

Opioid settlement edges McKinsey's payouts close to USD 1 billion

cdr-news.com/categories/litigation/19915-opioid-settlement-edges-mckinsey-s-payouts-close-to-usd-1-billion

Rob Harkavy

The firm has paid dearly for its role in advising OxyContin maker Purdue Pharma.

The US consultancy firm **McKinsey and Co** has once again agreed to pay for its part in the opioid crisis by agreeing to compensate insurers, pension plans and healthcare funds USD 78 million, according to documents released on Friday (29 December) by the US Federal Court in San Francisco. The settlement agreement comes just three months after the firm agreed to pay USD 230 million to settle hundreds of US class-action lawsuits brought by school districts and local governments in all 50 US states.

This latest settlement brings the total paid out by McKinsey for its role in advising **Purdue Pharma** – makers of OxyContin – to almost USD 1 billion. Despite disbursing this eye-watering sum, the firm has consistently maintained that its conduct was lawful, and in a short statement issued following the settlement agreement, wrote: “As we have stated previously, we continue to believe that our past work was lawful and deny allegations to the contrary”, adding that it had reached the settlement to avoid protracted litigation. The settlement has yet to be approved by **Judge Charles Breyer**.

According to the filing, the claimants suffered harm because they were made to pay for prescription opioids “rather than safer, non-addictive and lower-cost prescription drugs (including over-the-counter pain relievers) that would have been used otherwise, and further paid for opioid addiction-related treatment that followed”. **Robbins Geller Rudman & Dowd** partner **Paul Geller**, representing some of the claimants, reiterated this assertion in a statement, saying that the crisis was a consequence of the oversupply of dangerous addictive drugs, adding that the case aimed to “recover some of the money spent on the over-prescribed pills”.

This case, in common with the other actions involving McKinsey, centres on the allegation that the consultancy offered sales and marketing advice to Purdue and Johnson & Johnson, even after the scale of the scandal became apparent. This allegation has been consistently and constantly rebuffed by the firm, which has made it clear that it ceased offering advice to opioid-related businesses in 2019.

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Securities Law

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J&J to Face Investor Class in Talc Safety Misrepresentation Suit

By Ben Miller

Documents

 Opinion

 Docket

- Class includes those who bought J&J stock over six-year period
- Bid to trim claims was denied by another judge in 2019

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J&J to Face Investor Class in Talc Safety Misrepresentation Suit

By Ben Miller 2024-01-02T16:31:42000-05:00

Class includes those who bought J&J stock over six-year period

Bid to trim claims was denied by another judge in 2019

Johnson & Johnson will face a class of investors who acquired stock in the company during a nearly six-year period of alleged misrepresentations about the safety of its talc products, as well as other misleading statements regarding research commitments, a federal judge said in an order certifying the class.

The class comprised of investors who acquired J&J stock between February 2013 and December 2018, was approved last week in US District Court for the District of New Jersey. Lead plaintiff San Diego County Employees Retirement System will serve as class representative and Robbins Geller Rudman & Dowd LLP was appointed as class counsel.

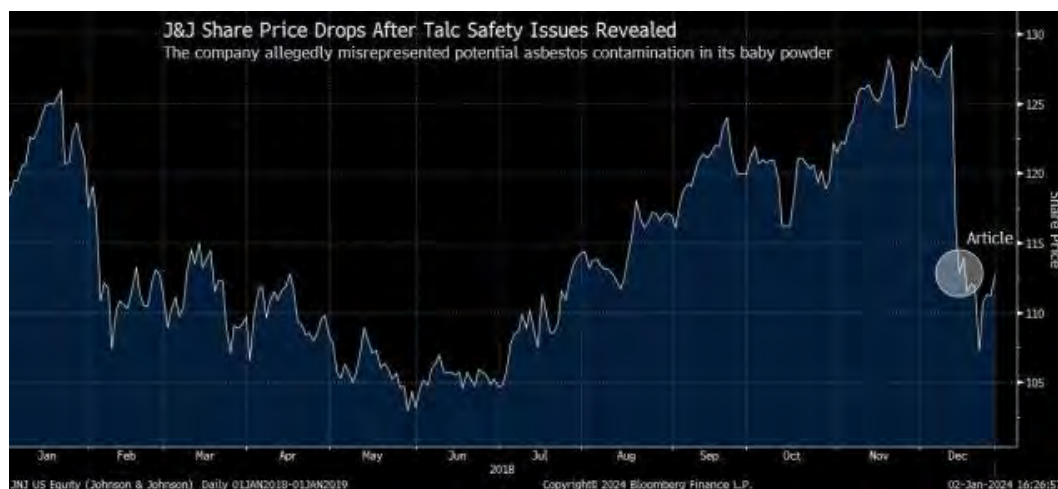
"We respectfully disagree with and intend to appeal the decision granting class status," said Erik Haas, J&J's lawyer overseeing the talc litigation, in an emailed statement. "Plaintiffs' claims are premised on articles republishing the mass tort plaintiff bar's unproven and disputed allegations, which are insufficient to sustain a securities class action."

The company made “truthful and fulsome” statements about the safety of its talc products and will continue to “vigorously” litigate cases challenging those statements, he said.

Judge Zahid Quraishi granted the retirement association's May 25 motion for class certification on Dec. 29, while also granting two motions to supplement the record with new evidence of corrective disclosures filed by defendants.

The judge found that J&J didn't sufficiently rebut the presumption of price impact stemming from the alleged misrepresentations and subsequent revelation of safety risks in the company's baby powder.

After Reuters published an article on Dec. 14, 2018 detailing the asbestos-related risks associated with the talc product, the company's stock price fell 10% in one trading day, according to the complaint. That was the stock's biggest drop since 2002, according to data compiled by Bloomberg.



J&J was denied a bid to trim investors' allegations regarding the misrepresentation of whether the baby powder products contained asbestos, and some of the company's statements about its commitment to product safety are actionable, Judge Freda Wolfson said in a 2019 ruling.

The investors allege that the company publicly touted the products' safety while internally acknowledging that an outside lab didn't think testing methods were optimal for identifying asbestos.

Faegre Drinker Biddle & Reath LLP represent J&J and its executives.

The case is Hall v. Johnson & Johnson, D.N.J., No. 3:18-cv-01833, 12/29/23

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Veradigm hit with investor class action over alleged financial misstatements



cookcountyrecord.com/stories/653177188-veradigm-hit-with-investor-class-action-over-alleged-financial-misstatements

December 29, 2023

Lawsuits



Brian Cochran | Robbins Geller Rudman & Dowd

Healthcare technology company Veradigm is facing a class action lawsuit from investors alleging that the company and its top executives have been misreporting financial conditions to their shareholders.

The case was lodged in late November in Chicago federal court by named plaintiff John M. Erwin, on behalf of other investors.

The lawsuit accuses Veradigm of violating federal securities laws. It accuses Veradigm of overstating historical revenues by at least \$20 million and artificially inflating earnings and margins by allegedly recording duplicate transactions over two years.

The complaint further alleges that Veradigm failed to maintain effective internal controls over its financial reporting and did not comply with generally accepted accounting principles regarding appropriate revenue recognition practices.

The plaintiffs seek to expand the lawsuit to include a class of all purchasers of Veradigm common stock between February 2021, and June 2023. The case follows Veradigm's press release on Feb. 28, 2023, which allegedly acknowledged internal control failures related to revenue recognition that resulted in misstated reported revenues over six quarters.

Plaintiffs are represented in the action by attorneys Brian E. Cochran and Samuel H. Rudman, of Robbins Geller Rudman & Dowd, of Melville, New York, and Michael I. Fistel Jr., of Johnson Fistel LLP, of Marietta, Georgia.

ORGANIZATIONS IN THIS STORY

Robbins Geller Rudman & Dowd

In Fox shareholder case against board, lead plaintiffs fault network's business strategy

 [reuters.com/legal/legalindustry/column-fox-shareholder-case-against-board-lead-plaintiffs-fault-networks-2024-01-02](https://www.reuters.com/legal/legalindustry/column-fox-shareholder-case-against-board-lead-plaintiffs-fault-networks-2024-01-02)

Alison Frankel

Rupert Murdoch, the chairman of News Corp and 21st Century Fox, arrives at New York State Supreme Court with his lawyers in New York, November 20, 2013. REUTERS/Brendan McDermid/File Photo Acquire Licensing Rights 

Jan 2 (Reuters) - Fox News' entire business model will be under scrutiny in a Delaware Chancery Court lawsuit against Fox board members, thanks to a decision last week appointing New York and Oregon public pension funds to lead the case.

Vice Chancellor Travis Laster ruled on Dec. 29 that the New York and Oregon funds were a better choice to head up the case than the competing candidate, a Swedish investment fund that had teamed up with a Cayman Islands pension fund.

Both shareholder groups sought to lead derivative litigation on behalf of the company, accusing Rupert Murdoch and other Fox (FOXA.O) directors of failing to avert Fox's allegedly defamatory reporting on election fraud claims by supporters of former President Donald Trump in the aftermath of the 2020 election.

Fox board members, as you surely recall, became a juicy target after the company agreed last April to pay \$787.5 million to resolve defamation claims by Dominion Voting Systems. As I told you back then, shareholders viewed the big Dominion settlement as tangible evidence of the consequences of Fox's allegedly shoddy reporting and geared up to sue board members on behalf of the company.

Last week's leadership decision included a potentially ominous signal for Fox's directors. The Delaware judge said he was swayed, in part, by the New York and Oregon funds' assertion that Fox's whole business strategy in the last several years has been to sacrifice accuracy and fact-checking in order to appease its conservative audience. Board members, according to the New York and Oregon funds, deliberately accepted the risk of defamation lawsuits and settlements as a consequence of that business model.

Under Delaware precedent from 2011's *In re Massey Energy*, corporate directors can be held liable for breaching their fiduciary duties if they knowingly allow their company to operate outside legal bounds. Laster said that at this early stage of the Fox case, the New York and Oregon funds' Massey claim – that Fox directors knowingly accepted the risk of airing defamatory reporting – “appears promising.”

Laster said the Massey claim was an important factor in his decision to pick the New York and Oregon funds over the Swedish and Cayman team. The U.S. funds' assertion that Fox's board made a strategic determination to assume the risk of airing defamatory reporting, he said, made their complaint stronger than the pleading submitted by the Swedish and Cayman funds.

Fox spokespeople did not respond to my email requests for comment on Laster's leadership decision or his early assessment of shareholders' "promising" Massey claim. The company, which is vigorously contesting a defamation lawsuit in New York state court by voting technology company Smartmatic, said when it settled with Dominion that the agreement "reflects Fox's continued commitment to the highest journalism standards."

The New York and Oregon funds are represented by Friedlander & Gorris; Cohen Milstein Sellers & Toll; and Lieff Cabraser Heimann & Bernstein.

New York City Comptroller Brad Lander said in an email statement that Laster's decision "recognized our office's expertise, in both financial matters and corporate governance." His office, Lander said, intends to ensure "that Fox's board is held accountable for its careless actions, as well as leading the charge for corporate governance reforms at Fox that will ensure that similar failures don't happen in the future."

Oregon Attorney General Ellen Rosenblum said in an email statement that she looks forward to "making a strong case."

The Swedish and Cayman funds are represented by Bernstein Litowitz Berger & Grossmann; Robbins Geller Rudman & Dowd; and Kessler Topaz Meltzer & Check. Lawyers from Bernstein Litowitz and Robbins Geller did not respond to my query about Laster's decision.

