in 2023, compared to 197 in 2022, representing an increase of about 7.6%. The number of 2023 federal court securities suit filings, while up compared to 2022, was well below the over 400 securities suit filings each year during the period 2017-2019 (when the filing totals were inflated by an influx of federal court merger objection class action lawsuits). Please note that these figures do not include securities class action lawsuits filed in state court.

While the number of annual federal court securities class action lawsuit filings was elevated during the period 2017-2019 by a flood of federal court merger objection class action lawsuits, the merger-related lawsuits were hardly a factor in the total number of federal court securities class action suit filings in 2023. By my count, there were only two federal court merger objection class action lawsuits. (The merger objection lawsuits were still being filed in significant numbers during 2023, but the lawsuits were filed as individual actions rather than as class actions, and so do not show up in the class action lawsuit filing tallies.)

Factors that contributed significantly to the number of federal court lawsuit filings in 2022 continued to contribute to the number of filings in 2023, though to a lesser degree than in 2022. Thus, for example, there were 12 SPAC-related securities suits filed in 2023, compared to 23 in 2022. Similarly, there were nine COVID-19-related securities suits filed in 2023, compared to 18 in 2022. There were 12 crypto currency and digital asset related securities suits in 2022, compared to 22 in 2023.

The overall increase in the number of federal court securities class action lawsuit filings in 2023 compared to 2022 was driven by other factors that developed during the year.

Thus, as will be discussed in my forthcoming annual Top Ten Stories in D&O survey (which I hope to publish this week), there were a series of new lawsuits filed in 2023 related to the Banking Crisis of 2023; indeed, banks in general were a more frequent target in 2023. By my tally, there were twelve federal court securities class action lawsuits filed in 2023 against companies in the 602 SIC Code Industry Group (Commercial Banks). High interest rates caused many of the issues at the banks; as my forthcoming Top Ten survey will also show, high interest rates and other macroeconomic factors (including economic inflation and supply chain and labor supply disruption) were generally significant factors in the total number of securities suits filed overall in 2023.

As has been the case in most recent years, there were significant numbers of federal court securities class action lawsuits filed in 2023 against companies in the biotech and high-tech sectors. Thus, by my tally there were 25 securities class action lawsuits filed against companies in the 283 SIC Code Industry Group (Drugs), including 17 in the 2834 SIC Code category (Pharmaceutical Preparations). There were also an additional nine securities class action lawsuits filed against companies in the 384 SIC Code Industry Group (Surgical and Medical Instruments), bringing the total number of 2023 federal court securities class action lawsuit filings against companies in the biotech sector to 34, representing 16% of all securities suits filed during 2023.

With respect to the securities suit filings against high-tech companies, there were 29 federal court securities class action lawsuits filed in 2023 against companies in the 737 SIC Code Industrial Group (Computer Programming and Data Processing), including 17 in SIC Code Category 7372 (Prepackaged Software). The 29 securities suits against companies in the this SIC group represented about 13.7% of all of the federal court securities class action lawsuits filed in 2023.

The lawsuits filed against biotech and high-tech companies together represented a total of 66 suits, representing about 31% of all the 2023 federal court securities class action lawsuit filings.

The 2023 federal court securities class action lawsuits were filed in 44 different federal district courts. The courts with the greatest numbers of first-filed federal court securities lawsuits were the Southern District of New York with 34 filings; the Northern District of California, with 30 filings; the District of New Jersey, with 23 filings; and the Central District of California, with 19 filings.

There was a total of 58 securities lawsuit first-filed in the California federal district courts taken together, representing about 27% of all 2023 securities lawsuit filings. There was a total of 46 first-filed federal court securities lawsuit filings in district courts located in New York, representing about 22% of all 2023 securities suit filings.

The total of all of the cases first-filed in California and New York taken together is 104, representing about 49% of all 2023 federal court securities suit filings.

There was a total of 34 federal court securities class action lawsuit filings against companies based outside the U.S., representing 15 different countries. The countries with the highest number of companies sued were China (with 9, plus one more for Hong Kong and another for Taiwan); Israel (5); and the U.K (with 4, plus one more for Jersey). The 34 lawsuits against foreign companies represents about 16% of all 2023 federal court securities class action lawsuit filings, roughly equivalent to the proportion of foreign companies among all companies listed in U.S. exchanges.

Notes about Data and Methodology: I count each company that has been sued in a securities class action lawsuit for essentially the same allegations only once, regardless of the number of complaints actually filed. This counting methodology may differ from the methodology used by other public sources that track securities lawsuit filings, which in turn may cause my tallies to differ from other published tallies.

In tracking the securities lawsuits, I rely on several different sources, including the Stanford Law School Securities Class Action Clearinghouse; Law 360; Justia; ISS Securities Class Action Services; and Stanford Securities Litigation Analytics. I also audit my tally against other resources periodically throughout the year.

Top Ten Stories of 2023 Webinar: Please note that on Thursday, January 11, 2024 at 11:00 AM EST, my colleagues Marissa Streckfus, Chris Bertola, and I will be conducting a free, hour-long webinar in which we will discuss The Top Ten D&O Stories of 2023. Registration for the webinar can be found here. I hope you can join us for the webinar.

One Final Note: Go Blue!

First trials, major fights will shape Camp Lejeune litigation in 2024

 [reuters.com/legal/government/first-trials-major-fights-will-shape-camp-lejeune-litigation-2024-2024-01-02](https://www.reuters.com/legal/government/first-trials-major-fights-will-shape-camp-lejeune-litigation-2024-2024-01-02)

Diana Jones

[1/2]A sign at the entrance to U.S. Marine Corps Base Camp Lejeune, in eastern North Carolina, U.S., sits in this undated handout photo. U.S. Marine Corps/Handout via REUTERS Acquire Licensing Rights 

Jan 2 (Reuters) - In the coming year, litigation over tainted water at Marine Corps Base Camp Lejeune may involve the first trials, which could decide liability and damages for several types of cancer claims as one of the biggest mass torts takes shape.

Nearly 150,000 administrative claims and 1,500 lawsuits have been filed over the water at the Jacksonville, North Carolina Marine base, which was contaminated for decades with chemicals that government scientists have linked to cancer and other diseases.

Ed Bell of Bell Legal Group, who is lead attorney for the plaintiffs in the litigation, said in a statement that 2024 will be "critical" because the first cases will get to trial.

The trials will be used to determine the value of claims over different diseases, but to get there, the parties have to resolve some looming questions in the litigation: whose cases should go to trial -- and who should decide those trials.

A U.S. Department of Justice spokesperson declined to comment.

The first trials are expected to address claims over leukemia, Parkinson's disease, non-Hodgkin's lymphoma, bladder cancer and kidney cancer.

Attorneys for both the government and the plaintiffs have selected batches of cases to go trial, with the final selection expected in the early part of 2024.

But the government is disputing whether Camp Lejeune claims should go to trial before a jury, according to filings. Government attorneys are arguing the law which removed government immunity for the claims does not affirmatively and unambiguously grant the right for claimants to seek jury trials. Trials may proceed before a judge, they argue.

Attorneys for the plaintiffs say the law, known as the PACT Act, clearly allows jury trials. The motion is still pending, court records show.

Other questions that may be resolved in 2024 include who qualifies to bring a claim on behalf of someone who died after they were exposed to the water.

The claims and lawsuits became possible in August 2022 after President Joe Biden signed the PACT Act, removing government immunity, and 2023 marked the start of the litigation.

The first lawsuits were filed in February in the Eastern District of North Carolina, with more than 900 hitting the docket by early May. The court named a team of plaintiffs' attorneys to oversee the litigation, choosing Bell, Zina Bash of Keller Postman, Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein and several others as co-lead counsel.

In September, the Navy and the U.S. Department of Justice announced an "elective option," which offers pre-set settlement amounts to people who suffered from specific diseases, based on how long they were exposed. At a hearing on Oct. 30, government attorneys said they had offered the first payouts to Camp Lejeune victims. By Dec. 19, the government had paid \$1,450,000 to resolve six cases, according to court filings.

Just before the new year, the plaintiffs' leadership team lost out on its bid to force the government to turn over a new but unpublished study on cancer incidence rates at Camp Lejeune.

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Reporting by Diana Jones

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GE Can't Dodge Bulk Of Suit Over Fatal Military Training Crash

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General Electric Co. failed to convince a federal judge to toss a suit alleging the incorrect installation of one of its engines on a military helicopter caused a crash in 2017 that killed one crew member and injured five others.

The US District Court for the Southern District of Georgia on Thursday rejected GE's arguments that the suit was precluded by the political question doctrine and that the complaint was a shotgun pleading. The court dismissed a claim for breach of warranty since Georgia law requires plaintiffs to show they were in privity with GE, and there wasn't privity between the company and the crew members.

The widow of the crew member who died and the remaining crew members say GE improperly installed a B-nut and injector on a UH-60M helicopter that caused engine failure. They allege that because of the improper installation a fuel leak led to engine failure which ultimately caused the crash off the coast of Yemen.

GE argued the complaint should be dismissed under the political question doctrine since its defenses would cause the court to question core military decisionmaking. The doctrine bars courts from "adjudicating disputes that would require the Court to evaluate questions exclusively committed to another branch of government," Judge Lisa Godbey Wood said.

Wood rejected the argument since "the only military decision relevant to Plaintiffs' claims is the Army's decision to use GE to manufacture the Engine."

She said that it was too early to dismiss the case since no discovery had been completed and "a well-developed factual record is necessary to determine a question of causation, especially when the political question doctrine is asserted."

Unlike the case GE relied on where a service member's guardian alleged a driver's negligence in a combat suit caused the service member's injuries, the "military aspect" wasn't central, Wood noted. "While this was a training mission, it was not a mission to deliver fuel supplies necessary for military operations, and the conditions were not 'potentially life-threatening' by nature of taking place in an active warzone."

"At this point, there is only a possibility that the Army's decision-making will be implicated," Wood said. She denied dismissal on that basis without prejudice, and said the court was prepared to reexamine whether the doctrine applied after discovery.

Wood also rejected GE's argument that the complaint was a shotgun pleading. She said it didn't suffer from the "unifying defect" of all shotgun pleadings: the failure to give the defendant adequate notice of the claims against it and their grounds.

"Even if the second amended complaint suffers from some minor defects (i.e. a misplaced apostrophe), those defects do not make it so confusing that GE cannot understand Plaintiffs claims against it," Wood said.

GE's argument that the plaintiffs didn't sufficiently allege their strict liability claim also failed since they did allege a specific manufacturing defect and included facts showing how that defect might have caused the crash.

Wood denied GE's motion to dismiss the plaintiffs' request for punitive damages since it isn't a claim subject to dismissal and their claims for negligence and strict liability survived.

Wood said the wrongful death claim was governed by the Death on the High Seas Act since the crash occurred in the Gulf of Aden, so the widow couldn't seek non-pecuniary damages related to her husband's death.

The plaintiffs are represented by Motley Rice LLC and Suthers & Harper.

GE is represented by Nelson Mullins Riley & Scarborough LLP.

The case is *Rivera-Lopez v. Gen. Elec.*, 2023 BL 470289, S.D. Ga., No. 4:19-cv-00211, 12/28/23 .

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With Data Breach Lawsuits Mounting, 23andMe Moves for California MDL

LAW [law.com/therecorder/2023/12/29/with-data-breach-lawsuits-mounting-23andme-moves-for-california-mdl](https://www.law.com/therecorder/2023/12/29/with-data-breach-lawsuits-mounting-23andme-moves-for-california-mdl)

By ALM Staff



What You Need to Know

- In a Dec. 21 motion, 23andMe attorney Ian Ballon said there are more than 30 lawsuits filed over the breach, announced on Oct. 6.
- 23andMe expanded the number of potential victims of the cyberattack earlier this month from an initial 14,000 to 6.9 million.
- Ballon highlighted some of 23andMe's possible defenses, including 'plaintiffs' comparative liability and those based on lack of standing and the economic loss rule.'

Genetic testing firm 23andMe Inc. has moved to transfer lawsuits over this year's data breach to California, citing an increase in the number of cases.

In a Dec. 21 motion before the U.S. Judicial Panel on Multidistrict Litigation, 23andMe attorney Ian Ballon, a Greenberg Traurig shareholder in Los Angeles and Palo Alto, California, said there are more than 30 lawsuits filed over the breach, announced Oct. 6. And they are only expected to grow, he wrote.

"Based on the large (and increasing) number of actions, jurisdictions, and counsel involved, informal coordination is not a viable alternative to streamline the pretrial litigation process," he wrote. "Given the ongoing filing of putative class actions over the last two-and-a-half months, 23andMe expects that lawsuits allegedly arising from the incident will continue to be filed."

The move comes amid a surge in cyberattacks this year and after 23andMe expanded the number of potential victims of the cyberattack earlier this month from an initial 14,000 to 6.9 million. In a Dec. 1 notice before the U.S. Securities and Exchange Commission, parent company 23andMe Holding Co. said the breach would cost up to \$2 million in technology consulting services, legal fees and advisors.

“The full scope of the costs and related impacts of this incident and related litigation, including, without limitation, the availability of insurance to offset some of these costs, cannot be estimated at this time,” the company said in the filing.

What Are 23andMe’s Possible Defenses?

The 23andMe hackers gained access through its service called DNA Relatives to personal information, including genetic backgrounds, some of which have already shown up in a database, shared on the dark web, identifying individuals with Ashkenazi Jewish heritage and Chinese descent. Plaintiffs’ firms who have filed suits include Milberg Coleman Bryson Phillips Grossman, Gustafson Gluek and Casey Gerry Schenk Francavilla Blatt & Penfield.



Ian Ballon, Greenberg Traurig shareholder.

In 23andMe’s motion, Ballon highlighted some of its possible defenses, including “plaintiffs’ comparative liability and those based on lack of standing and the economic loss rule.”

Ballon did not elaborate in the motion, but, in its initial announcement of the breach, 23andMe found that some users had the same passwords they provided on other hacked websites. As a result, “threat actors” were able to access accounts through what is called “credential stuffing.” In a Dec. 5 update, 23andMe said it had required users to reset their passwords and login using two-step verification.

“We do not have any indication that there has been a data security incident within our systems, or that 23andMe was the source of the account credentials used in these attacks,” the company said.

In other data breach lawsuits, defendants have challenged the standing and economic losses of the plaintiffs, most of whom suffered no financial impacts.

23andMe also changed its terms of service, which require users to arbitrate disputes and waive participation in class actions, after the breach.

23andMe’s motion insisted the cases should be in California’s Northern District, near its headquarters in South San Francisco. Moreover, 29 of the cases are in that district; one case is in the Central District of California, while another is in the Northern District of Illinois.

The company did not specify a judge in the motion, but U.S. District Judge Edward Chen ordered the consolidation of 23 cases on Nov. 30. Meanwhile, two other cases are in San Francisco County Superior Court and Santa Clara County Superior Court.

Content moderation law doesn't violate free speech, judge rules

DJ [dailyjournal.com/articles/376391-content-moderation-law-doesn-t-violate-free-speech-judge-rules](https://www.dailyjournal.com/articles/376391-content-moderation-law-doesn-t-violate-free-speech-judge-rules)

Jan. 2, 2024

The ruling was a setback for X Corp., formerly Twitter, which claimed AB 587 violates the First Amendment and Section 230 of the Communications Decency Act.

A federal judge refused to enjoin a California law that requires social media companies to disclose their content moderation policies.

The ruling was a setback for X Corp., formerly Twitter, which claimed AB 587 violates the First Amendment and Section 230 of the Communications Decency Act. *X Corp. v. Bonta*, 2:23-cv-01939-WBS-AC, (E.D. Cal., filed Sept. 8, 2023).

The ruling came Thursday as X Corp. and its owner, Elon Musk, are fighting claims by activist organizations that the social media platform promotes hate speech.

In his ruling Thursday, U.S. Senior District Judge William B. Shubb of Sacramento wrote that X Corp. failed to show that its challenge to AB 587 would succeed on the merits.

"Plaintiff argues that "[i]f X Corp. takes actions in good faith to moderate content that is 'obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,' without making the disclosures required by AB 587, it will be subject to liability," thereby contravening Section 230," Shubb wrote. "This interpretation is unsupported by the plain language of the statute. AB 587 only contemplates liability for failing to make the required disclosures about a company's terms of service and statistics about content moderation activities, or materially omitting or misrepresenting the required information."

The ruling likely came as little surprise to anyone who watched Shubb's November hearing on the matter. Appointed by Republican President George H.W. Bush in 1990, Shubb has enjoined several California laws over the years. But he told X's attorney, Joel Kurtzberg, that "AB 587 doesn't require any of the things you say it requires" and "doesn't compel your client to do anything but report facts." Shubb also said during the hearing that he expected his decision would be reviewed by the 9th U.S. Circuit Court of Appeals.

Kurtzberg is partner and co-chair of the First Amendment & Media Litigation practice at Cahill Gordon & Reindel LLP in New York. He and other attorneys for the social media company could not be reached Friday for comment.

Assemblyman Jesse Gabriel, D-Encino, who wrote the law, said in a statement: “As we have repeatedly emphasized, Assembly Bill 587 is a pure transparency measure that simply requires Twitter and other companies to be upfront about if and how they are moderating content. It in no way requires any specific content moderation policies — which is why it passed with strong, bipartisan support. If Twitter has nothing to hide, then they should have no objection to complying with this law.”

Signed in 2022, AB 587 requires social media companies with \$100 million in gross annual revenues to file regular reports with the state about how they moderate topics like hate speech, racism, extremism, disinformation, harassment and foreign political interference. This means it applies only to X and a few other large companies, notably Meta Platforms Inc.

Under questioning from Shubb, Kurtzberg said last month that he wasn’t trying to argue the law specifically targeted X. Shubb has set a scheduling conference on the case for Feb. 26.

Musk has faced scrutiny over his content moderation policies since he purchased Twitter in October 2022 and pledged to make it a place that welcomed free speech. Several activist groups who opposed his takeover have charged that he has allowed racist and antisemitic speech to flourish. Musk has responded with lawsuits and threats of lawsuits.

On Dec. 22, attorney J. Jonathan Hawk moved to oppose efforts to dismiss X’s case against one organization. *X Corp. v. Center for Countering Digital Hate, Inc.*, 3:23-cv-03836-CRB (N.D. Cal., filed July 31, 2023).

X Corp. claims the Center for Countering Digital Hate violated its terms of service by using a technique known as scraping to analyze large amounts of digital data from the platform. This information was used in a series of reports the group released to the media that were critical of the company.

“X Corp. seeks to recover for the harm that Defendants’ intentional wrongdoing caused it to suffer,” wrote Hawk, a partner with McDermott Will & Emery LLP. “This allegation is not in serious dispute. CCDH US’s Feb. 9, 2023 report admits to scraping X to obtain data for the report. Because it cannot retract its admission, CCDH instead focuses on strained alternative readings of the ToS, an appeal to public policy that ignores the facts and context in which this dispute arises, and a damages argument that conflicts with both the allegations of X Corp.’s Amended Complaint and the rest of CCDH’s own Motion.”

X Corp.'s lawsuit drew a rebuke in an amicus curiae brief filed by the American Civil Liberties Union, which claimed that the company was trying "to disguise a nonviable defamation claim as a breach of contract claim to retaliate against a nonprofit."

In another case, filed in the U.S. Northern District of California, X Corp. is opposing efforts by European organizations which claim to fight online hate speech. A year ago, HateAid and the European Union of Jewish Students sued the company then known as Twitter Inc., accusing it of violating German law by failing to remove antisemitic posts. In October, HateAid sent a letter warning the platform that it could face additional legal action over removing the accounts of researchers studying hate speech.

In an opposition motion filed in November, Hawk argued that X Corp. is a "nonparty" to the litigation against Twitter International Unlimited Company, a now-separate entity based in Berlin. He also called the request "a transparent and impermissible fishing expedition."