Both of the candidates to lead the case alleged in their competing complaints that oversight failures by Murdoch and other Fox board members left the network exposed to defamation suits by Dominion, Smartmatic and other targets of Fox's election fraud reporting.

But the U.S. and non-U.S. funds offered slightly different legal theories, as the candidates emphasized in their briefs asking to head the litigation. The Swedish and Cayman funds argued their pleading was superior because it alleged that after Fox was spun off in 2019, it abandoned corporate governance reforms adopted in a 2013 settlement of derivative claims against predecessor News Corp (NWSA.O). (That case arose from a phone hacking scandal.) The allegation that Fox ditched the 2013 controls, the non-U.S. funds said, strengthened the case that board members were acting in bad faith.

The New York and Oregon brief, in contrast, argued that the case should center on “the context of Fox News's business model during the Trump era.” The U.S. funds said their emphasis on the network’s alleged practice of advancing “pro-Trump narratives without regard for their factual foundation” was a stronger theory.

Laster agreed, although he also said that the partnership of the New York and Oregon funds was more “intentional, thoughtful and client-centered” than the hook-up of the Swedish and Cayman funds. The U.S. funds, Laster noted, united before filing their complaint to sign up their lawyers and assert a demand for Fox’s books and records. The Swedish and Cayman funds, he said, seemed to have a more ad hoc relationship.

Securities law nerds will surely be intrigued by Laster’s musing about whether two of the law firms representing the non-U.S. funds, Bernstein Litowitz and Robbins Geller, would have been able to get along as co-counsel. The judge described those firms — an undisputed duopoly — as “the Athens and Sparta of the plaintiffs’ securities bar,” both in their dominance of the field and their rivalry with each other.

“How well they can work together is an open question: Would it be the Persian War or the Peloponnesian?” Laster wrote.

The judge was being a bit cheeky, since, as he pointed out, all of the shareholder firms that sought appointment have excellent track records in Chancery Court. Bernstein Litowitz and Robbins Geller also both frequently work with other plaintiffs' firms (though not frequently with each other).

I’m sure the firms would have gladly put aside their rivalry in pursuit of Fox. But after Laster’s decision, we’ll never know.

Read more:

Get ready for a brawl over leadership of the case against Fox’s board

Fox shareholders are circling Rupert Murdoch

Two shareholder firms have reaped more than \$1 billion in fees. Are they overpaid?

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Reporting By Alison Frankel

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Pa. Opioid Suits Head Home as Long-Running Coordinated Litigation Winds Down

 [law.com/thelegalintelligencer/2024/01/02/pa-opioid-suits-head-home-as-long-running-coordinated-litigation-winds-down](https://www.law.com/thelegalintelligencer/2024/01/02/pa-opioid-suits-head-home-as-long-running-coordinated-litigation-winds-down)

By Max Mitchell

What You Need to Know

- The judge overseeing Pennsylvania's coordinated opioid litigation has remanded several cases to their home jurisdictions.
- According to one plaintiffs attorney, the orders essentially mark the end of the coordinated proceedings.
- The city of Philadelphia and the Philadelphia district attorney have long fought to escape Delaware County.

Pennsylvania's opioid litigation is breaking up after more than six years coordinated in a suburban county court.

With most of the state's significant opioid lawsuits now settled, the judge overseeing the coordinated proceedings sent a handful of remaining cases back to the courts where they were originally filed.

The Dec. 29 orders from Judge Barry Dozor of the Delaware County Court of Common Pleas essentially mark an end to the coordinated litigation, according to Saltz Mongeluzzi Bendesky partner Patrick Howard, a plaintiffs lawyer involved with the case.

"Anybody that was litigating against what I would call the major MDL defendants has been returned to their home jurisdiction," Howard said.

A few cases still remain in Delaware County, Howard said, but they all involve smaller defendants.

Dozor's Dec. 29 orders remanded around 20 lawsuits out of Delaware County, with most of the cases returning to the Philadelphia Court of Common Pleas.

Dozor wrote that the coordinated proceedings "have recently accomplished the settlement and end to substantially all the claims and cases in this commonwealth brought by governmental subdivisions."

However, not all of the government bodies signed on to the large global settlements that resolved many of the cases in the litigation.

The district attorneys of Philadelphia and Allegheny counties are still pursuing lawsuits on behalf of the state of Pennsylvania against several defendants who have otherwise settled claims against them. The city of Philadelphia is also continuing to litigate claims against several pharmacies.

Those suits are now headed back to their respective counties, something the Philadelphia plaintiffs in particular have long fought for.

The city of Philadelphia and its DA's Office filed several motions for remand since 2018, criticizing Delaware County Court as a "black hole" in one 2022 filing.

In a September motion, the city of Philadelphia contended it had "no active, operative path to exercising its right to a jury trial," claiming, "This is the polar opposite of the just, speedy and inexpensive determination that the Pennsylvania Rules of Civil Procedure purport to secure for all litigants."

A spokesperson for the Philadelphia DA's Office declined to comment.

Despite some parties' objections to the slow pace of Pennsylvania's opioid litigation, which was coordinated in March 2018, others contended that the proceedings have achieved what they were supposed to.

"There is no doubt that these coordinated proceedings have been a success," the defendants wrote in a motion. The defense had argued that the court should maintain the coordinated proceedings and establish a bellwether track for a batch of 13 cases brought individually by private third-party payors.

"Despite this significant progress, there is still work left to be done," the defendants asserted.

Dozor, however, remanded the third-party payor cases to Philadelphia.

Liaison counsel for the defense, Stuart Smith of Churchman Law Firm, declined to comment.

Dozor wrote in his Dec. 29 orders that "coordination has had a remarkable level of resolution" resulting in settlements with an aggregate value of about \$2 billion.

Howard, whose client Delaware County has resolved its claims, said he, too, sees the coordination as a success.

He said, "It was difficult and tedious ... but in the end, I think we got to the right spot."

NOT FOR REPRINT

Walmart Beats AIG in Opioid Epidemic Legal Defense Insurance Row

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- AIG must defend Walmart over opioid lawsuits, state court says
- Insurance policies cover negligence and unintended harm

American Insurance Group Inc. units must pay for Walmart Inc.'s legal defense costs in opioid lawsuits brought by government entities, an Arkansas state court said.

"AIG owes Walmart a defense obligation" under commercial general liability policies for lawsuits alleging the retail and pharmacy chain negligently oversold opioid painkillers, Arkansas Circuit Judge John R. Scott said in a Dec. 29 decision. The judge rejected AIG's argument that the underlying lawsuits didn't allege damages stemming from a physical injury—a precondition for coverage.

Walmart has been sued by government entities seeking to recover billions of dollars in financial losses responding to the opioid epidemic. Walmart began settling underlying opioid lawsuits in 2022, and subsequently sued AIG, Chubb Ltd., and other insurers after the carriers denied coverage. Walmart held insurance policies with AIG and Chubb starting in the 1990s.

AIG has argued its insurance policies cover an "occurrence" or accident, but not expected harm. The insurer has said it owes no payment to Walmart because the underlying suits alleged the retailer intentionally oversold opioid drugs and expected the damages. But the state court sided with Walmart's argument that the underlying suits alleged negligence and unintended harm.

"The AIG policies clearly anticipate covering intentional and foreseeable harm so long as the harm is not expected or intended," Scott said. "Coverage for liability arising out of the sale of distribution of drugs would be meaningless if foreseeable adverse consequences of ingesting such drugs were not covered. "

The underlying lawsuits also alleged "a direct proximate cause of bodily injuries" covered by the policies, the judge added.

The court separately refused Walmart's excess insurance carrier QBE Insurance Group Ltd.'s bid to send the case to arbitration. QBE's insurance policy lacks a clear arbitration provision, and even if it had one, such language wouldn't be enforceable under Arkansas law, the judge said.

Cohen Ziffer Frenchman & McKenna LLP represents Walmart. Willkie Farr & Gallagher LLP represents AIG.

The case is Walmart v. Ace American Insurance Co. et al. , Ark. Cir. Ct., Case No. 04CV-22-2835, opinion issued 12/29/23 .

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Matt Levine's Money Stuff: Fake Surgeries Are Securities Fraud

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Stimwave

If you trick people into getting unnecessary surgeries to implant fake medical devices in their bodies, is that securities fraud? Obviously you know the answer — everything is securities fraud — but doesn't that seem *more* like something *else*? Like if you go around tricking people into getting surgeries to implant fake medical devices in their bodies, doesn't it seem like the victims are mostly the patients? The people you tricked into implanting fake medical devices?

But the US Securities and Exchange Commission regulates securities fraud, not surgeries, so here is an SEC lawsuit against Laura Perryman, the former chief executive officer of Stimwave Technologies Inc.:

The Securities and Exchange Commission [Dec. 19] charged Laura Tyler Perryman, the former CEO and co-founder of Florida-based medical device startup Stimwave Technologies Inc., with defrauding investors out of approximately \$41 million by making false and misleading statements about one of the company's key medical device products. According to the SEC's complaint, the medical device comprised several components, one of which was a fake, non-functional component that was implanted into patients' bodies. ...

"We allege that Perryman touted a supposedly innovative medical pain-relief device while concealing that a primary component of the device was fake and that patients were unwittingly undergoing unnecessary surgeries to implant the non-functional component into their bodies," said Monique C. Winkler, Director of the SEC's San Francisco Regional Office. "Investors are entitled to know material information about the products of the companies in which they invest. The SEC is committed to holding bad actors accountable."

Meanwhile there was an earlier federal criminal case against Perryman, but there again the victims were not the *patients*, who got fake medical devices implanted in their bodies, but rather *Medicare* and *insurance companies*, who paid for it.

From the criminal indictment, you can sort of see why. Stimwave built a *working* medical device, consisting of (1) an "implantable electrode array (the 'Lead') that stimulated the nerve," (2) an externally worn battery, and (3) a "a separate implantable receiver measuring approximately 23 cm in length with a distinctive pink handle," with a copper antenna that transmitted energy from the battery to the lead. Doctors would implant the lead and the receiver in the patient's body, the patient would wear the battery, and the whole thing would stimulate the nerve and, I suppose, cure the pain.

But the pink-handled receiver was too long to fit into some people's bodies. "The Device could function without a receiver, so long as the Battery was placed close enough to the Lead," so doctors could have just implanted the lead and left out the receiver. This would have been fine *medically*, but it would not have worked *financially*: Stimwave charged \$16,000 for the product, and doctors could bill insurers \$4,000 to \$6,000 for implanting the lead and \$16,000 to \$18,000 for implanting the receiver. Implant them both, bill \$20,000 or so, cover the cost, make a profit, everything works. But without implanting the receiver, the business didn't work.

So Stimwave developed another, smaller receiver, which (1) had a white handle and (2) didn't do anything — it was just plastic, no copper, so it didn't actually transmit any energy. It was implanted into patients purely to extract \$16,000 from their insurers to make the whole trade work financially.

I suppose the SEC is right that investors were entitled to know this? And I suppose the Justice Department is right that the insurers were defrauded? Still I wonder about the patients. Shouldn't they have gotten some disclosure? But also, what would they have done with full disclosure? Like imagine you went to your doctor complaining of chronic pain, and she was like "I have a device that can cure you. It's this electrode array that I will implant in your body, and a battery that you will wear to power it. Those two things will fix your pain. I will also, however, have to implant an irrelevant piece of plastic into your body, because that will trick your insurance into paying for it." You might take that trade, right?