"Applicants' proposed nine document requests and six deposition topics would seek staggeringly-broad swaths of information. ... The proposed requests are often not limited to a specific time period, and seek information about extensive operational matters within X Corp. and TIUC that have no bearing on the narrow issues in the 'German Litigation,'" Hawk wrote.

HateAid did not respond to emails seeking comment. *In re: ex parte Application of HateAid gGmbH*, 4:23-mc-80235-HSG (N.D. Cal., filed Sept. 19, 2023).

#376391

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More Corporate Guilty Pleas Coming Soon, Says US Criminal Chief

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- DOJ official defends white-collar enforcement record
- Lawmakers, other critics cite disappointing figures

The Justice Department's criminal chief said "a number of guilty pleas" are coming from corporations in early 2024, as DOJ faces bipartisan criticism from Capitol Hill over the pace and toughness of white-collar enforcement.

A series of company settlements following DOJ white-collar investigations "just missed" closing before the New Year, but are now expected in January and February, said Nicole Argentieri, the criminal division's acting assistant attorney general, in a Dec. 28 interview. She didn't specify their nature beyond saying they'll be "impactful" and "involve different industries."

Lawmakers, former prosecutors, and other critics have pointed to a decline in annual corporate prosecutions and settlements, but Argentieri said the department's nine corporate resolutions in 2023 reveal a "robust" enforcement record. Newly revised policies to incentivize self-disclosures of company misconduct and a heightened focus on individual accountability are already bearing results, she said.

The number of corporate resolutions per year, which in the previous decade routinely hit double figures before slowing in the past few years, are "not the most important measure," said Argentieri, who's run the division on an acting basis since August. Instead, she highlighted the statistics that she said show DOJ is leveraging limited resources to achieve maximum impact.

"When you look at the average loss in cases charged by our fraud section—over \$25 million per individual defendant— average penalties in our corporate resolutions—\$350 million— those are the highest numbers in years," Argentieri said. "Those numbers really demonstrate the scale and complexity of our white-collar cases."

The corporate penalty figure is heavily skewed by the department's \$4.3 billion settlement with Binance, the world's largest cryptocurrency exchange.

Argentieri spoke following her Dec. 12 appearance at a Senate hearing in which members from both parties knocked the department for going too soft on corporate misconduct, particularly when it comes to prosecuting executives. Senate Judiciary Committee Chair Dick

Durbin (D-Ill.) cited numbers from a recent Public Citizen analysis that he said prove “federal prosecutions of corporate crime have reached record lows under both the Trump and Biden administrations.”

Argentieri didn’t directly refute those findings. Instead, she countered that DOJ is “actively focused on bringing cases to hold culpable individuals and corporations accountable.”

She noted that in the majority of the nine resolutions plus three corporate declinations, DOJ prosecuted individuals either before or simultaneous to settling with the company. Overall, the criminal division charged more than 290 individuals in 2023, including 30 executives, she said.

Prosecutors have been adhering to a 2022 directive from Deputy Attorney General Lisa Monaco that they “must strive” to complete investigations into individuals either before or simultaneous to concluding the related corporate probe.

“This was a gut check to remind us all that we need to act with urgency,” Argentieri said. “Individuals have always been front of mind for us, but it’s an additional push so that we’re talking about it at every stage of the investigation.”

Complex Trials

Yet the department, in prepared testimony for last month’s Senate Judiciary Committee hearing, acknowledged that its insistence on corporate guilty pleas and steep jail sentences for executives presents challenges. “Well-resourced white collar and corporate defendants are using every tool available in an attempt to escape accountability,” DOJ stated in materials submitted to the Senate panel.

Asked about that statement, Argentieri said, “What it means, and I think what the numbers show, is that we’re trying more cases than ever.”

There were more than 40 white-collar trials in 2023, coming off a record-high 52 in 2022, as federal courts addressed pandemic-era backlogs.

Policies Working

Over the past year, federal prosecutors and defense lawyers started operating under revised policies in January that offered reduced penalties and a clearer path to avoid prosecution to companies that voluntarily report wrongdoing.

Some white-collar defense lawyers have been skeptical about advising corporate clients to take advantage of DOJ’s increased incentives to self-report when they’ve uncovered potential violations. Losing control of the outcome and costs—and on a matter DOJ may

never learn about otherwise—often makes companies reluctant to confess.

Argentieri declined to provide the number of company self-reports in 2023.

“What I can say to you is we’re seeing a really healthy number, including self-reporting outside of the FCPA context,” she said.

Results are also coming in from another policy shift in March to provide penalty discounts to companies that claw back compensation from executives responsible for the wrongdoing, Argentieri said.

“Companies have expressed a real interest in availing themselves of this pilot program. You’re going to see additional resolutions next year in which companies try to take advantage of that,” she said.

Those resolutions may not satisfy congressional critics who want guilty pleas, rather than deferred and nonprosecution agreements that they say are too lenient or lack transparency.

More than half of the nine corporate resolutions in 2023 were DPAs or NPAs. Argentieri repeated her forceful defense at the Senate hearing of such settlements, which allow companies to avoid indictment provided they satisfy compliance obligations.

“I cannot say this enough: Deferred prosecution agreements, nonprosecution agreements are not a pass,” she said. “They contain basically almost all of the same requirements as a guilty plea.”

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<https://www.wsj.com/finance/wealthy-investors-rescued-juul-from-bankruptcy-others-are-crying-foul-5cb18578>

EXCLUSIVE FINANCE

Wealthy Investors Rescued Juul From Bankruptcy. Others Are Crying Foul.

Lawsuit accuses two directors of benefiting themselves through corporate financial maneuvers; Juul says decisions were made in company's best interests

By *Jennifer Maloney*

Jan. 2, 2024 5:30 am ET



Juul Labs, once a vaping juggernaut, was struggling to raise money in 2022, when two directors offered a bailout. PHOTO: JOHN SMITH/VIEWPRESS/CORBIS/GETTY IMAGES

Two of Juul Labs' longtime directors—a Hyatt Hotels heir and a venture capitalist—helped bail out the e-cigarette maker when it was on the brink of insolvency.

It was a deal that preserved the equity investments of Nick Pritzker and Riaz Valani, cemented their influence over the company and secured them releases from liability in thousands of lawsuits against Juul. Now Juul is fighting a lawsuit from a group of investors alleging that those two directors were looking out for their own interests, not the company's.

Among the questions in dispute is whether the bailout that allowed Juul to avert bankruptcy in 2022 benefited insiders at the expense of other investors.

The allegations have come to light as the company is trying to raise new capital, become profitable for the first time and turn the page after a turbulent year-and-a-half.



Nick Pritzker, a Juul director and early investor in the company, participated in the bailout. PHOTO: STEVE JENNINGS/GETTY IMAGES FOR WHOLE WORLD WATER

Juul says that it delegated decisions to independent directors and that it secured needed financing from investors who support the company's mission of offering adult cigarette smokers a less-harmful alternative.

Juul was once a vaping juggernaut and one of the most valuable startups in America. Tobacco giant Altria Group in 2018 invested \$12.8 billion in Juul. Juul used nearly all of the cash from Altria's investment to fund employee bonuses and shareholder dividends, including more than \$2 billion to Valani and more than \$1 billion to Pritzker, The Wall Street Journal has reported.

Since then, Juul has been beset by thousands of lawsuits over its marketing practices and embroiled in

a dispute with federal regulators over whether its e-cigarettes can be sold in the U.S. Juul has denied allegations that it marketed its e-cigarettes to children and teens.

Juul began exploring bankruptcy in June 2022, when the Food and Drug Administration ordered its e-cigarettes off the market and a court stayed the order. By September 2022, according to people familiar with the matter, Juul's top executives agreed that bankruptcy was the likeliest outcome. The start of Juul's first bellwether trial was looming, and the company was struggling to

raise money to settle outstanding lawsuits while its products remained in regulatory limbo.

In board meetings and in conversations with the CEO, Pritzker and Valani argued that the company shouldn't file for bankruptcy and offered it a bailout instead, these people said. Pritzker and Valani were early Juul investors and have long been powerful members on its board.



K.C. Crosthwaite, Juul Labs CEO, at a House Oversight subcommittee hearing in 2020 on vaping and public health. PHOTO: MANDEL NGAN/AGENCE FRANCE-PRESSE/GETTY IMAGES

As the bailout was being discussed, Juul's chief executive and top lawyer raised concerns internally about potential conflicts of interest facing Pritzker and Valani, according to the people familiar with the matter. Valani continued to press the case against bankruptcy to CEO K.C. Crosthwaite while Juul interviewed candidates for a special board committee to oversee the company's next steps, these people said.

The bailout was done in three parts. Pritzker and Valani in September 2022 refinanced a Juul term loan and later that fall loaned Juul more money to cover operating costs. Finally, the two directors, along with Juul co-founders James Monsees and Adam Bowen, backstopped a sweeping legal settlement and made an equity investment in Juul. Pritzker, Valani and the co-founders, who were named as co-defendants in many of the lawsuits, have denied wrongdoing.

Juul, after approaching dozens of potential investors, closed a funding round in October 2023 that raised \$1.27 billion. That sum included money that entities

connected to Pritzker, Valani, and Juul's two co-founders committed for Juul's legal settlement and an additional \$45 million from the same four investors.

Entities tied to Valani and Pritzker now own nearly half of Juul, while most other investors have had their stakes sharply diluted amid the rescue.



Adam Bowen and James Monsees, founders of Juul Labs, helped backstop the cost of a sweeping legal settlement. PHOTO: AXEL HEIMKEN/PICTURE ALLIANCE/GETTY IMAGES

Affiliates of hedge fund D1 Capital Partners and two other investors sued Juul in October 2023 to block a debt conversion triggered by the funding round. The conversion would slash \$2 billion in outstanding notes to \$116 million in equity, a 94% drop in value, according to Juul.

The lawsuit alleges that Pritzker and Valani “leveraged a distressed situation for their own personal gain to the detriment of Juul’s other stakeholders.”