Parallaxes

Last year I blurbed Gary Sernovitz's novel, *The Counting House*, whose main character is the chief investment officer of a fictional university endowment. (I really liked it — it is not for everyone, but I think it is probably for a lot of Money Stuff readers.) Much of the book consists of somewhat comical pitch meetings, in which managers of hedge funds and private equity funds and lending businesses try to convince the CIO to invest some of the endowment's money with them. The CIO is jaded: He has heard all this stuff before. There are only so many ideas, and he keeps hearing versions of them. He knows the weak points of each of them, knows before he asks the questions what the answers will be. The book is among other things a survey of the popular ideas in alternative investments in 2023, how they are pitched and what their flaws are.

Here's a Wall Street Journal story about Andy Lee, who runs Parallaxes Capital, an investment firm that buys tax receivables agreements. His limited partners say stuff like this:

As Lee pitches TRA holders, he educates potential investors. "I got the deck sent to me and at first I didn't really understand what this was," said Gilbert Calderon, chief investment officer at M4 Capital Management, a single-family office in Chicago known for buying

esoteric investments. M4 eventually signed on.

That's what you want! "I got the deck sent to me and at first I didn't really understand what this was," conditional on eventually understanding it, is ideal. I mean in the sense that you might be getting an uncorrelated source of returns, but also in the sense that you will have a little treat, some entertainment in your workday, a pitch meeting that, for once, will feel new. "We do private equity rollups of middle-market companies," six people pitch you every day, but you only get so many TRA guys. Possibly only one TRA guy.

Meanwhile the other side of the trade — the people with tax receivables agreements that Parallaxes wants to buy from them — are similarly attractively confused:

Lee often starts with cold outreaches to people with TRAs who are surprised to hear from him. One company founder responded to Lee's pitch with a cry laughing emoji. "I don't know what a TRA is, so probably not for me," the founder said.

Lee had the public financial filings to prove the founder had a TRA and a price Parallaxes would pay for its future cash flows. Through thousands of conversations and one-on-one deals like these, Parallaxes has invested more than \$300 million across four funds. It is currently raising two more.

Again, that's what you want! If you are in the business of buying _____s from people who don't know that they have _____s, or what a _____ is, they are probably not going to drive a hard bargain, no matter what goes in that blank. "I'll give you \$1 million for your TRA." "I do not have a TRA and have never heard of such a thing." "Then this \$1 million is found money isn't it?" "Sure where do I sign."

As it happens, we have talked about TRAs before, when Sculptor Capital Management Inc. was in a hostile takeover fight involving, among other things, its TRA. Basically if you are a founder or early employee of a private partnership, and then later it goes public, you will end up converting your partnership shares into shares in a public corporation, which will trigger immediate taxes for you and tax savings for the company over, often, 15 years. The norm is for the company to pay you most of those tax benefits (typically 85%) as they are realized; realizing them means mostly the company having enough taxable income to take advantage of the tax savings. So a TRA is a quasi-debt instrument of a public company, one that doesn't trade and that has unusual triggers. So if you sell this weird illiquid bond-ish thing to Parallaxes, you should expect to sell it at a big discount, and Parallaxes makes its money by figuring out which TRAs will pay out and buying them at a discount.

As is often the case with weird corporate derivatives trades, though, this is *really* a bet on merger activity. The Journal reports:

Parallaxes's first two funds have returned about 15% annually, according to investors. Later funds have done better because some companies whose TRA rights they owned were acquired and the TRAs were paid out early.

TRAs often have acceleration provisions that say that if the company gets acquired then the TRA gets paid out all at once, at maximally favorable assumptions, rather than over 15 years and only if there's taxable income. So if you buy a 15-year TRA at a 15% yield and all it gets paid out next year, that's where you make the real money.

Juul

Here is a Wall Street Journal article about how "Wealthy Investors Rescued Juul From Bankruptcy. Others Are Crying Foul." That is, on its face, sort of odd:

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. ...

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. ...

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

It is a somewhat unusual complaint. Ordinarily the thing about bankruptcy is that it wipes out shareholders, so if some shareholders pumped money into Juul to avoid bankruptcy, the *other* shareholders should have no complaints. (They got diluted, sure, but that's better than getting zeroed.) And ordinarily the thing about *averting* bankruptcy is that it leaves the debt intact, so if some shareholders pumped money into Juul to avoid bankruptcy, its *creditors* should have no complaints. The creditors are senior to the shareholders, so raising more money from shareholders should be strictly good for the creditors.

Here, however, there's an unusual trick. In 2019 and 2020, Juul issued \$2 billion of debt outstanding in the form of convertible bonds. Intuitively the way these bonds work is:

- 1. They are debt, but
- 2. If Juul goes public, they convert into stock at a discount to the initial public offering price.

So basically if you invest \$2 billion and things go well, you get back, I don't know, \$2.5 billion or so of public stock; if things go poorly, you get back your \$2 billion in cash. And there are a floor and a cap on the conversion price: If Juul goes public at, like, a \$100 billion valuation, you get way more than \$2.5 billion worth of stock; if it goes public at a tiny valuation, you get less — but why would it do that?

But while that is the rough intuition, it is not *exactly* what the bonds say. They actually allow the company to force conversion into cash upon a “qualified financing,” which *could* be an IPO, but could also be a private stock sale that raises at least \$500 million from outside sources. I suppose that, when you negotiate a bond like this, you think “well, if this company is raising \$500 million in stock from new equity investors, that's probably good news, so I'll be happy to convert into stock,” but that's not *necessarily* true.

And so the upshot is that, by raising a bunch of money at a 99.6% discount to its peak price, Juul was able to convert \$2 billion of debt into stock worth much, much less:

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.”

Here's the lawsuit, which basically argues that the rescue financing does not count as a qualified financing (because it was largely funded by insiders) and so shouldn't trigger their conversion. But that's the crux of what is going on here: Juul had an opportunity to take an equity investment in a way that *wiped out its debt*, so it did.

PE exits

Doesn't it seem like this should be a solvable problem?

The private equity industry has entered 2024 with record amounts of unspent investor cash and an unprecedented stockpile of ageing deals that firms must sell in coming years.

Private equity firms were sitting on a record \$2.59tn in cash reserves available for buyouts and other investments as of December 15, according to S&P Global Market Intelligence. ...

Industry executives and their advisers believe the new year presents a big test for private equity investors as they seek ways to sell down large investments while searching for new opportunities.

With the market for IPOs still lukewarm and global dealmaking slow, the number of private equity exit transactions last quarter was near a decade low, according to consultancy Bain & Co.

That has left buyout groups with a record \$2.8tn in unsold investments and what Bain described as “a towering backlog” of companies to exit. ...

The conditions have frustrated many large institutional investors that normally expect a regular flow of cash to be returned to them as private equity groups sell down profitable investments. Instead, these investors have received just a trickle of money over the past five years, even as they committed enormous sums to fund new buyout deals.

Just from first principles, I mean, private equity funds have (1) a ton of cash from their investors to buy new companies and (2) a desperate need to sell their existing companies and return cash to their investors. Obvious solutions present themselves:

- 1. Private Equity Firm A takes its billions of fresh cash from investors and uses it to buy the entire portfolio of Private Equity Firm B, which returns the cash to its investors. And then Firm B uses its billions of fresh cash from investors to buy the entire portfolio of Firm A, which returns the cash to its investors, leaving everyone happy.
- 2. Private Equity Firm A takes its billions of fresh cash from investors and uses it to buy *its own* entire portfolio from itself, returning the cash to its investors. (The investors who put in the fresh cash get to own the portfolio; the investors who wanted a regular flow of cash get it.) This is called a “continuation fund.”

Anyway I suppose you get hung up on valuations. The article goes on:

In order to get deals done, many private equity groups have deployed financial engineering tactics to bridge a disconnect between what buyers will pay for a company and what owners will accept. ...

Industry sources told the Financial Times that private equity groups selling businesses to each other had increasingly used complex structures. Those included performance-based earn-outs — which pay sellers additional cash if a business performs better than expected — or other tools such as deferred payments from buyers and large rollover investments from sellers in order to get deals done.

High-frequency sports book

Did everyone know this?

Just as financial trading desks pipe in securities prices from stock exchanges, sports desks rely on data feeds from the NFL.

FanDuel said it takes about 1.5 seconds to receive the data point—what happened on the field—and about 1 second for its model to process the data and push out new odds. That information travels faster than the game broadcasts and streams viewers watch at home.

Basically if you watch a football game on television, you see what happens shortly after the sportsbook does, and they can update their odds of something happening before you see it happen. The sportsbook has a direct feed from the NFL, whereas you rely on the consolidated tape of watching the game on TV. If you are at the game in person can you front-run the sportsbook on your phone? A little bit? I am going to get 200 emails about this. At least one of my readers has surely front-run a sportsbook.

Anyway that is from this Wall Street Journal article about the traders at FanDuel who make odds on US sporting events:

Sports betting has become big business for gambling companies, sports leagues and media outlets over the past five years. By the time your finger taps the glass of a smartphone screen to place a bet, a sportsbook trading desk powered by algorithms and raw data on past and current games has made its best guess of what is likely to play out on the field. ...

On the recent Sunday, FanDuel took in more than \$200 million bets on NFL games.

The point made by the article is that being a trader on a sportsbook trading desk is a lot like being a trader on a stock or bond trading desk: You have some computer algorithms that synthesize (1) fundamental data about the real world and (2) order data about supply and demand for the stuff you're trading, and you use those algorithms and your own intuitive sense of markets and risk to set prices that will maximize revenue while minimizing risk.

I suppose the difference is that if you are a trader at an electronic stock market making firm, you are *partially* in the business of facilitating capital formation and providing liquidity to public companies, and *partially* in the business of facilitating people's sensible retirement savings, and *partially* in the business of facilitating retail gambling and taking a cut. And it is hard to disentangle those things, and easy to talk about the high-minded stuff and ignore the retail gambling. Whereas at the sportsbook you totally know it's gambling.

Things happen

'Everyone Got Burned': Wall Street Missed the Great Stock Rally of 2023. Help wanted: fund staff who can sell wealthy investors on 'alts.' The Entrepreneur Who Bet His Company on a Fight With Apple. Elon Musk's X gets another valuation cut from Fidelity. Russia's Seaborne Crude Exports Surge to End 2023 on a High. JPMorgan Clashes With Partly Owned Greek Fintech. BNP Paribas to settle with customers over risky Swiss franc mortgages. Big Four firms rethink governance after year of mis-steps and scandals. Tiger Global's Coleman Regains Control of Venture Unit After Losses, Client Complaints. How IKEA Downsized to Go Downtown. Former Actor Who Became a Crypto Evangelist Loses Beach Hotel in Feud. "Nothing says Australia quite like *Bluey*."

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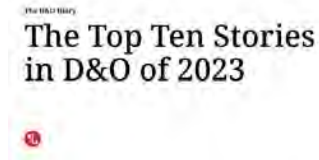
- 1. In fact, Lee and his team at Parallaxes helped explain them to me at the time.
- 2. This is loose and oversimplified, and in fact there are more baroque ways to come into a TRA, but this is the sort of normal approach, and what we discussed in the case of Sculptor.
- 3. I am interpreting a bit, but I get this from pages 19 and 20 of the D1 complaint, which quotes the terms of the bonds. Note that there are two sources of the discount: The notes convert "an amount equal to 107% of the Original Principal Amount" into stock, effectively giving the note holders a 7% bonus on their money, and then also they convert at a conversion price equal to the new-money investment price "multiplied by the Applicable Discount." The discount is redacted, and there are valuation floors and caps that are also redacted, but this is the idea.
- 4. Again, pages 18 and 19 of the D1 complaint spell this out.
- 5. Probably? Here's a 2018 Sports Illustrated article saying: "For the most part, online presentations of games run 15 seconds to a minute behind the traditional television broadcasts, which themselves air several seconds after live action. Simple data can be transferred near instantaneously these days, allowing apps like Draftkings Sportsbook to offer pitch-by-pitch odds during the World Series that come in ahead of the play on broadcast television."

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The Top Ten Stories in D&O of 2023

K [dandodiary.com/2024/01/articles/director-and-officer-liability/the-top-ten-stories-in-do-of-2023](https://www.dandodiary.com/2024/01/articles/director-and-officer-liability/the-top-ten-stories-in-do-of-2023)

January 2, 2024



By Kevin LaCroix on January 2, 2024
Posted in Director and Officer Liability



The directors' and officers' liability environment is always changing, but 2023 was a particularly eventful

year, with important consequences for the D&O insurance marketplace. The past year's many developments also have significant implications for what may lie ahead in 2024 – and possibly for years to come. I have set out below the Top Ten D&O Stories of 2023, with a focus on future implications. 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.

1. The Number of Federal Court Securities Class Action Lawsuit Filings Increased in 2023

Securities class action lawsuits represent the most significant severity risk for public company D&O insurers. For that reason, the insurers closely track the annual number of securities class action lawsuit filings. The number of filings provides a significant indicator of the insurers' likely loss experience for the year, and the filings trends represent an important factor in insurers' calculation of their profit-making price. Accordingly, insurers will be concerned to note that the number of federal court securities class action lawsuit filings increased in 2023, after significant declines in more recent years from record-setting levels that prevailed during the period 2017-2019.

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 class action lawsuit filings, while up compared to 2022, was well

below the over 400 securities suit filings that were filed each year during the period 2017-2019. *Please note that these figures include only federal court securities suit filings; the numbers do not include securities class action lawsuits filed in state court.*

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. However, 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 filed in 2023. (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.)

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

Thus, as is discussed in the second section below, 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 discussed in the third section below, 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.

As discussed in the final section below, the increase in securities suit filings in 2023 comes at a time when D&O insurance pricing is under significant pressure, one of several factors complicating the current D&O insurance marketplace.

2. The Banking Sector Has a Tumultuous Year

Over the course of several weeks from March to early May in 2023, three large U.S. banks failed in a sequence of events that has come to be known as the Banking Crisis of 2023. The failed banks' \$548.7 billion in combined asset value represents the highest amount for failed banks in a single year, ever.

Fears arose at the time that the bank failures could trigger a contagion event across the banking industry. However, the Fed, the Treasury Department, and the FDIC acted forcefully and took extraordinary measures to reassure markets and depositors of the safety and security of the banking system. These measures were sufficiently effective that within a very short time calm returned to the banking sector and there were no further large bank failures during the year.

But while the aggressive regulatory action may have helped the banking industry to dodge a contagion event, it did not necessarily remedy the underlying concerns for many banks.

In recognition of the continuing concerns, on August 7, 2023, the ratings firm Moody's took credit rating action on 27 banks, including downgrading the credit ratings of ten banks, putting others under review, or giving their ratings a negative outlook. The reasons for the firm's actions included rising deposit costs and risks to commercial property and construction loans posed by changes to the commercial real estate market brought about by shifts to remote work during the pandemic. On August 21, 2023, S&P also took actions similar to those of Moody's, downgrading or cutting the ratings on a host of banks, for similar reasons.

The way that the concerns the credit rating agencies cited can lead to securities litigation, even in the absence of a bank failure, is illustrated in at least two banking crisis-related securities suits filed later in 2023.

First, on August 4, 2023, a plaintiff shareholder filed a securities class action lawsuit in the Northern District of Ohio against KeyCorp, the bank holding company for KeyBank, and certain of its executives. As discussed here, the plaintiff shareholder filed the lawsuit in the wake of declines in Key's share price after bank executives announced reductions in the

company's earnings guidance, as the bank found itself required to pay higher interest rates to attract deposits. The complaint also referred to the bank's disclosures about liquidity issues.

Second, as discussed here, on September 11, 2023, a plaintiff shareholder filed a securities class action lawsuit in the Central District of California against PacWest and certain of its directors and officers. In July 2023, PacWest had announced its plan to merge with the Bank of California. PacWest struggled with the many of the same issues that had taken down Silicon Valley Bank, including large unrealized losses in its bond portfolio and significant amounts of uninsured deposits. The securities complaint alleges that the defendants made misrepresentations in connection with the events surrounding the other banks' failures and leading up to the July merger.

The worries about commercial real estate that the rating agencies noted may represent a reason to continue to be concerned about the banking sector. As the *Wall Street Journal* has detailed, rising vacancy rates in office buildings has stressed the commercial real estate sector, putting many landlords in a difficult spot as they continue to try to service their debt. The well-publicized sector stress has put many borrowers in a position where they cannot roll over their debt as existing loans mature. The increased vacancy rate and the drying up of lending capacity increases the likelihood of commercial real estate loan defaults.

The net result is what the *Wall Street Journal* has called a "doom loop" that, according to the *Journal*, "threatens America's banks." The "doom loop" scenario involves the following stages: "losses on the loans trigger banks to cut lending, which leads to further drops in property prices and yet more losses." How all this will play out remains to be seen, but the process won't play out quickly; rather, it will, according to the *Journal*, be a "slow grind." 2023 was difficult for commercial landlords; according to the *Journal*, 2024 will be worse. All of this is bad news for commercial landlords, and for their lenders.

Another problem for many banks, particularly smaller banks, is the value of the securities they hold on their balance sheets. After federal government stimulus money flooded many banks with deposits during the pandemic, some banks invested in interest-rate sensitive securities, particularly long-dated bonds. As the Fed raised interest rates starting in March 2022, and raised rates higher and faster than many banks anticipated, the banks saw the market value of their bond portfolios plummet, putting some banks balance sheets "underwater." As the *Wall Street Journal* put it in a December 28, 2023 article (here), many community banks have been in a "full blown crisis"; according to the *Journal*, more than 300 U.S. banks have half or more of their assets in securities, and about 100 of these banks have more than 75% in securities.

The bottom line is that it may be too early to sound the "all clear" signal for the banking sector. There could still be more of the story to be told in the months ahead.

3. Macroeconomic Factors Weigh on Businesses and, in Some Cases, Translate into Securities Suits

One significant factor in the huge bank failures in 2023 was the impact of elevated interest rates, as discussed above. But high interest rates were only one of several macroeconomic factors affecting the overall business environment in 2023. Other significant macroeconomic factors included rising economic inflation, and labor supply and supply chain disruption. These factors not only presented companies with business challenges; in many cases, the impact of these factors on company operations translated into securities class action litigation.

Thus, for example, in March 2023, the coffee-shop chain Dutch Bros was hit with a securities class action lawsuit after the company announced disappointing financial results due to inflationary pressure on the company's margins. Similarly, and also in March 2023, the organic food company United Natural Foods was sued in a securities suit after the company disclosed a profitability decline, despite increased sales, due to inflationary pressure. The backup power supply company Generac Holdings was sued in a securities class action lawsuit in November 2023 after the company announced decreased sales due to declining consumer demand because of elevated interest rates.

Labor supply and supply chain issues led to securities lawsuits in other cases. Thus, for example, in January 2023, the chain eye care firm National Vision was sued in a securities lawsuit after the company announced disappointing financial results the company blamed on its difficulties in recruiting and retaining professional staff after the pandemic. In April 2023, the hydrogen fuel cell company Plug Power was hit with a securities suit after the company announced disappointing revenue growth due to supply chain "complexity." In July 2023, the drug company Baxter International was sued in a securities lawsuit after the company announced that continuing supply chain issues were setting back its operations.

In yet another lawsuit during the year in which macroeconomic factors played an important role, and as discussed here, in November 2023 investors filed a securities class action lawsuit against the software company Expensify. The shareholder plaintiff alleged not that a *single* macroeconomic factor undercut the company's results, but rather that adverse macroeconomic conditions *in general* – what the plaintiff's complaint called "macroeconomic headwinds" – hurt the company's financial results and caused it to fall short of the growth projections it made in its IPO.

As challenging as the economic circumstances were in 2023, things could have been worse. At the outset of the year, a majority of economists surveyed were predicting that the U.S. would enter a recession during 2023. Fortunately, the country managed to avoid falling into a recession during the year; some hope that perhaps the U.S. has managed to pull off the almost mythical "soft landing."

The extent to which the challenging economic circumstances will continue to weigh on the economy as we head into 2024 of course remains to be seen. Much will depend on what happens with interest rates. At its final meeting for the year in December 2023, the Federal Reserve not only held interest rates steady, but signaled that it was ready to pivot its interest rate approach in 2024. Though his remarks following the meeting were guarded and cautious, Federal Reserve Jerome Powell (and accompanying documentation) suggested that Fed officials anticipate as many as three rate *cuts* in 2024.

The reasons the Fed has shifted on its interest rate policy signaling is also good news; inflation appears to have eased significantly in recent months – although it still remains above the Fed's target rate. Labor supply issues and supply chain issues appear to be continuing to improve as the economy recovers from the pandemic-related shutdowns.

The possibility for interest rate easing represents a positive sign for the economy and for economic prospects in the New Year. Were macroeconomic challenges to ease, it could reduce at least one source that presented significant securities litigation risk in 2023.

4. Geopolitical Risk Contributes to Corporate Litigation Exposures

In addition to the macroeconomic factors discussed above, an additional consideration complicated the global business environment and also heightened corporate and securities litigation risk during 2023. As discussed below, a variety of issues contributed to geopolitical risks during the year; a host of additional issues that could come into play in the months ahead could make geopolitical risk an even bigger factor in 2024.

For starters, several securities lawsuits filed in 2023 underscored the political challenges associated with doing business in China. For example, in June 2023, the China-based video company DouYu International Holding Limited, whose securities trade on Nasdaq, was hit with a securities lawsuit after Chinese government crackdown on video game and computer addiction resulted in Chinese regulatory enforcement action against the company.

Similarly, Futu Holdings Limited, a Hong-Kong based digital financial services company with securities trading on Nasdaq and that was providing services to consumers in China, was also sued in a securities class action lawsuit after it was subject to a regulatory crackdown based on questions surrounding its licensure to provide the financial services to Chinese consumers.

Questions concerning international trade regulations and trade sanctions also led to securities lawsuits during the year. For example, in July 2023, and as discussed here, the computer memory device company Seagate Technology Holdings was sued in a securities lawsuit after a Department of Commerce division imposed a \$300 million penalty against the company for violation of export restrictions related to the Chinese company, Huawei. In November 2023, as discussed here, the directors and officers of the bankrupt medical device

company Rockley Photonics Holdings were sued in a securities suit after the company lost revenue from a joint venture partnership when the venture partner was added to the U.S. Department of Commerce's export restrictions entities' list.

The list of geopolitical risk-related securities lawsuits filed in 2023 may appear to be relatively short. However, there is no doubt that as we head into 2024, the world is in a very dangerous geopolitical environment. There are not only two hot wars being fought, each of which has a dangerous and worrisome potential to spread, but there are tensions in the South China Sea with further worrisome potential, as well as ongoing trade tensions between the U.S. and China.

There are a host of other sources of geopolitical stress that could lead to business and operating difficulties for many companies. To focus on just one topic heading, there are a number of elections scheduled or likely to be scheduled in 2024 that could significantly affect the geopolitical environment. The U.S. Presidential election scheduled for 2024 could have (and seems likely to have) enormous geopolitical implications. But the U.S. is not the only country with a Presidential election scheduled next year – Mexico, Indonesia, and South Africa also will have elections in 2024. Elections are also likely in Canada, the U.K., and India. And in an election that could have enormous geopolitical implications, Taiwan's voters will go to the polls in January 2024. In all, more than two billion people in roughly 50 countries representing over 60% of global GDP will go to the polls in 2024.