Juul said that its management never decided that bankruptcy was the best path. The company said its actions over the past year-and-a-half were far better than the alternative—bankruptcy—which could have wiped out all shareholders’ equity. Since 2022, Juul has settled nearly all of its remaining legal liabilities and cut expenses, including roughly halving its employee head count.

The company said its board avoided conflicts of interest by bringing on two independent directors with restructuring experience to form a special committee. In a statement, the committee said it assessed the company’s options with the assistance of separate legal advisers, and made decisions that maximized the company’s value.

Altria's 2018 investment had set Juul's share price at \$279. The investment round that closed in October put it at \$1.07.

Juul's CEO told employees at an internal meeting in November that they would receive equity awards—the way new employees do when they join a startup—to compensate for the dilution in their shares.

“I believe that we've got significant value we can go build from here,” Crosthwaite said at the meeting.

Juul in 2024 aims to raise another \$330 million as it fights to keep its existing products on the U.S. market and submits new vaping products for federal authorization. It is still offering shares at \$1.07 to Juul's shareholders and potential new investors.

Write to Jennifer Maloney at Jennifer.Maloney@wsj.com

Wary courts confront AI pitfalls as 2024 promises more disruption

 [reuters.com/legal/transactional/wary-courts-confront-ai-pitfalls-2024-promises-2023-12-27](https://www.reuters.com/legal/transactional/wary-courts-confront-ai-pitfalls-2024-promises-2023-12-27)

Sara Merken

AI (Artificial Intelligence) letters and robot hand miniature in this illustration taken, June 23, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Acquire Licensing Rights 

Dec 27 (Reuters) - Generative artificial intelligence technology made its mark on the world in 2023, and courts of law were no exception.

U.S. judges grappled with the use of evolving AI tools in their courtrooms, particularly after lawyers made headlines for submitting legal briefs with fictitious case citations that were generated by tools like OpenAI's ChatGPT.

Experts said the courts – and the broader legal industry – would feel even greater impacts from generative AI in 2024 and beyond.

"I think we are just seeing the beginnings of it right now. And I think that the changes are going to accelerate in the years ahead," said Andrew Perlman, the dean of Suffolk University Law School.

Two New York lawyers were sanctioned in June after a judge found they filed a brief with six fake, AI-generated case citations and later misled the court. A Colorado lawyer was temporarily suspended from practicing law in November over a similar episode.

The lawyers in those cases said they misunderstood the technology. But judges have said that's no excuse.

A growing number of judges have issued orders since the spring governing how attorneys with cases before them can use AI tools, which are prone to making things up.

The orders fall into several categories, said Shannon Capone Kirk, global head of advance e-discovery and AI strategy at law firm Ropes & Gray. Some seek to educate, while others prohibit the use of AI altogether. Most require disclosure of the use of AI or verification of the information, she said.

Kirk's team has identified 17 such federal or specialty court orders and one state court order so far. She said she expects that in 2024, "we will see a multitude of these orders coming out, either by specific judges or whole courts."

U.S. District Judge Brantley Starr of the Northern District of Texas in May became one of the first U.S. judges to require lawyers to certify they did not use AI to draft their filings without a human checking their accuracy.

Judges in other jurisdictions across the country followed with their own guidance or mandates.

The U.S. District Court for the Eastern District of Texas introduced a rule that took effect this month requiring lawyers using AI programs to "review and verify any computer-generated content."

The 5th U.S. Circuit Court of Appeals, which covers federal courts in Texas, Mississippi and Louisiana, proposed a similar certification requirement last month and is accepting public comment through Jan. 4. Lawyers who misrepresent their compliance with the rule could be sanctioned and have their filings stricken.

Bar associations are also weighing the use of generative AI in legal practice. The American Bar Association in August formed a group to assess AI's impact and to probe ethical questions that the technology poses.

The California Bar last month approved new guidance for lawyers using the technology, and the Florida Bar's professional ethics committee has issued a proposed advisory opinion and is accepting public comment.

Suffolk University's Perlman said explicit rules on lawyers' use of generative AI are "ill-advised." Existing professional conduct and other rules for lawyers already cover their obligations to vet documents for accuracy, he said.

The court orders may also cause confusion if they take different approaches or are not clear on what they mean by AI or generative AI, Perlman said.

"Lawyers regularly use AI and generative AI without even realizing it," such as in legal research tools or in Microsoft Word, he said.

The technology, meanwhile, only promises to become more powerful with time.

"I think generative AI is going to be the most transformative technology that the legal profession has ever seen," he said.

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Reporting by Sara Merken

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Accounting & Consulting services**Big Four firms rethink governance after year of mis-steps and scandals**

Auditors and regulators consider ways to strengthen oversight and hold management to account



National regulators take divergent views on how the 'Big Four' accounting firms — Deloitte, EY, KPMG and PwC — should be governed © FT montage/Getty Images/Bloomberg

Stephen Foley in New York and **Simon Foy** in London YESTERDAY



A series of scandals and strategic mis-steps exposed shortcomings in the governance of Big Four accounting and consulting firms in 2023, prompting a rethink about how best to hold management to account.

EY's US partners voted before Christmas to introduce a new governance system that includes a board to oversee management and approve strategy, according to people familiar with the matter. The revamp, which will come into force in July, was proposed after [EY's](#) current US management team vetoed a plan to spin off the firm's global consulting business, prompting anger from many partners.

PwC's global boss Bob Moritz [told](#) the Financial Times that governance reforms in Australia, where it was hiring a chair from outside the firm for the first time, could become a blueprint for other countries in its global network.

Meanwhile, the US audit regulator has launched a “culture review” of the firms, to root out the cause of a rise in the number of public company audits that fail to meet [regulatory standards](#). The review would examine whether something had gone wrong with “tone at the top”, the Public Company Accounting Oversight Board announced in December. It would also put the organisational structure of firms under scrutiny.

The debate over governance at the Big Four, which collectively employ 1.5mn people and audit most of the world’s largest public companies, was overdue following years of heady growth, according to Laura Empson, a professor specialising in the management of professional service firms at the University of London’s Bayes Business School.

“The current governance of the Big Four encompasses the worst aspects of partnership governance and the worst aspects of corporate governance,” she said. “The partnership model eliminates the principal-agent problem, in that owners, managers and major producers are one and the same. At a small scale that can work very effectively. The problem is, when it becomes scaled-up, the leadership becomes more and more divorced from the partners.”

The Big Four firms operate as global networks of locally-owned partnerships, making them quite different from multinational public companies, where boards of directors have significant sway.

A common structure is for management to be overseen by a board made up of longtime partners from different parts of the firm, which has the responsibility of appointing the chief executive or senior partner and some role in approving strategy. Critics point out the circularity: even longtime partners owe their jobs in whole or in part to the chief executive.

This was laid bare in the scathing report on PwC’s culture in Australia, where a tax partner [used secrets](#) gleaned from his advisory work for the government to help craft tax planning services for multinational technology companies. The [report](#) said the governance structure created a clubby atmosphere that gave too much power to the chief executive. In response, PwC Australia said it would beef up its governance board overseeing management and bring in at least three independent board members, including one as chair.

Moritz, PwC’s global chair, said that he had been encouraging local partnerships to improve governance by involving independent outsiders for the past six years.

“Because of these unfortunate, unique circumstances, Australia’s got to leapfrog ahead quite a bit and jump right to that end game,” he said in an interview with the FT.

EY has been an outlier in not having a board overseeing its global management nor requiring that arrangement in its local partnerships. That led to the unusual spectacle of chief executive Carmine Di Sibio playing a kingmaker role in the [appointment of his successor](#), who was picked by EY’s 18-member global executive committee in November. EY’s governance council ratified the appointment, but the group is made up of 38 people — too unwieldy for active decision making, according to governance experts.

Senior executives at EY have been working on proposals for governance reform, which will be in the packed in-tray of global chief executive-elect [Janet Truncale](#).

The US is already ploughing its own furrow having approved the creation of a new board that will be chosen by elected partners and will have hiring and firing power over EY’s US leader. The local board could ultimately include members from outside the firm, according to a person familiar with the plan.

National regulators take divergent views on how the Big Four should be governed. In Europe, some countries have mandated the creation of oversight boards and the appointment of at least some independent board members.

In the UK, the Financial Reporting Council first recommended the introduction of independent non-executives from outside the firm in 2010 for those auditing 20 or more listed companies.

The regulator’s latest audit firm governance code, which operates on a “comply or explain” basis, recommends that larger firms have at least three independent non-executives who are in the majority on a supervisory body that oversees “public interest matters”.

Under separate plans for the Big Four in the UK to ringfence their audit businesses from their tax and advisory arms, they will be required to have a separate audit board with a majority of non-executives to oversee audit quality and the activities of their audit arms.

Meanwhile, since 2018, the Netherlands has required firms auditing public interest entities to have an independent supervisory board to oversee their internal activities.

In the US, the PCAOB has proposed requiring an audit firm to have [at least one person](#) who is not a partner sit on its board or some other kind of advisory body — but it concedes that all of the Big Four would already meet these limited criteria.

Francesca Lagerberg, chief executive of Baker Tilly International, a top-10 accounting firm by revenue, said independent non-executives were a “real positive” for the sector as they allowed firms to “break through their own echo chamber” and encourage management to question whether they were “doing the same old things in the same old way”.

But Bayes Business School’s Empson, who was a non-executive at KPMG UK from 2013 to 2016, cautions not to expect too much.

“The firms haven’t yet come to terms with how much involvement the non-execs need to have in order to perform the role that the regulators are expecting of them,” she said.