I emphasize these points here, and indeed I set up geopolitical risk as a separate topic in this survey, to set a marker down; I believe geopolitical risk will create significant operating and business challenges for many companies, and I believe further that in many cases these challenges will translate into corporate and securities litigation, in 2024 – and beyond.

5. Regulatory and Legislative Actions Ensure That ESG Remains a Hot Button Issue

One of the hot button topics for several years has been “ESG” – which is an acronym representing a grab bag of Environmental, Social, and Governance concerns. In recent years, many companies have felt pressured by institutional investors and other constituencies to show that they are “good” on ESG (even though there is no consensus on what it actually means to be “good” on ESG).

More recently, as the issues surrounding ESG have evolved, companies have found themselves under very different kinds of scrutiny. As pressure from activists at other points on the political spectrum has developed, an ESG backlash has emerged, resulting in political and legislative action in some conservative states, and in litigation in other instances as well. Companies themselves increasingly trying to avoid the cross-fire, as a result of which increasing numbers of companies are resorting to “greenhushing” – that is, taking a much

lower profile on ESG-related concerns. For these and for a variety of other reasons, there have been public calls from academics and others to the effect that it may be time to “say RIP to ESG.”

While some commentators may be done with ESG, the fact is that ESG is not done with us. Pending and existing regulatory and regulatory changes ensure that ESG will continue to be a high-profile issue for corporate executives, regulators, investors, and others, for some time to come.

Among the pending regulatory concerns is the long-awaited final release of the SEC’s final climate change disclosure guidelines. The agency first released the draft guidelines for public comment in March 2022. The release of the final rules has been delayed multiple times. It now appears that the agency will not release the final climate change disclosure guidelines until at least April 2024, at the earliest. Although it still remains to be seen what will be in the final guidelines, at this point it must be assumed, based on the draft release, that final rules will impose significant disclosure requirements on reporting companies concerning greenhouse gas emissions and climate change-related risk management.

While we continue to await the SEC’s final guidelines, other regulators and other authorities have moved forward. Among other things, both the EU and the California legislation have put in place extensive climate change and ESG-related guidelines that will affect many companies, including those outside the EU and California.

First, On July 31, 2023, the European Commission adopted the first set of European Sustainability Reporting Standards (ESRS), which require EU and non-EU companies with specified levels of EU activity to file annual sustainability reports with their financial statements. The standards will soon become law and apply in all 27 EU Member states, with compliance requirements effective as early as 2025 for the 2024 reporting period. The ESRS set out detailed reporting requirements for EU companies, including general reporting requirements; a list of mandatory disclosure requirements related to the identification and governance of sustainability matters; and ten ESG-related topics on which disclosure is required, subject to a materiality assessment.

The standards adopted in the first ESRS go considerably further than the disclosure requirements in the SEC’s proposed climate change disclosure guidelines; among other things, the EU standards require companies to report on a broader set of sustainability topics, such as biodiversity, water, and pollution. The EU standards also apply to private companies.

Of critical importance, for the fiscal year 2028 (that is, to be reported in 2029), non-EU companies that generate a net turnover of more than 150 million euros in the EU in the last two consecutive financial years must comply with the reporting standards. Similarly for the fiscal year 2028, non-EU companies that have at least one subsidiary or branch within the

EU must comply with the reporting requirements. In other words, the EU disclosure requirements could — and are intended to — have a huge impact on companies based outside the EU.

As if that were not enough, in September 2023, as discussed at length here, the California legislature adopted two pieces of legislation, subsequently signed into law by the California governor, that will similarly impose significant disclosure obligations on a host of companies, including even those not based in California.

Senate Bill 253, signed into law on October 7, 2023, requires Scopes 1,2, and 3 greenhouse gas (GHG) emissions disclosures from all business entities “doing business” in California with revenues greater than \$1 billion. The disclosure requirements in effect require companies to make disclosures concerning GHG both up and down the companies’ value chains. The annual GHG disclosures are to commence in 2026 with respect to Scopes 1 and 2; disclosures with respect to Scope 3 emissions commence in 2027.

Senate Bill 267, also signed into law on October 7, 2023, requires that on or before January 1, 2026, and every two years thereafter a “covered entity” must disclose its “climate-related financial risk” and measures taken to reduce and adapt to climate risk. A “covered entity” is a business with over \$500 million in revenue and that does business in California.

The California legislature estimated that SB 253 will affect as many as 5,300 companies, and SB 267 will affect as many as 10,000 companies. The two bills are almost certain to face legal challenge; among other obvious concerns is that neither of the two bills defines what it means to be “doing business” in California.

Among the many risks with the various disclosure requirements is the possibility that the new guidelines could increase the potential shareholder litigation exposure for publicly traded companies. Companies that make optimistic claims about their emissions efforts or the sustainability of their operations could be subject to “greenwashing”-type claims. Companies that experience operating setbacks or diminished financial results because of climate impacts (as for example companies experience extreme weather events or of changed climate conditions) will have their prior disclosures closely scrutinized.

Even though the new guidelines have not yet taken effect, and the SEC’s final guidelines have not even yet been released, the new and anticipated disclosure requirements represent a significant challenge for many companies. The bottom line is that, regardless of what some observers may want, ESG is going to remain a hot-button issue for a long time to come.

6. New SEC Disclosure Guidelines Could Mean Cybersecurity Claims Ahead

The possibility of a corporate or securities lawsuit arising out of a cybersecurity incident is nothing new – the threat of cybersecurity-related litigation has been a recurring theme for several years. The litigation threat is continuing; for example, in March 2023, a plaintiff shareholder filed a securities class action lawsuit against pay TV services provider Dish Networks after the company experienced a cybersecurity incident involving its internal communications network, as discussed here.

The SEC itself has also been active in filing securities enforcement actions based on cybersecurity-related issues. For example, as discussed here, in March 2023, the SEC filed a settled action against Blackbaud, Inc., which agreed to pay a \$3 million penalty in connection with allegations that the company had made misleading disclosures about a ransomware attack. In a high-profile move, and as discussed here, in late October 2023, the SEC filed an enforcement action against software company SolarWinds and its Chief Information Security Officer alleging that the company had misled investors by understating the company's cyber vulnerabilities and the ability of hackers to penetrate the company's systems. (The SolarWinds incident was the subject of a prior securities class action lawsuit; as discussed here, in October 2022, the suit settled for \$26 million.)

The possible future direction and content of cybersecurity incident-related securities suits may be significantly influenced by the new cybersecurity-related disclosure guidelines the SEC approved in July 2023. As discussed here, the new guidelines are quite detailed; the key features of the guidelines are the requirements that companies (i) disclose material cybersecurity incidents they experience, and also (ii) disclose on an annual basis material information regarding their cybersecurity risk management and governance. The new rules require disclosures for annual reports on Form 10-K (or the foreign company equivalent) for reporting periods ending after December 15, 2023. The rules regarding incident reporting took effect on December 18, 2023.

The new incident disclosure provision requires reporting companies to disclose any cybersecurity incident they determine to be material, within four days of determining the materiality, and to describe the material aspects of the nature and scope of the incident as well as the likely material impact of the incident on the company's operations and financial condition.

Under the new rules, reporting companies will be required to disclose in their annual filing their processes for assessing, identifying, and managing material risks from cybersecurity threats, including whether any threats have materially affected or are reasonably likely to materially affect the company. The final rules also require the company to describe the board of directors' oversight of the risk from cybersecurity threats and the role and expertise of company management in assessing and managing cybersecurity risks.

These new rules could increase the litigation risk for companies experiencing a cybersecurity incident. For example, after a company suffers a cybersecurity incident, plaintiffs' lawyers, armed with the knowledge of what kind of incident the company suffered, will go back and scrutinize the company's disclosure and say that the company did not properly disclose to investors the risk of the specific incident that later took place, or that the company described procedures that were represented as sufficient to prevent the kind of incident that occurred.

Similarly, mandated disclosures concerning board cybersecurity governance practices, particularly with respect to board oversight processes concerning cybersecurity could also contribute to securities litigation. Again, the plaintiffs' lawyers armed with the benefit of hindsight after an incident has occurred will go back and scrutinize the prior board governance disclosures to try to argue that actual practices differed or omitted disclosures of oversight inadequacies that permitted the incident that occurred.

The four-day incident reporting requirement could prove to be a challenge. To be sure, the four days run only from the date that the company determines that the cyber incident is material. The concern is that the company may be quite sure that an incident is material but not yet be in a position to be able to report all of the specific items the rules require companies to disclose. One can easily imagine a securities suit being filed based on the allegation that the initial, rushed 4-day disclosure was misleading because the incident turns out to have been far different than was initially thought. Plaintiffs' lawyer may later claim these rushed disclosures were misleading and that the companies deliberately tried to "soft pedal" the description of the incident. Plaintiffs' lawyers may try to raise arguments about allegedly delayed materiality determinations as well.

Even though cybersecurity lawsuits and enforcement actions have been a part of the litigation scene for years now, the new reporting guidelines could mean more challenging cybersecurity-related D&O claims environment in the months ahead.

7. The U.S. Supreme Court Agrees to Take up Two Potentially Significant Securities Cases

Securities litigation is not always a part of the U.S. Supreme Court's docket. The Court sometimes goes for years without hearing a securities law case. However, in its current 2023-2024 term, the Court has agreed to take up two cases. Both cases potentially could have a significant impact on securities litigation and enforcement.

First, on June 30, 2023, the U.S. Supreme Court agreed to take up a case to consider the SEC's use of in-house administrative tribunals, as discussed here. The agency sought Supreme Court review of a federal appellate court ruling that held the administrative courts to be unconstitutional.

The case involves hedge-fund operator George Jarkesy. In 2013, the SEC commenced an administrative proceeding against Jarkesy and his advisory firm that resulted in a liability finding and an order for him to pay a \$300,000 fine and barring him from participating in the securities industry.

Jarkesy filed an action in federal court challenging the SEC's authority to bring the enforcement action against him before the administrative tribunal. In May 2022, a divided three-judge panel of the Fifth Circuit ruled in Jarkesy's favor, holding that the SEC's administrative courts violate the Seventh Amendment's right to a jury trial. The appellate court also held that the agency's authority to choose between pursuing enforcement actions in district court or in an administrative tribunal overstepped the limits on Congressional delegation of power. Finally, the appellate court held that Congress violated the separation of powers pertaining to the removal of executive officials.

In March 2023, the agency filed a petition to the Supreme Court for a writ of certiorari. The agency argued that the Supreme Court has a history of upholding laws in which Congress has provided for the laws' enforcement through administrative proceedings. The agency argued that the Court has long held these types of proceedings to be consistent with the Seventh Amendment. The agency also argued that the agency's authority to enforce the federal securities laws either in the district courts or through administrative tribunals does not create violate the constitution, as the choice is purely an executive function and not a legislative power delegated by Congress.

At a minimum, the case will require the court to consider how the SEC will enforce the federal securities laws. The case could have a significant impact on the way that agency pursues enforcement actions against individuals and firms that are accused of violating the federal securities laws.

Second, on September 29, 2023, the Supreme Court agreed to take up a case in which the court must address the recurring question of whether the failure to make disclosure required by Item 303 of Reg. S-K is an actionable omission under Section 10(b) and Rule 10b-5. A copy of the Court's September 29, 2023, order agreeing to take up the case, *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, can be found [here](#).

Item 303 of Reg. S-K states in pertinent part that in its periodic reports to the SEC, a company is to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a materially favorable or unfavorable impact" on the company.

The underlying complaint alleges that Macquarie misled investors about the impact of the eventual elimination of sulfur-heavy form of marine fuel oil. The district court granted the defendants' motion to dismiss, holding, among other things, that the plaintiffs had failed to

allege a violation of Item 303 or that the omission was material. The plaintiffs appealed the district court ruling.

In an unpublished summary order dated February 23, 2023 (here), a three-judge panel of the Second Circuit affirmed in part and reversed in part the district court's order. Among other things, the appellate court held that the plaintiffs had adequately alleged violations of Item 303. In reviving the claims based on Item 303, the appellate court cited its own prior authority that Item 303 disclosure can support a claim under Section 10(b) if the other elements have been sufficiently pleaded.

In their petition to the Supreme Court for a writ of certiorari, the defendants urged the Court to take up the question "whether a Section 10(b) claim can rest on a failure to provide a disclosure required under Item 303 of SEC Regulation S-K, even without an affirmative statement that is rendered misleading by omission." The defendants pointed out that while the Ninth, Third, and Eleventh Circuits had rejected this possibility, the Second Circuit, in express recognition that its contrary position puts it "at odds" with the Ninth Circuit, has long held that an Item 303 violation can be a basis of a Section 10(b) claim, even in the absence of an otherwise misleading statement.

Item 303 allegations are a regular feature of securities class action complaints. Item 303 allegations are useful for plaintiffs because they help the plaintiffs' counsel solve a pleading problem. That is, under the U.S. securities laws, it is generally held that absent a duty to speak, a defendant company cannot be held liable for failing to disclose information – unless further disclosure is required in order to make a prior statement not misleading. Item 303 provides a way for the plaintiffs' lawyers to argue that the defendants had a duty to speak, even if there isn't a prior statement for which further disclosure is required in order to avoid the prior statement from being misleading.

Precisely because the U.S. Supreme Court only occasionally takes up securities cases, any time the Court agrees to take up a case there is the potential for the Court to provide a perspective or pronouncement that could significantly affect the way the securities laws are applied. In any event, the specific questions the cases present in and of themselves present important and potentially influential questions.

8. Mega-Settlements of Shareholder Derivative Lawsuits Continue to Proliferate

There was a time not long ago when it was unusual for the settlement of a shareholder derivative lawsuit to involve a significant cash component. The cases usually settled for the defendants' agreement to adopt corporate therapeutics and the payment of plaintiffs' attorneys' fees. In more recent years, it has become more common for derivative suit settlements to include a significant cash component. Indeed, nine of the top ten largest derivative suit settlements over the last 20 years have taken place just in the last four years alone.

The trend toward shareholder derivative settlements with significant cash components continued in 2023, as there were several settlements announced this year that are among the all-time largest settlements. Two of these settlements are particularly noteworthy.

First, as discussed here, in April 2023, Paramount Global announced the \$167.5 million settlement of the derivative lawsuit brought by CBS shareholders in Delaware Chancery Court in connection with CBS's \$30 billion acquisition of Viacom in 2019. (The combined company was known as ViacomCBS, which changed its name to Paramount Global in February 2022.) The settlement of the CBS shareholders' action is noteworthy in and of itself, but it takes on even greater significance when considered along with the fact that there was a separate direct action for damages relating to the same merger transaction filed on behalf of Viacom shareholders that settled for \$122.5 million (as reflected here). The \$290 million collective value of the two settlements is an impressive milestone.

Second, and as discussed here, in what is the largest shareholder derivative lawsuit settlement ever as measured by nominal dollar value, the defendant board members in the Tesla Board compensation derivative lawsuit agreed in July 2023 to settle the case for a combination of payments and transfers with a total stated value of \$735 million. The lawsuit alleged that the board had paid themselves "outrageous" compensation in the form of directors pay, stock awards, stock options, and other benefits and bonuses. Among other things, the settlement included the directors' agreement to return massive amounts of cash, stock, and options they were awarded as compensation for board service.

Some observers may question whether the Tesla derivative suit settlement actually has the same value to Tesla's treasury as the stated \$735 million nominal cash value. These objections notwithstanding, the fact is that the settlement is, by any measure, massive. Even though the Tesla settlement did not involve the payment of any D&O insurance dollars, a settlement of that size could have an impact on future settlements – which could in turn cause the expenditure of D&O dollars. The two recent settlements, and in particular, the Tesla settlement, underscore how much things have changed since the days when derivative suit settlements rarely involved the payment of significant cash amounts.

9. AI Emerges as a Important Technological Development and as a Potentially Significant New Corporate Risk

Whenever the discussion turns to the question of emerging risks these days, among the first topics to come up is artificial intelligence (AI). But just as AI technology itself is still taking shape, the legal risks and exposures that the emergence of AI may present are still emerging as well.

On October 30, 2023, in what is unquestionably a key step in the development of a regulatory and legal framework for AI, the White House issued an Executive Order on the development and use of AI. The Order, which is entitled "Executive Order on the Safe,

Secure, and Trustworthy Development and Use of Artificial Intelligence,” can be found here. The Order seeks to initiate a coordinated effort at the federal government level to ensure the “development and use of AI safely and responsibly.”

The Executive Order identifies a variety of actions and initiatives, as discussed in a November 3, 2023, memo from the Wachtell Lipton law firm on *The CLS Blue Sky Blog* (here).

First, the Order requires a number of federal agencies to assess AI risk within the industries the agencies oversee, after which the regulatory agencies must publish guidelines for companies within those industries.

Second, the Order also directs agencies to evaluate and determine the extent of AI-related discrimination and bias.

Third, in light of existing concerns about competition protection in arenas dominated by large technology companies, the Order directs federal agencies to consider and assess the possibilities for concentration of market power, in order to ensure continued competition in the AI marketplace.

Fourth, the order directs the Department of Labor to prepare guidelines to protect workers, given concerns about the use of AI to “undermine rights, worsen job quality, encourage undue worker surveillance, lessen market competition, introduce new health and safety risks, or chase harmful labor-force disruption.”

The Executive Order is not prescriptive; instead, the Order requires future federal agency actions that will lay down the AI-related requirements to which companies must adhere. But while the actual requirements are yet to come, the Order clearly points to an environment in which the federal government aims to impose a wide variety of AI-related regulatory requirements.

In addition to the White House Executive Order, there have been other AI-related regulatory initiatives as well. In that regard, the EU has been active with respect to AI as it has been in other areas.

As discussed in a December 8, 2023 *Wall Street Journal* article (here), the EU recently “reached a political deal” on regulating artificial intelligence. The EU’s Artificial Intelligence Act arguably is the first set of detailed regulations to regulate AI; the *Journal* article speculates that the Act could become the standard for other governments. The Act lays down restrictions in certain areas, such as with respect to the use of facial recognition technology. It also sets transparency rules for AI systems and the models on which they are based. According to the *Journal*, the Act still needs “final approval from parliamentarians and representatives from the EU’s 27 countries and is unlikely to take full effect before 2026.”

These and other regulatory initiatives clearly will create an environment in which companies must work to manage their AI-related regulatory risks. The likely future development of an AI-related regulatory environment also raises the question of companies' future AI-related legal and liability risks, as well.

The fact is that while AI itself as a technology is still just emerging, AI-related litigation has already arrived. An interesting September 5, 2023 memo from the K&L Gates law firm ([here](#)), details the "growing number of recently filed lawsuits associated with generative artificial intelligence (AI) training practices, products, and services." The memo describes the legal theories that have served as the basis of existing AI-related claims, including invasion of privacy and property rights; patent, trademark, and copyright infringement; libel and defamation; and violations of consumer protection laws, among others. It is worth noting that to date much of the litigation has been targeted against AI *developers*, by contrast to AI *users*, as was the case, for example, in the lawsuit that the *New York Times* recently filed against OpenAI and Microsoft.

For D&O insurance professionals, one rather urgent question is the extent to which AI also presents corporate and securities litigation risks. At this point, there are certain categories of corporate and securities law claims that seem to be the most likely.

First, the regulatory initiatives discussed above foreshadows a business environment in which companies use of AI tools could involve significant regulatory risk. Companies use of AI in their operations could lead to regulatory concerns, particularly when it comes to workplace issues (including, for example, in hiring and supervision).

Second, particularly for publicly traded companies, there will be a host of disclosure-related issues, including, for example, disclosures around companies' use of AI; the impact of AI on its operations, competitive environment, and financial results; and the impact of AI on future revenues and overall financial performance. For example, companies touting a supposed business advantage they enjoy because of the company's incorporation of AI technology in their operations may be subject to allegations concerning the extent to which investors were fully informed about the risks associated with the strategy.

In a December 5, 2023, speech SEC Chair underscored the potential disclosure-related AI risks, as discussed [here](#). In particular, Gensler commented on the kinds of AI-related corporate behaviors that he and his agency consider to be problematic.

The first corporate behavior that Gensler alluded to echoes concerns about "greenwashing," in which companies allegedly overstate the sustainability of their products or operations.

Gensler said that just as companies should not "greenwash," companies should not "not AI wash." By that, Gensler apparently meant that companies should not overstate or mislead investors as to their true AI capabilities or the extent to which the company has incorporated AI into their operations or products.

In particular, Gensler noted that as AI-related technology is emerging, there are a variety of processes and operations encompassed within the term “AI,” and that ambiguity means that businesses may seek to try to promote their use of AI when the businesses are in fact using only a small amount of AI, or even none at all.

Gensler also expressed a concern about the gap that could arise between what companies may be promising with respect to their adoption of AI-related tools and the reality of what the tools may actually be able to deliver.

Beyond regulatory and disclosure-related concerns, boards also likely will be subject to claims based on allegations pertaining to the board’s duties of oversight. For example, picture a company that is using images or other content generated by AI and that subsequently faces claims that it has been using synthetic content deceptively. These kinds of allegations could not only lead to consumer protection-type claims but could also lead to allegations that the company’s board failed to properly oversee a critical corporate function.

There undoubtedly will be other types of claims to emerge as well, not the least of which may be employment-related claims based on allegations of discrimination or bias, as well as other workplace-related allegations, such as invasion of privacy.

Gensler’s point – that though AI is a new technology, the same disclosure principles still apply – is an important one. While there may be a sense in the current climate that we have to be talking about AI because it is the hot topic *du jour* does not take away from the fact that there are some real and identifiable litigation risks associated with corporate adoption of AI tools.

10. Competition Defines a “Softer” D&O Insurance Market

From late 2018 through the end of 2021, the D&O insurance marketplace was in a so-called “hard” market, meaning that most buyers saw their D&O insurance premiums increase significantly.

The hard market pricing environment attracted new capital and new market participants. The new participants’ presence started to have a significant effect in 2022, as competition returned to the marketplace. Many buyers saw the overall pricing for their D&O insurance decline, at least relative to the higher pricing that prevailed during the hard market.

The more competitive conditions continued in 2023. Many buyers continue to see reductions in the cost of their D&O insurance, particularly with respect to excess layers of insurance. Of course, there are certain buyers who are seeing more elevated pricing (such as financially troubled companies or companies with a poor claims history), but many other buyers are seeing price decreases, in some cases significant price decreases.

Insurance is a cyclical business and it is always difficult to project in advance when the insurance market will move into the next phase of the cycle. There are some commentators in the D&O insurance arena expressing concern that the more recent price decreases have already fallen below risk-based pricing levels; indeed, in September 2023, Patrick Tiernan, the Chief of Markets at Lloyd's, decried the "moronic underwriting approach" being pursued with respect to D&O insurance in London, adding further that the D&O insurance market currently is "irrational" and "shambolic."