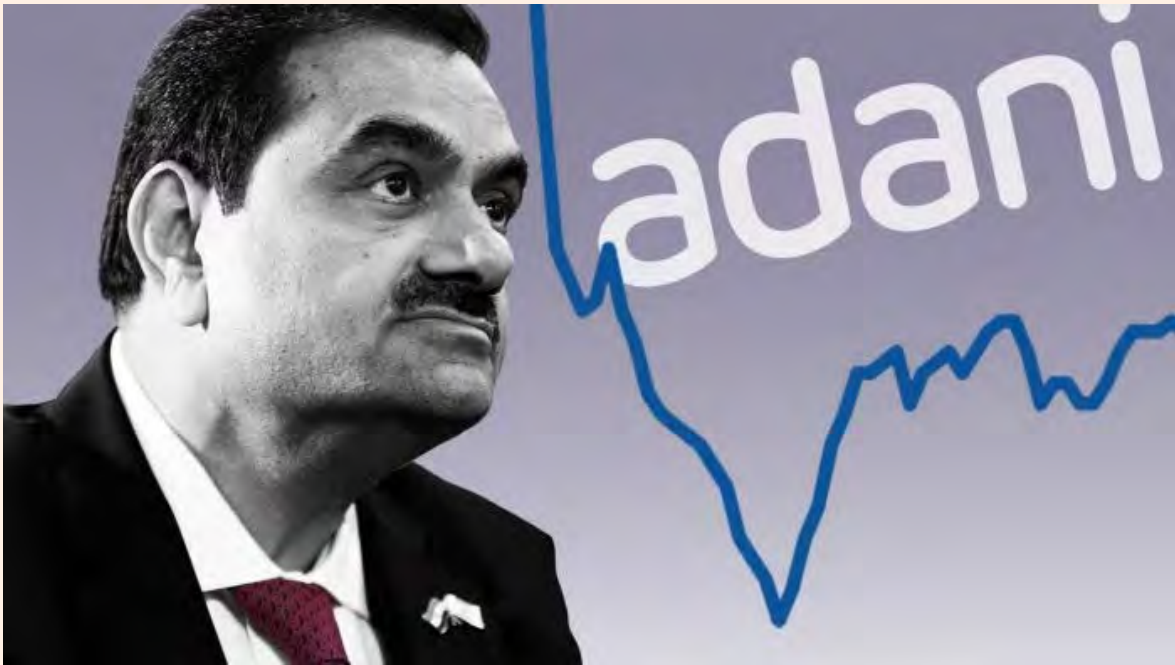
“In underestimating the time and commitment of their non-execs, the big audit firms also underestimate how much they need to pay them. As a result, it is not always easy to attract enough of the right people for the job.”

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Adani Group

Adani stocks regain half of losses from Hindenburg report fallout

Indian billionaire's listed businesses have recovered nearly \$46bn in market capitalisation



Gautam Adani's conglomerate has been rebuilding its stock market value after a short seller accused the group last year of accounting fraud and stock market manipulation © FT montage/Bloomberg

Chloe Cornish in Mumbai and **Hudson Lockett** in Hong Kong YESTERDAY



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Indian tycoon Gautam Adani's listed businesses have regained \$46bn in market capitalisation over the past month, representing nearly half the losses incurred after Hindenburg Research released a damaging short-seller report almost a year ago.

The sprawling infrastructure conglomerate has been rebuilding its stock market value after the report in January last year accused [Adani](#) of accounting fraud and stock market manipulation.

The allegations plunged the group into a public relations crisis, forced it to call off a \$2.4bn share sale and wiped as much as \$150bn from its market capitalisation despite Adani's strong denials.

India's political opposition also seized on the report to attack Prime Minister Narendra Modi, widely perceived to be close to Adani. The billionaire denies benefiting from any personal connection with Modi but says the group aligns itself with the Indian government's development priorities.

Following a brief recovery rally in March, the market capitalisation of Adani's 10 listed companies has languished at about Rs10tn (\$120bn) for most of the year, roughly half their value prior to Hindenburg's report.

But since November 24, the stocks have posted average gains of 36 per cent, delivering a recovery of Rs3.8tn in market value and paring overall losses for 2023 to about 25 per cent.

Most of the gains came after a decision on November 24 by the Securities and Exchange Board of India not to request more time for its probe into Adani businesses from [India's](#) Supreme Court, with one official telling justices the regulator had finished investigating all but two of two dozen cases related to the group.

Adani stocks claw back losses almost a year on from short report

Total market value of Gautam Adani's listed companies* (Rs tn)



*Includes Adani Green Energy, Adani Enterprises, Adani Total Gas, Adani Ports & SEZ, Adani Power, Adani Energy Solutions (formerly Adani Transmission), Ambuja Cements, ACC, Adani Wilmar and NDTV

Sources: FT research, Bloomberg

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An Asia-based equities analyst at one large European asset manager said the regulator's decision was "not quite a clean bill of health, but Sebi at least declined to say anything was off after looking into the accusations that were levelled against Adani".

He added that the market value of the group's listed companies was unlikely to fully recover from the short-seller report "because the unwelcome publicity from Hindenburg has probably highlighted to even retail investors how richly valued some of these companies were".

The gains for Adani stocks follow a [broader rally for India's stock market](#), with the country's benchmark Nifty 50 index up 20 per cent over the past year. Sentiment towards the group's listings was also buoyed in early November, when the US government announced it was lending \$553mn to an Adani-led container terminal development project in Sri Lanka.

As its share prices tumbled in the weeks following the short-seller report, Adani moved to reassure its bankers by paying off more than \$2bn in share-backed loans that had been taken by the Adani family. It launched a bond buyback at its ports unit and found a new investor — US-based firm GQG — which initially [bought \\$1.9bn worth of stock](#) in March.

"They needed a few billion dollars on a personal level to pay off those loans," said Samir Arora, founder and fund manager of Helios Capital, who has also invested in Adani stocks. "To get \$2bn-\$3bn was not an issue and then of course GQG came and solved it for them."



Adani's conglomerate operates coal plants and renewable energy projects © Amit Dave/Reuters

Adani has insisted the Hindenburg report has not changed operations at his companies, which include ports, airports, cement processors, data centres and even apple farms.

“After the first few days of confusion and market volatility, life inside the organisation continued as normal,” said an Adani executive who asked not to be named. “There was never any cost-cutting that happened. We have only hired more people.

“The first thing he [Adani] did was that he called all the business CEOs and said that they could focus on the businesses and he will take care of the market noise,” the executive added.

The group has pointed to its financial performance as proof that Hindenburg’s attack has not harmed its operating business. The company said its earnings grew by 47 per cent — its best performance — in the first six months of India’s financial year, which begins in April.

The group has also brought its net debt down to 2.5 times its annual earnings, compared with 3.3 times before the short-seller report.

Adani has sold some assets, including shares in his businesses, with one deal involving the sale of shadow bank Adani Capital to US private equity group Bain Capital.

However, the group has also made some acquisitions, buying cement company Sanghi Industries and the news agency IANS.

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Ohio Legal Battles To Watch In 2024

By **Ryan Harroff**

Law360 (January 1, 2024, 8:02 AM EST) -- The new year in Ohio will ring in more developments in claims over the Norfolk Southern train derailment in East Palestine and a fight by FirstEnergy investors to keep class certification, with both matters having already spawned a cavalcade of complaints.

Another battle is being fought by an Ohio Supreme Court justice seeking to undo a state law requiring her to be listed as a Democrat on general election ballots, marking a rare instance of such a high-ranking judicial official being a plaintiff while on the bench.

Here are three Buckeye State cases to watch in 2024.

FirstEnergy Investor Class Fights to Maintain Certification

The Sixth Circuit will hear arguments from embattled Ohio power company FirstEnergy and its investors over whether those investors can pursue their claims arising from the firm's role in a massive state corruption scandal as a certified class.

FirstEnergy investors have been fighting for a payout from the major drop in the company's stock price after it was revealed the energy firm worked with **former Ohio House Speaker Larry Householder** in the state's largest corruption scandal ever in order to get a **\$1.3 billion tax-funded bailout** of its nuclear energy program. The company has admitted to its role in the scheme and **agreed to pay** a \$230 million fine to the government, but it has continued to fight investors' claims arising from the scandal.

Corporate compliance attorney Mark Chutkow of Dykema Gossett PLLC told Law360 that FirstEnergy's bid to decertify the investor class would, if granted, allow them to "divide and conquer" the claims for civil liability flowing from the company's admitted role in the bribery scheme with Householder. Chutkow said that looking at the situation on a surface level, he believed the class could get decertified.

"It's fairly unusual to get an interlocutory appeal on a class action like this over certification," Chutkow said. "The Sixth Circuit is obviously taking very seriously the arguments that FirstEnergy is making here in terms of whether the plaintiffs adequately represent the class and whether there's a commonality in their damages of the individual class members."

Robbins Geller was appointed class counsel when the Southern District of Ohio certified the investors, and it is that certification order that FirstEnergy will ask the Sixth Circuit to undo next year.

In a separate case also brought by investors, this one a derivative shareholder suit, FirstEnergy has agreed to pay a **\$180 million settlement** but the court **held up that deal** because of a parallel case brought by yet another investor claiming he should have been involved in the settlement talks. The complex twisting and untwisting of different investors' claims will no doubt be part of the company's argument as it asserts that they cannot possibly be certified without an error of law.

The case is *In re: FirstEnergy Corp.*, case number 23-0303, in the U.S. Court of Appeals for the Sixth Circuit.

Norfolk Southern Faces a Barrage of Train Derailment Suits

Ever since a train carrying toxic chemicals derailed and partially exploded in February in East Palestine, a town near the border between Ohio and Pennsylvania, lawsuits have been piling up from all sorts of parties including affected residents, government officials and Norfolk Southern's investors.

Coming in to 2024, **dozens of proposed class actions** are still pending resolution as individuals and businesses surrounding the site of the derailment and subsequent intentional chemical burn that Norfolk Southern caused seek damages, medical monitoring and other relief. Attorneys across multiple disciplines have been loaded up on cases arising from the situation, and those not directly involved in the litigation are paying close attention, too.

Michael Miguel, a principal insurance recovery attorney at McKool Smith, told Law360 that litigation is just getting started in terms of contamination and environmental damages. Miguel said both the government and Norfolk Southern are going to have to spend substantial time figuring out the total impact of the derailment, adding that what has already been put before the courts and what judges will hear next year is likely "the tip of the iceberg."