While these remarks are certainly interesting, efforts to jawbone the market have rarely worked in the past, particularly in a competitive market like the one currently in effect. The laws of supply and demand generally control the insurance marketplace, and at the current moment the supply remains ample.

On the other hand, there are enough factors of concern that D&O insurance underwriters (or at least some of them) might well turn cautious. There are indeed a host of uncertainties in the D&O insurance marketplace as we head into 2024, particularly with respect to ESG, Cybersecurity, and AI. These uncertainties arise at a time when the claims trends are distinctly unfavorable, as well.

For the moment, at least, competitive conditions remain in effect and it remains a more favorable pricing environment for policyholders than in the recent past. What the future will bring remains to be seen.

3M Allowed to Issue \$1 Billion of Stock in Earplug Settlement

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3M Co. has gotten court approval to issue \$1 billion worth of unregistered stock as part of its \$6 billion settlement with service members over its allegedly defective combat earplugs.

Using unregistered stock as payment is fair to the earplug users, said Judge M. Casey Rodgers, who oversees the vast hearing-loss litigation. The valuation methodology and two other considerations weigh in favor of that conclusion, Rodgers said Dec. 31, 2023, for the US District Court for the Northern District of Florida.

First, the stock's value will be determined using a weighted average "used by regulators and sophisticated parties—such as investment bankers or senior business executives—to determine the fair value of shares for publicly traded firms," she said. Second, the stock's issuance in tranches will limit the risk of stock dilution as the veterans' fund sells shares, she said. And third, an investment manager and adviser will take steps to recue the investment's risk, she said.

Other factors also favoring a fairness finding include the "unprecedented breadth of discovery, along with the indisputable superiority of the global settlement over continued litigation," Rodgers said.

The result removes a hurdle to the resolution of personal injury suits that have threatened 3M with huge but hard-to-assess potential damages and ever-mounting legal fees.

A court's fairness determination was needed to satisfy an exemption from a requirement under the Securities Act of 1933 that issuers register their stock. Rodgers held a hearing Dec. 11 to look into the procedural and substantive fairness of the plan.

About 230,000 earplug users sued 3M and its Aearo Technologies LLC subsidiary, alleging Aearo's Combat Arms version 2 earplugs were ineffective. The devices were intended to block loud noises while allowing voices to be heard. 3M lost 10 of 16 test cases tried, and the juries awarded the plaintiffs a total of about \$265 million in damages.

At the fairness hearing, attorneys for 3M and the veterans presented witnesses who testified to the notice veterans received about the opportunity to voice their concerns. Another witness, Robert Jackson—a professor at NYU School of Law and a former commissioner of the Securities and Exchange Commission—testified positively about the stock aspect of the deal.

Near the end of the hearing, Rodgers asked if the claimants who were present wished to speak. Veteran Duane Nancarrow made his way to the dais, described his combat injuries, and noted that 3M “threatened bankruptcy” in the past.

3M attempted to globally settle the hearing-loss claims through the Chapter 11 filing of its Aearo unit, but a bankruptcy court didn’t allow that to proceed as the company hoped.

“What will stop them from declaring bankruptcy a year from now?” Nancarrow asked.

Rodgers said she didn’t see 3M contemplating that action.

In her written opinion, Rodgers didn’t directly address that concern but cited the paucity of objections from veterans in the multidistrict litigation. Among the approximately “260,000 Eligible Claimants in this MDL who received direct notice, only four filed Notices of Intent to Appear on the MDL docket,” Rodgers said. “As it turned out, however, the four notices were filed in error and were promptly withdrawn.”

And only one veteran expressed concerns at the hearing, she said.

The stock issuances are substantively and procedurally fair, Rodgers said. “Accordingly, 3M may issue the shares of 3M common stock as contemplated by the Stock Issuances in the Agreements without registration or compliance with the prospectus delivery and disclosure requirements of United States securities laws” or similar state laws, she said.

The case is *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, N.D. Fla., No. 3:19-md-02885, 12/31/23 .

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Law.com's Critical Mass with Amanda Bronstad: Monsanto Halts Roundup Jury Awards With Defense Verdict, Talc Lawyer Fires Back At J&J's 'Smear Tactics'

LAW [law.com/2024/01/03/law-coms-critical-mass-with-amanda-bronstad-monsanto-halts-roundup-jury-awards-with-defense-verdict-talc-lawyer-fires-back-at-jjs-smear-tactics](https://www.law.com/2024/01/03/law-coms-critical-mass-with-amanda-bronstad-monsanto-halts-roundup-jury-awards-with-defense-verdict-talc-lawyer-fires-back-at-jjs-smear-tactics)

By Amanda Bronstad



Welcome to Law.com Class Actions: Critical Mass, a weekly briefing for class action and mass tort attorneys.

This week: After five juries awarded **Roundup** plaintiffs more than \$2 billion, **Monsanto** stopped the streak with a defense verdict on Dec. 18 in California. Attorney **Andy Birchfield** responded to **Johnson & Johnson's** move to disqualify him from the talc litigation. Find out who represents **Perry Johnson & Associates**, and others, in data breach lawsuits.

I'm Amanda Bronstad. Feel free to reach out to me with your input. My email is abronstad@alm.com. Follow me on LinkedIn or X: [@abronstadlaw.com](https://www.linkedin.com/company/abronstadlaw).



Jessica Grant of Shook, Hardy & Bacon. Courtesy photo

Monsanto Preps for Another Roundup Trial After Defense Verdict

A five-trial win streak by plaintiffs suing **Bayer's Monsanto** over its **Roundup** pesticide ended last month after a California jury rendered a defense verdict.

Here's my recap on the jury's Dec. 22 decision, which ended a streak of jury awards in Roundup trials totaling more than \$2 billion in the past few months. It also gives Bayer its tenth Roundup victory since trials resumed after the COVID-19 pandemic shutdowns. Another Roundup trial, in Philadelphia, begins this Thursday, with opening statements set for Monday.

Shook Hardy partners Jessica Grant and Mat Larsen handled the California trial, which involved plaintiff Bruce Jones, 72, diagnosed with non-Hodgkin lymphoma in 2021 after decades of spraying Roundup on his ranch and commercial properties.

The jury found for Monsanto on claims of design defect, strict liability for failing to warn, negligence and negligent failure to warn. Minutes before the jury's decision, **San Benito County Superior Court Judge Patrick Palacios** denied Monsanto's motion for a directed verdict, in part due to court decisions in prior Roundup trials in California regarding punitive damages and federal preemption, according to a transcript. That reflected arguments from Charles Miller (**Heygood, Orr & Pearson**), an attorney for Jones, who referenced Roundup cases now on appeal:

"And so I think unless the U.S. Supreme Court takes up the case and there is a circuit split in the future, I know that they are trying to engineer that with cases before the Third Circuit and Eleventh Circuit, but in California, right now, the controlling law is there's no preemption argument that's been decided."



Andy Birchfield principal with Beasley Allen Law. Courteys photo

Johnson & Johnson: 'The Facts Are the Facts'

Plaintiffs' lawyer Andy Birchfield (**Beasley Allen**) is fighting back against **Johnson & Johnson's** attempt to disqualify him from the talc litigation, calling the move the "latest example in a long line of smear tactics."

Here's what's happening: **Johnson & Johnson** filed a motion last month to disqualify Birchfield and his firm from the plaintiffs' leadership of the talc multidistrict litigation, where Leigh O'Dell (**Beasley Allen**) serves as co-lead plaintiffs' counsel.

The reason? Birchfield formed a partnership with one of Johnson & Johnson's former lawyers, **James Conlan**, who now runs a business venture called Legal Liability Solutions. He and Birchfield have publicly proposed a \$19 billion deal to resolve talc lawsuits against Johnson & Johnson.

What Birchfield says: Birchfield's lawyer, Jeffrey Pollock (**Fox Rothschild**), noted that Conlan was never an employee of Beasley Allen, and Birchfield never represented Johnson & Johnson. Also, neither Birchfield nor his firm received confidential information about Johnson & Johnson from Conlan.

Johnson & Johnson attorney Steve Brody (**O'Melveny**) filed a Dec. 29 reply that said:

"The facts are the facts, and they show that Birchfield teamed with J&J's former lawyer to formulate a plan adverse to J&J's interests where they both benefit financially. The question for Birchfield is whether he can explain how that alliance could possibly be proper. His opposition shows that he cannot."



Bethany Lukitsch, with BakerHostetler. Courtesy photo

Who Got the Work?

Several defense attorneys appeared before the **U.S. Judicial Panel on Multidistrict Litigation** in lawsuits filed over a data breach at **Perry Johnson & Associates Inc.** Joel Maxwell (**Cozen O'Connor**) for Perry Johnson & Associates; Kathryn Caldwell (**Ropes & Gray**) for **Northwell Health Inc.**; Bethany Lukitsch (**Baker Hostetler**) for **Salem Regional Medical Center**; and Meagan VanderWeele (**Gordon Rees**) for **Cook County Health and Hospitals System**. About 30 lawsuits are pending over a cyberattack at Perry Johnson & Associates, which provides medical transcription services to healthcare facilities. The breach, which occurred in early 2023 but was disclosed on Oct. 31, compromised the personal information of about 8.9 million individuals. The U.S. Judicial Panel on Multidistrict Litigation has scheduled the cases for its Jan. 25 hearing.

Here's what else is happening:

Girardi Competent: A federal judge found that **Girardi Keese** founder **Tom Girardi**, 84, was competent to stand trial on charges that he stole at least \$15 million from his clients. **U.S. District Judge Josephine Staton** issued her order temporarily under seal after a lengthy competency hearing last year. Lawyers for Girardi, who lives in an assisted living facility, argued he had mild dementia, but prosecutors insisted he was malingering. Prosecutors also argued in a final brief that Girardi's own courtroom behavior at the competency hearing, including hurling an expletive at one of them under his breath, showed he was competent.

California Bound? Genetic testing firm **23andMe Inc.** is moving to transfer a growing number of lawsuits filed over last year's data breach to California. In a Dec. 21 motion before the **U.S. Judicial Panel on Multidistrict Litigation**, 23andMe attorney Ian Ballon (**Greenberg Traurig**) said more than 30 lawsuits have been filed over the breach, announced Oct. 6. He suggested the Northern District of California, where 23andMe has its headquarters in South San Francisco.

PCB Problems: Monsanto, which already lost \$750 million in verdicts stemming from PCB exposure at a school near Seattle, was hit with an \$857 million verdict on Dec. 18 in King County Superior Court. The trial featured two mothers and five former students of the **Sky Valley Education Center**, whose trial lawyers were **PWRFL's** Mike Wampold and Felix Luna, and **Trial Lawyers for Justice** attorneys Keith Bruno and Theresa Hatch. "Generally speaking, the size of these verdicts is trending upwards," said Rick Friedman (**Friedman Rubin**), who is leading the plaintiffs' cases. "After each trial, our experts get stronger and Monsanto's experts get weaker." Monsanto plans to appeal, saying, "The objective evidence in this case, including blood, air and other tests, demonstrates that plaintiffs were not exposed to unsafe levels of PCBs, and PCBs could not have caused their alleged injuries."

Thanks for reading Critical Mass! I'll be back next week.