"[The contamination] doesn't all show up the next day in a creek," Miguel said. "You know, it migrates through the subsurface environment and can come in contact with a lot of things that impact property, groundwater and that sort of thing. There's no way they're going to be completely quantified and known by the end of 2024, for sure."

Also on Norfolk Southern's plate will be the ongoing government investigations and scrutiny from elected officials including both of Ohio's senators, who **called for** a state of emergency declaration for the East Palestine area in September.

The company's shareholders are also going after Norfolk Southern over the substantial dip in its stock price that followed the derailment as public outcry over its safety practices spooked investors. Labaton Sucharow was **named lead counsel** for a class of investors in September and is leading the charge on that front.

The consolidated case is In Re: East Palestine Train Derailment, case number 4:23-cv-00242, in the U.S. District Court for the Northern District of Ohio. The investor case is In Re Norfolk Southern Corporation Bond/Note Securities Litigation, case number 1:23-cv-04068, in the U.S. District Court for the Southern District of New York.

Ohio Supreme Court Justice Battles Partisan Ballot Rule

Ohio legal experts have a lot on their plate already for the year, and one of its most powerful attorneys is challenging a state law designating candidates for appellate judge positions as partisans. Ohio Supreme Court Justice Jennifer Brunner does not want to have the word "Democrat" next to her name when she runs for reelection next time.

Justice Brunner **filed her complaint** in November, arguing that she **lost her campaign** for the Ohio Supreme Court's top seat to her colleague Chief Justice Sharon L. Kennedy in part because she for the first time had to be listed alongside her party affiliation but was forbidden from engaging in certain political actions that other "partisan" candidates are permitted to do in Ohio, such as attending rallies.

The crux of Justice Brunner's claims is that appellate judge candidates are unfairly held to limitations that only apply to judges which prevent them from, as an example, clarifying their disagreements with a given political party in public. As a result, Justice Brunner said she and other appellate judge candidates are deprived due process in a way that municipal judges, county judges and partisan candidates for other positions are not.

Brett Krantz, the chairman of global law firm network Meritas and a partner at Cleveland firm Kohnman Jackson & Krantz, told Law360 that Justice Brunner will have a hard time trying to get the partisan label rule overturned. Krantz said that having read the complaint, he does not see the due process or equal protection violation that the justice is alleging.

"I think she has a little bit better argument on the free speech side than on the due process or equal protection side," Krantz said. "I'm not a constitutional scholar, but I think any time you're a judge,

and you're going and saying, 'This violates my constitutional rights to give less information to the voters,' I think that's an uphill battle."

Krantz also noted that both Democrat and Republican organizations already distribute lists of their preferred judicial candidates to voters and said that putting a party affiliation on the ballot itself is not the only way the public can get an impression of a judge's political leanings.

Justice Brunner's attorney and husband Rick Brunner told Law360 in November that part of the issue is what incorrect impressions voters could have of a judicial candidate based on their party affiliation, even if that candidate does not agree with their party on every matter. Krantz said that while voters might make assumptions about how a judge feels on a given issue because of general party trends, that does not necessarily rise to the level of a constitutional problem.

"If you make the assumption that voting for judges is the appropriate thing to do, I don't think you should take knowledge away from voters," Krantz said.

The case is Brunner v. LaRose et al., case number 4:23-cv-02180, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Keith Goldberg, Clark Mindock and Hailey Konnath. Editing by John C. Davenport.

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Private Securities Litigation To Watch In 2024

By **Jessica Corso**

Law360 (January 1, 2024, 8:02 AM EST) -- There's at least one shareholder dispute being heard by the U.S. Supreme Court this year, while it remains to be seen whether the justices will be asked to weigh forum-selection clauses in corporate bylaws. And a former high court case continues to make waves in the lower courts as they decide whether to certify investor class actions.

Here are five cases and controversies on the minds of securities litigators in 2024.

High Court Showdown

Later this month, the U.S. Supreme Court will hear arguments in a case that could determine whether shareholders can sue companies for fraud over alleged failures to be forthright about potential financial pitfalls associated with anticipated future events, such as regulatory deadlines.

The case before the justices accuses Macquarie Infrastructure Corp. of downplaying the impact a U.N. ban on some shipping fuels would have on its fuel storage business.

Lead investor Moab Partners LP **said the company's management** should have disclosed how reliant Macquarie was on storage of the targeted fuel before the ban came into effect, causing significant damage to the company's bottom line.

That disclosure would have needed to be made under a provision of U.S. Securities and Exchange Commission regulations known as Item 303, wherein management discusses trends and uncertainties that could have a material impact on a company's financial operations.

Though several circuit courts have found Item 303 violations are only enforceable by the SEC, the Second Circuit has said such claims can be the basis of private fraud litigation upholding lawsuits like the one brought against Macquarie.

Plaintiff-side attorney Chris Moriarty of Motley Rice LLC said leaving it solely up to the SEC to police the markets "is problematic because the SEC has limited resources."

"Private attorneys representing private clients and class members are incentivized to ensure that the securities laws are followed, even when the SEC is unable to do so," Moriarty told Law360.

Macquarie argues, however, that the lawsuits are problematic because Item 303 forces a company's management to decide whether a trend or uncertainty is material enough to be included in a forward-looking analysis. The SEC, and not the plaintiff's bar, is in a better position to determine whether leadership made the right call, the company **told the Supreme Court**.

The high court has been asked before to rule on the issue that will be argued in front of the justices later this month, but the **parties to that 2017 case settled** before a decision could be rendered.

Oral arguments are scheduled to take place Jan. 16.

The case is Macquarie Infrastructure Corp. et al. v. Moab Partners LP et al., case number 22-1165, in the Supreme Court of the United States.

The Future of Forum Selection

Attorneys are also waiting to see whether forum-selection clauses come up for debate in the Supreme Court after an en banc Ninth Circuit **created an appellate split over the issue**. It's unclear if the lead plaintiff in that Ninth Circuit dispute, Gap Inc. investor Noelle Lee, will appeal her case — as she hasn't done so yet.

Lee filed a derivative lawsuit against the retailer in 2020, alleging the company failed to create any meaningful racial or ethnic diversity on its board of directors and executive management team despite publicly stating it was committed to diversity.

But a clause in Gap's corporate bylaws requires all derivative suits to be filed in Delaware Chancery Court and the case, therefore, did not belong in California federal court, the Ninth Circuit ruled in June.

That puts the court at odds with the Seventh Circuit, **which has ruled** that companies cannot use forum-selection clauses in their bylaws as a run around the federal courts.

Shareholder advocates have argued the Ninth Circuit ruling leaves them without any forum in which to bring derivative lawsuits under the federal securities laws, and they fear the Delaware laws won't allow them to seek the same corporate reform demanded in a federal derivative suit.

But for companies, forum-selection clauses "eliminate the possibility that you're going to be heard in jurisdictions that may not be as familiar with the claims as other jurisdictions," Jonathan Youngwood, who leads Simpson Thacher & Bartlett LLP's civil securities litigation practice, told Law360.

Even if the Supreme Court doesn't hear this particular case, there's a possibility that the circuit split could grow if more appellate courts weigh in on the forum-selection issue, Munger Tolles & Olson LLP attorney Achyut Phadke said.

In the meantime, "what we might see is a lot of Delaware cases" against companies based out of Ninth Circuit states like California, Phadke said.

The case is Noelle Lee v. Robert Fisher et al., case number 21-15923, in the U.S. Court of Appeals for the Ninth Circuit.

Post-Goldman Class Challenges

After 13 years of legal wrangling, Goldman Sachs investors last year finally **gave up the ghost** in a lawsuit that made its mark on the class certification process with a 2021 Supreme Court ruling in favor of the financial industry behemoth. Yet while one company's lengthy legal battle is finally over, the full impact of the decision has yet to be seen.

There are companies and corporate advocates currently fighting class certification in district courts based on allegations that investors cannot meet the Supreme Court's Goldman standard, **as is the case** in a California courtroom overseeing shareholder litigation against Google parent company Alphabet Inc.

That **high court ruling** requires courts to determine whether generic statements about a company's usual business practices can be linked to an inflated stock price. If they cannot, then the class cannot be certified.

How lower court rulings on Goldman challenges pan out is a topic of great interest among securities litigators, Motley Rice's Moriarty said.

So far, only one circuit court has weighed in on the issue. It was the Second Circuit, in that very same dispute with Goldman Sachs, and it said the Supreme Court ruling meant the Goldman class **must be decertified**.

It isn't surprising there are so few rulings citing the Supreme Court precedent, Moriarty said, given how recent the decision was made.

"Often when you have a big ruling from the Supreme Court, it takes a couple of years to track the

effects of it and how significant it is," he said. But by the end of this year, "I think we'll start to see a developing body of case law," Moriarty said.

Bank Failure Litigation

A report **release last year** by Cornerstone Research found investors filed more proposed class actions over the first six months of 2023 than they did over the entire course of 2022.

That increase was driven in part by turbulence in the financial industry that began with the liquidation of FTX-tied bank Silvergate Capital Corp. in early March and was followed in quick success by the collapse of Silicon Valley Bank, Signature Bank and Credit Suisse.

The small-scale banking crisis led to a wave of investor litigation that is still playing out in courts, including one accusing SVB of **downplaying its exposure** to interest rate changes and another accusing Credit Suisse of hiding its financial losses from investors.

The SVB case has been paused as the bank's parent company makes its way through the bankruptcy process, but Credit Suisse was purchased by UBS Group AG and is still trying to **fight off** a number of post-crisis lawsuits.

Phadke argues many of the banks have a "clear defense" they did not commit securities fraud but were made vulnerable by "unforeseen events" in the market like a number of back-to-back interest rate increases.

Making Moves

Finally, there is a shareholder dispute in Delaware Chancery Court that could determine whether TripAdvisor Inc. is allowed to reincorporate in Nevada.

TripAdvisor stockholder Dennis Palkon sued last April to prevent the Delaware-registered company from absconding to Nevada, where Palkon argues they will be insulated "from almost any stockholder litigation."

Delaware Vice Chancellor J. Travis Laster **heard arguments** in the case in November, promising to issue a ruling on dismissal at a later date after vigorously questioning both sides.

The vice chancellor wondered whether greater judicial scrutiny of the decision could spark unwieldy follow-up litigation or, on the other hand, if giving the company a free pass could damage the Delaware brand.

Phadke said the question is whether TripAdvisor was allowed to make the decision to reincorporate without the input of investors and that it is an "interesting issue for the Delaware courts to weigh in on."

The case is Dennis Palkon et al. v. Gregory B. Maffei et al., case number 2023-0449, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas. Editing by Philip Shea and Kelly Duncan.



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Delaware Trends And Cases To Watch In 2024

By **Leslie A. Pappas**

Law360 (January 1, 2024, 8:02 AM EST) -- The year ahead could spell changes for corporate deal-makers and shareholders of Delaware corporations, based on several cases winding through the state's Court of Chancery and appellate state Supreme Court in 2024.

The legal home to nearly two million business entities, including two-thirds of the Fortune 500, has long touted itself as business-friendly, but as an increasing number of non-traditional business disputes shift to the First State, Delaware courts may need to trim down the welcome mat.

"Everyone is trying to move everything into Delaware and make everything about business law," Ann Lipton, a law professor and associate dean for faculty research at Tulane University Law School, told Law360.

Delaware's courts are struggling to keep up as shareholder plaintiffs push the limits of who is considered a controlling shareholder, what constitutes a conflicted transaction, and what types of disputes belong in Delaware under an ever-expanding umbrella of corporate fiduciary duty.

Jenness E. Parker, a partner at Skadden Arps Slate Meagher & Flom LLP, expects to learn more about the courts' views on special committees and board processes when there is a conflict or a potential conflict with a controlling shareholder.

"Consistent with the trend in the past few years, we are likely to hear more in 2024 about the impact of controllers and influential people on deal processes," she told Law360. "This year alone, the Delaware Supreme Court and the Court of Chancery issued four hugely important and illustrative cases in this context in **Mindbody**, **Columbia Pipelines**, **Tesla** and **Oracle**. This body of law will no doubt continue to develop in 2024 and beyond."

All of those 2023 cases involved transactions that shareholders challenged as unfair due to conflicts involving a controlling shareholder.

Tesla, Columbia, Mindbody, Oracle

In the Tesla case, shareholders challenged Tesla's \$2.6 billion acquisition in 2016 of rooftop solar venture SolarCity Corp. because Tesla CEO Elon Musk held significant stock in both companies and was also chairman of the SolarCity board of directors. The Delaware Supreme Court last year upheld a Chancery Court finding that although the deal process was flawed, the price Tesla paid for the company was fair.

In the Oracle case, Vice Chancellor Sam Glasscock III dismissed the suit that accused Oracle founder Lawrence J. Ellison of orchestrating a self-interested deal in 2016 for NetSuite Inc. Chancery Court watchers are still watching the case to see if stockholders will win a **\$5 million "mootness fee."**

In the Mindbody case, Chancellor Kathaleen St. J. McCormick found company founder and former CEO Richard L. Stollmeyer liable for breaches during the company's sale to private equity firm Vista Equity Partners Management LLC in 2019, and awarded shareholders an extra \$1 per share.

In the Columbia Pipeline dispute, Vice Chancellor J. Travis Laster also awarded shareholders an extra \$1 per share after finding breaches of fiduciary duties in connection with Columbia's \$13 billion merger with TC Energy Corp. predecessor TransCanada Corp.

The Mindbody and Columbia Pipeline cases are expected to be appealed sometime in 2024.

Another deal-related case attorneys say they're watching is the appeal of Vice Chancellor Lori W. Will's **dismissal of In re Baker Hughes**, a stockholder derivative suit that challenged an allegedly conflicted multipart separation agreement involving General Electric, based on the investigation of a single-member special litigation committee.

Match.com

Coming up in 2024: more cases about controllers and conflicts, including a Delaware Supreme Court decision in the appeal of Match.com, which has the **potential to upend** a 2014 standard about conflicted mergers.

The Match.com stockholder derivative litigation, which challenged the reverse spinoff of Match.com's parent Match Group Inc. from Barry Diller-controlled IAC/InterActiveCorp. in 2019, could clarify how Delaware courts should apply a seminal 2014 ruling in *Khan v. M&F Worldwide Corp.*

That ruling found that in conflicted mergers, corporations can avoid the stringent "entire fairness" standard review — which requires a defendant to show that a merger transaction was fair in both price and process — by creating an independent special committee to vet the deal, and getting it approved by a majority vote of minority shareholders.

In May of this year, Delaware's Supreme Court took the unusual step of asking both sides in the Match.com litigation for supplemental briefing on whether just one of the measures — rather than both — might have been sufficient for the IAC spinoff, since it was a nonmerger transaction.

"What the Supreme Court does will go a long way to defining how these controller conflict transaction cases get resolved and how the transactional planners" arrange them, Lawrence Hamermesh, emeritus professor at Widener University's Delaware Law School and former director of the Widener Institute of Delaware Corporate and Business Law, told Law360.

Hamermesh said that over time there has been uncertainty and confusion about how and when the standard established in *Khan v. M&F Worldwide* applies.

"The law has gotten increasingly unraveled, and the Supreme Court is trying to ravel it up again," Hamermesh said.

Several cases in 2024 are pushing the limits of what constitutes a "controller" and what is considered a "conflicted transaction" under Delaware law, Lipton of Tulane University said.

At its most basic, a "controlling stockholder" is a shareholder who holds more than 50% of a company's stock. A transaction is "conflicted" when the controller stands on both sides of a transaction or has an interest that competes with common shareholders.

Elon Musk Pay

Over time, "plaintiffs got very creative as to who counts as a controlling shareholder and what is an alleged conflicted transaction," Lipton said.

Plaintiffs now frequently argue that a shareholder with less than 50% stock still may be a controller if the shareholder holds some type of outsize influence.

In his Chancery Court suit challenging Tesla CEO Elon Musk's 10-year, potentially \$56 billion compensation package, plaintiff shareholder Richard J. Tornetta **often brought up Musk's control** of the company and the board, even though Musk held only about 22% of Tesla's stock when the compensation plan went into effect.

Chancery Court watchers are eagerly awaiting a decision in that case, which is still pending more than 10 months after its **post-closing arguments** in February 2023.

TripAdvisor

A shareholder challenge to TripAdvisor Inc.'s **decision to move its corporate home to Nevada** also raises interesting questions about what constitutes a conflicted transaction, Lipton said.

Traditionally, a "conflicted transaction" would refer to a merger, but in this case, shareholders are alleging that a redomestication to Nevada fits the bill.

The suit warns that if TripAdvisor and its holding company, Liberty TripAdvisor Holdings Inc., go through with a plan to change their state of incorporation from Delaware to Nevada, the companies' directors would be insulated "from almost any stockholder litigation."

Defendants in the suit include stockholder Gregory B. Maffei, who is both president and CEO of Liberty as well as the chair of TripAdvisor's board of directors.

TripAdvisor stockholder Dennis Palkon and Liberty stockholder Herbert Williamson argue that the move is a conflicted transaction because it would benefit Maffei but go against the interests of common stockholders, who would allegedly lose protections if the company relocates.

Fox Corp., Facebook

Lipton says she'll also be watching **a pair of derivative lawsuits** against Fox Corp. directors and senior managers, in which stockholders are seeking damages stemming from the network's defamatory broadcasts during the 2020 election.

Part of the reason the network allegedly defamed Dominion Voting Systems was to boost ratings and benefit the company, Lipton said, but that would create a problem for the board if it is found to have broken the law.

"Boards are not allowed to engage in illegal conduct," Lipton said. "You can't break the law intentionally, even if it is in the best interests of the company."

That conflict "puts Delaware in the crosshairs of some really hot-button issues," she said.

Plaintiffs seeking to litigate "non-traditional" issues like **opioids**, gun control, diversity, or employment issues may find ways that a board allegedly broke the law, and then file a breach-of-fiduciary duty case in Delaware.

James McRitchie's **lawsuit** against Meta Platforms Inc., formerly known as Facebook Inc., is an example of a social investor activist trying to leverage corporate law to effectuate broader change. The lawsuit asserts that Meta's board needs to focus on the company's wider social and market impact rather than simply maximizing the company's long-term cash flows. If company policies imperil the rule of law or public health, the complaint says, the portfolios of Meta's diversified stockholders could suffer.

Lawsuits like these could plant the seeds for other suits that reinterpret the scope of fiduciary duties to shareholders, **experts say**.

"It's starting to invite a lot of litigation" about non-business topics, she said. "Make everything into a fiduciary, corporate business dispute ... and suddenly I'm in Delaware on a fiduciary duty case."

--Editing by Jay Jackson Jr.



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5 Cases General Counsel Should Watch In 2024

By **Sue Reisinger**

Law360 (January 2, 2024, 10:02 AM EST) -- Once in a while, a major case arises that holds the potential to reshape the future of the law, but in 2024 the possibility of such massive change exists in at least five legal areas that confront general counsel.

Here Law360 Pulse examines the litigation in which next year's developments could affect how companies, or entire industries, operate in the future.

The five significant actions to watch in 2024 include novel suits over artificial intelligence, the Purdue Pharma bankruptcy case, the government's antitrust suit against Google Inc., a fishing dispute that could bring down the venerable Chevron doctrine, and a move to broaden the scope of labor's joint employer rule.

Getting a Handle on AI

AI has been perhaps the most prolific legal topic of the year, and litigation over it could have the most impact – both on the law and on the legal profession itself -- in 2024 and beyond.

The lack of comprehensive legislation regarding AI means most lawsuits so far are based on a grab bag of theories such as invasion of privacy, misappropriation or infringement of intellectual property, consumer protection and safety, defamation, and discrimination, according to attorney Sharon Klein, who heads Blank Rome LLP's privacy, security and data protection practice and manages its Orange County, California, office.

"Many of the plaintiffs' complaints have been found deficient in proving harm for standing and even lack proper description of how the technology actually works," said Klein, who also served 12 years as associate general counsel at Siemens Medical Solutions USA.

"In 2024, we expect that the complaints will be better crafted," she added, "but still rely on basic common law contract, tort, and consumer protection theories as the law has not yet caught up with technology."

Some key legal questions **to be resolved** in several pending cases involve the use of data scraped from public sources to train the AI. The main question is whether it constitutes "fair use" under copyright law, though there are several related cutting edge issues.

In the tort area, Klein said a defamation **case filed** against OpenAI by a prominent radio host will test whether an AI company can be held liable for false facts.

In this case, Georgia radio host Mark Walters alleges that OpenAI's ChatGPT defamed him by producing a fake complaint in which Walters was named as a defendant in a real fraud case in which Walters was not involved.

"This will test OpenAI's defense that hallucinations are common in AI, but a machine cannot harbor [the] malicious intent" needed to prove defamation of a public figure, Klein said. "Also, this case will decide whether a response to a prompt is publication under the law."

Another area for general counsel to watch, Klein said, is the use of algorithms in employment decisions that could lead to discrimination. The U.S. Equal Employment Opportunity Commission **settled** its first lawsuit in this space in August with a tutoring services company.

The EEOC alleged that the company's hiring software automatically rejected older job applicants in violation of the Age Discrimination in Employment Act.

"This case will be the first of many we will see in 2024 as the EEOC has a regulatory priority to enforce anti-discrimination laws in the use of AI in the workplace," Klein explained.

She recommended that companies engage a team to oversee the use of AI — especially if that use is by human resources — to avoid algorithmic discrimination in the workplace.

Will Purdue Pharma Change Bankruptcy Law?

This one is likely the most important corporate bankruptcy case to come to the U.S. Supreme Court in the last 30 years, according to University of Chicago law professor Anthony Casey.

The court **heard arguments** on Dec. 4, and its ruling could confirm or upset decades of legal precedent.

The U.S. bankruptcy trustee is asking the court to undo creditor releases in favor of members of the Sackler family that own Purdue and are accused of contributing to the national opioid crisis.

"It goes to the core functioning of Chapter 11," which is the part of the U.S. Bankruptcy Code that allows companies to reorganize, said Casey, who teaches law and economics and is faculty director of the university's Center on Law and Finance.

Casey wrote a preview of the case for the American Bar Association, and shared those thoughts with Law360 Pulse. On the most fundamental level, he said, Purdue Pharma will determine whether Chapter 11 is a viable process for settling mass torts.

"If the Court declares a blanket prohibition on nonconsensual, nondebtor releases," Casey said, "it could overturn settlements in pending cases, like the one involving the Boy Scouts of America, and prevent global settlement in future cases."

The effects of this case will reach beyond mass torts, he said.

"Nondebtor releases are a feature of most large corporate bankruptcies," Casey said. "Recent crypto-asset bankruptcies, including those of BlockFi and Celsius, have involved nondebtor releases as part of their efforts to resolve complex webs of claims that cut across multiple debtors' estates."

In some of these cases, the debtors have used "opt-out" provisions to argue that the releases are consensual. The trustee disagrees.

"It is easy, then, to predict that if nonconsensual releases are prohibited, the next battle will be over the standard for consent. And this will be a battle fought in nearly every large Chapter 11 case," Casey said.

But if the court maintains the status quo by allowing the releases, Purdue's settlement will be implemented.

Then "the battleground for cases like Boy Scouts of America and future cases will be the standard for determining whether the releases are necessary and whether they cover an appropriate scope of claims," Casey said. He added that the contours "of that battleground will be determined by how much guidance the court provides in this case."

Google Fights for its Search Engine

No matter who wins the U.S. Department of Justice's antitrust case against Google Inc. in the next few months, the losing side almost certainly will appeal to the D.C. Circuit, according to Mark McCareins, clinical professor of business law at Northwestern University's Kellogg School of Management.

The 10-week federal antitrust trial **recently ended** over the government's allegations targeting the contracts that make Google the default search engine on the devices and browsers used by most Americans. Those contracts, with companies like Apple, are Google's largest source of revenue and helped make it a \$1.5 trillion juggernaut.

The trial court's decision is expected in early 2024. McCareins, who is also co-director of the law and master's of business dual degree program at Northwestern, practiced at Winston and Strawn LLP for 33 years and co-chaired its global competition group.

It was, according to the New York Times, "the first monopoly trial of the modern internet era" as well as the government's first major attempt at reining in Big Tech.

McCareins said the case presents four key issues, with the first being "whether general search engines are a relevant antitrust product market, in and of themselves."

Second is whether Google's conduct is exclusionary and was accomplished with no "legitimate business purpose." Or, McCareins asked, has Google succeeded so well because it has engineered "a better mousetrap," and consumers, and their device manufacturers, prefer Google because of its performance?

Much of the trial evidence has centered on this point, he said.

Assuming the two issues are answered against Google, then third is whether Google's conduct harmed competition, and indirectly consumers. He said factual testimony was introduced on both sides of this question.

Lastly, if the court agrees with the DOJ, then what remedy should be used to unwind Google's monopoly position?

"The remedy question brings back the discussion of the AT&T monopoly case in which the court ordered divestiture of the 'baby bells,' a decision which transformed the U.S. telecommunications industry," he said, implying Google could face a major shakeup if it loses.

"The case from my perspective is too close to call," he added, "but the DOJ does carry the burden of proof on the antitrust predicates, and Google has done a good job of marshaling evidence to support its side of the debate."

Still, by the end of 2024, Google could be making significant changes to how it operates and facing years of appeals. And other Big Tech general counsel could be changing how they operate accordingly.

Fishing for Less Regulatory Oversight

A case that involves herring fishing has the potential to totally disrupt federal agencies that regulate everything from the environment to cryptocurrency, from food and drugs to wage and hour laws.

In other words, the ruling could suddenly thrust general counsel across all industries into massive regulatory uncertainty.

A company of herring fishers, who **are suing** over a government-imposed fee, is asking the U.S. Supreme Court to overturn a landmark 1984 decision that established the Chevron doctrine. The doctrine requires federal courts to defer to executive agencies' interpretations of ambiguous statutes.

Several groups, including the Ohio Chamber of Commerce and some former state supreme court judges, have filed friend-of-the-court briefs urging the court to overturn the doctrine. They argue that it wrongly gives U.S. agencies the power to interpret laws, an authority the Constitution assigns to the judiciary.

But Emily Hammond, a George Washington University Law School professor who focuses on environmental and administrative law, told Law360 recently that a new decision could open the door to fresh challenges of previously upheld agency rules and regulations.

The federal government agrees. It argued in its brief that Chevron deference is a bedrock of administrative law and changing it would be a "convulsive shock to the legal system."

An article on the website of the environmental advocacy group National Resources Defense Council Inc. states that striking down that ruling could be a "recipe for chaos." Ironically, the NRDC was the opposing party that lost the Chevron case in 1984.

The Chevron doctrine itself is apolitical and "cuts both ways," the NRDC article explains, with both Republican and Democratic administrations using it to either restrict regulation or further impose it.

In fact, the doctrine was first used to protect the Reagan administration's environmental policies, which favored Chevron Corp.

In the article, John Walke, who has argued many federal court cases involving deference and is now director of NRDC's climate and clean energy program, warns that parties on both sides of the political divide should beware of erasing the doctrine.

"Regulatory agencies can be harmed, but deregulatory agencies can be harmed as well," Walke said in the article.

Employers Join the Fray

A new National Labor Relations Board rule is **set to go** into effect on Feb. 26, changing the standard for when linked businesses are considered joint employers.

The rule would deeply impact in-house legal departments, changing corporate bargaining obligations as well as labor law liability over the same workers. And a joint employer may be subject to labor picketing that would be unlawful under the old rule.

The new rule rejects the old rule's requirement for a joint employer to have "direct and immediate control" of the workplace. It instead says an employer is joint if it has control over one of seven working conditions, even if that control is indirect or reserved.

As they prepare to adapt their workplaces to this change, general counsel are closely watching the outcome of two separate lawsuits challenging the new rule. One says it's too narrow in scope, and the other says it goes too far.

The Service Employees International Union filed a petition with the D.C. Circuit, seeking to expand the rule's scope. And a coalition of business groups, led by the U.S. Chamber of Commerce, has filed suit in the U.S. District Court in Eastern Texas, hoping to quash the rule as too broad.

Meanwhile, a bipartisan group of lawmakers in Congress want to derail the rule under the Congressional Review Act.

In a letter to Congress, the SEIU has called it an important rule that "will ensure that workers have a real voice at the bargaining table when multiple companies control their working conditions."

The NLRB delayed implementing the rule from December to February in hopes that there might be more legal clarity by then, according to James Paretti Jr., a shareholder and management-side employment and labor relations attorney in Littler Mendelson PC's Washington, D.C., office.

Paretti, who also once served as chief of staff and senior counsel to the acting chair of the EEOC, said his law firm is co-counsel for plaintiffs in the Texas suit. Those clients also filed a motion to intervene in the D.C. Circuit case.

"We think it's a deeply flawed rule," Paretti told Law360 Pulse. "I think the consequences of the rule are going to be dramatic and have so many unintended consequences across a range of industries from franchising to healthcare and hospitals."

One problem, he said, will be the breadth of liability for employment practices.

But among the most important issues, he said, is that "it's entirely unclear under the rule who is a joint employer" or who has to be at the table during bargaining.

"If the goal of the NLRA is to stabilize bargaining relationships, then I do not know how it is possible to get a successful labor contract when you're going to increase dramatically" who is at the table, he added.

Paretti said twice before the labor board has tried to broaden the joint employer rule, and both times the appeals court told it to go back and narrow the scope.

Now, he said, the board has come up with a "new rule that is three times broader than before ... and goes even further."

He added, "I don't know how that's going to play out."

--Additional reporting by Matt Perez, Vin Gurrieri, Vince Sullivan, Bryan Koenig, Matthew Perlman, Katie Buehler and Braden Campbell. Editing by Alex Hubbard.

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