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- Latest

Novo Nordisk Backs Unifying Ozempic, Other Drug-Harm Lawsuits

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A plaintiff's request to combine product liability litigation against Ozempic maker Novo Nordisk and Mounjaro maker Eli Lilly & Co. into a single proceeding has drawn conflicting responses from the defendant drugmakers.

Novo Nordisk supported a single proceeding while Lilly said it should be excluded from combined litigation because most of the pending suits involve its competitor's Ozempic.

The drugs are injectable prescription medications that are used to control blood sugar in adults with type 2 diabetes. The medications have become increasingly popular for weight loss.

Louisiana resident Jaclyn Bjorklund asked the US Judicial Panel on Multidistrict Litigation in December to combine federal lawsuits involving the medications into a single proceeding in the Western District of Louisiana. Bjorklund, who used Ozempic and Mounjaro, alleged that the companies didn't adequately warn about serious side effects and said she suffered bouts of vomiting so severe that she lost teeth.

Plaintiffs have filed 41 suits in 17 different federal courts, Novo Nordisk said. Combining the litigation into a single multidistrict proceeding is appropriate because the suits share common factual, scientific, and legal issues, it said in a Dec. 29 filing.

But the lawsuits should be sent to the Middle District of North Carolina, Novo Nordisk said. Both companies maintain manufacturing facilities in or near the district, whose judges have the capacity to manage a complex MDL, Novo Nordisk said.

Alternatively, the lawsuits should go to Judge Anthony Battaglia in the Southern District of California, who presided over a previous MDL involving diabetes drugs, Novo Nordisk said.

Few Cases Involve Lilly

Lilly said the plaintiffs have emphasized the popularity of Novo Nordisk's Ozempic as a weight-loss treatment, and that its products therefore don't fall within the main focus of this litigation.

Only 10 cases involve claims against Lilly, it said. The two Lilly products at issue—Mounjaro and Trulicity—are approved to treat type 2 diabetes, not weight loss, Lilly said.

No plaintiffs suing Lilly allege that they used a Lilly product for weight loss. “The claims involving Lilly’s type 2 diabetes medicines should not be coordinated into a sprawling MDL that centers on allegations about Novo’s products,” Lilly said.

If the panel determines that Indianapolis-headquartered Lilly should be included in an MDL, the suits should be sent to the Southern District of Indiana or the Middle District of North Carolina, Lilly said.

A group of plaintiffs represented by Motley Rice LLC also urged the panel not to include both defendants in one MDL.

Morgan & Morgan represents Bjorklund. DLA Piper LLP represents Novo Nordisk Inc. and related companies. Kirkland & Ellis LLP represents Lilly.

The case is In re: Glucagon-like Peptide-1 Receptor Agonists (GLP-1 RAs) Prods. Liab. Litig., J.P.M.L., No. 3094, 12/29/23 .

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Kids' suit against feds over climate change marches toward trial

 [courthousenews.com/kids-suit-against-feds-over-climate-change-marches-toward-trial](https://www.courthousenews.com/kids-suit-against-feds-over-climate-change-marches-toward-trial)

Alanna Mayham

But at least one legal expert said the judge's decision to deny a request for appellate review means the Supreme Court may step in and doom the case — and future efforts to thwart climate change via the courts.

PORTLAND, Ore. (CN) — Young activists leading a 2015 climate lawsuit against the U.S. government may finally see their day in court after a federal judge allowed two of their claims to proceed and ordered attorneys to schedule a pretrial conference.

The Dec. 29 order from U.S. District Judge Ann Aiken arrives nine years after 21 young climate activists — all between the ages of 8 and 19 at the time of filing — accused the federal government of contributing to climate change through fossil fuel production, thus harming them and violating their constitutional rights to life, liberty and property while failing to protect public trust resources.

The lawsuit narrowly escaped dismissal in June 2023 after Aiken allowed the plaintiffs to file a second amended complaint. That decision followed a divided ruling from the Ninth Circuit in 2020 with instructions to dismiss the case for lack of Article III standing.

On Saturday, Aiken preserved the lawsuit again by sustaining the plaintiffs' affirmative government action and due process claims under the Fifth Amendment along with their fourth claim under the public trust doctrine.

"As this lawsuit demonstrates, young people — too young to vote and effect change through the political process — are exercising the institutional procedure available to plead with their government to change course," Aiken wrote. "While facts remain to be proved, lawsuits like this highlight young people's despair with the drawn-out pace of the unhurried, inchmeal, bureaucratic response to our most dire emergency."

Further on in the order, Aiken explained that, despite the government's argument to the contrary, "the judiciary is capable and duty-bound to provide redress for the irreparable harm government fossil fuel promotion has caused."

"Some may balk at the court's approach as errant or unmeasured, but more likely than not, future generations may look back to this hour and say that the judiciary failed to measure up at all," Aiken wrote. "In any case over which trial courts have jurisdiction, where the plaintiffs

have stated a legal claim, it is the proper and peculiar province of the courts to impartially find facts, faithfully interpret and apply the law, and render reasoned judgment. Such is the case here.”

Plaintiff attorney Julia Olson of Our Children’s Trust celebrated the order, saying “this path to justice has been over eight long years in coming.”

“Finally, in 2024, the *Juliana* plaintiffs will have their long-awaited trial and the federal government’s fossil fuel energy system will be measured and judged by the fundamental constitutional rights of these youth,” Olson said in a statement. “Our democracy will be stronger for it. In this new year, our air, our water, our climate, and our children’s health will finally find protection in the rule of law.”

And Aiken denied the government’s requests for interlocutory review and its motion to stay litigation — a move that one expert described as a defiant and reckless way of turning the case into a “zombie climate case.”

“The most startling part of Judge Aiken’s decision is not the sweeping assertions of constitutional rights, but her refusal to certify the opinion for interlocutory review, without comment,” Case Western Reserve University professor Jonathan Adler wrote in an op-ed for The Volokh Conspiracy.

Adler said the order is striking because Aiken previously refused to permit interlocutory review, prompting two Supreme Court orders “indicating that she had misapplied the standard in 28 U.S.C. §1292 and the Ninth Circuit’s ultimate stay.”

Adler added that, unlike her previous denials, Aiken did not explain why she denied the federal government’s request, “even though nothing has changed that would alter the application of §1292’s standards to this case, and the Supreme Court’s admonitions remain on point.”

The Department of Justice will have no other choice but to seek review of the order, Adler wrote, indicating that without the intervention of the Ninth Circuit the Supreme Court may “step in to make sure climate litigation does not get out of hand.”

“Many climate activists are cheering Judge Aiken’s latest ruling,” Adler wrote. “But should her shenanigans lead to premature high court review of pending climate claims, they may come to rue the day Judge Aiken refused to let the *Juliana* litigation stay dead and buried.”

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Categories / Courts, Environment, Government

Plastic Manufacturer Must Face Certified Class in Pollution Suit

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- PFOA from manufacturing plant contaminated residents' water
- Trial will be bifurcated into liability and damages segments

Saint-Gobain Performance Plastics must face a class of New Hampshire property owners who claim the manufacturer's plant exposed them toxic substances, after a federal judge granted partial certification of the class.

Residents living near the former Saint-Gobain Performance Plastics Corp. plant in Merrimack, N.H., sued the company in 2016, claiming that perfluorooctanoic acid from the facility contaminated their wells. Exposure to PFOA can increase the risk of cancer, thyroid disease, and high cholesterol, as well as effect fetal development and child health.

The plaintiffs proposed two subclasses of property owners—one class that sources from private wells, and one that sources from the Merrimack Village District Water Works.

Judge Joseph N. Laplante of the US District Court for the District of New Hampshire on Dec. 29 certified the class for liability issues under their trespass, negligence, and negligent failure to warn claims, finding that the claims met all requirements for class certification.

But Laplante denied certification for the residents' nuisance claim. There is individual variability in the harm experienced, making it unmanageable as a class action, the judge said.

Damages can't be determined on a classwide basis due to individual factors—like the extent of contamination, duration of residence, mitigation efforts, and specific inconveniences—so the trial will be bifurcated, Laplante said. The first phase will focus on the defendants' liability and the second phase will address damages, he said.

The residents are represented by The Hannon Law Firm LLC, Gottesman & Hollis PA, and Morgan & Morgan. Saint-Gobain is represented by McLane Middleton PA and Dechert LLP.

The case is *Brown v. Saint-Gobain Performance Plastics Corp.*, D.N.H., No. 1:16-cv-00242, 12/29/23 .

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Daily Journal

DJ [dailyjournal.com/articles/376447-can-we-trust-openai](https://www.dailyjournal.com/articles/376447-can-we-trust-openai)

Technology

Jan. 3, 2024

Can we trust OpenAI?

There is an argument to be made that Sam Altman should be monitored and controls put into place to prevent unilateral decisions that could cause serious harm to OpenAI and society.

James Park

Professor, UCLA School of Law

James Park is professor of law at UCLA School of Law and the author of a history of securities fraud, "The Valuation Treadmill: How Securities Fraud Threatens the Integrity of Public Companies."

See more...

Can corporate governance protect us from the development of dangerous Artificial Intelligence (AI)? The recent events at OpenAI, the developer of ChatGPT, illustrate the challenges boards face in controlling the developers of AI. Open AI's board of directors fired and then re-hired the organization's CEO, Sam Altman, after an outcry by OpenAI employees and the Silicon Valley community. OpenAI has a long road to regaining trust that it can fulfill its mission of developing "safe AI that is broadly beneficial."

Corporate boards are most often criticized for their passivity. Since at least the sudden collapse in 1970 of Penn Central, the nation's largest railroad, boards of failed companies have been blamed for rubber-stamping the decisions of management.

OpenAI's board has been ridiculed for its activism. Its decision to abruptly replace the organization's founder was widely viewed as incompetent. The board was unable to defend its decision, which was made in secret, and found that its power was contingent on the approval of key stakeholders.

While its board has largely been replaced, the problem OpenAI faces is that where there is smoke, sometimes there is fire. The board's vague reason for firing Altman, his "deceptiveness," may not have by itself been sufficient to precipitously act. But isn't the criticism of boards that they never act preemptively to prevent a crisis? That they ignore yellow flags and only act when it is too late? There is an argument that Altman should be monitored very closely and controls should be put into place to prevent unilateral decisions with dire consequences that cannot be reversed before they cause serious harm to OpenAI and society. Such efforts will be difficult to implement without squelching the entrepreneurial discretion that is necessary for the leader of a technology company. A more troubling possibility is that there was something worse that the board saw that they could not articulate or were unwilling to do so for fear of adverse consequences. If that is the case, the new board should move on from Altman immediately.

Another possibility is that OpenAI's mission has essentially changed. OpenAI is a non-profit with a for-profit subsidiary. Unlike a corporate board, OpenAI's board was charged with exercising "fiduciary duties in furtherance of its mission – safe AI that is broadly beneficial." It could be that under that standard, Altman was no longer the right leader, and the board was simply fulfilling its fiduciary obligation. He might have been acting in a way that was more consistent with profit-maximization than developing a safe product. Such a course of action would not be appropriate for a non-profit organization but fine for a for-profit corporation. OpenAI's new board will have to seriously consider whether the organization can operate under a non-profit mission. If it cannot, then it might be better for OpenAI to convert to a traditional corporation so that it is frank about its intentions.

The importance of stakeholders in the governance of OpenAI is worth highlighting. We typically think of large organizations as controlled by the interests of shareholders. At least for a human capital-intensive effort such as the development of AI, the views of employees mattered in this instance. The board may have overestimated its power to act and the importance of Altman's leadership.

The events at OpenAI also illustrate how founders of successful start-companies are often entrenched and are difficult for boards to control. Those who criticize boards for not acting to replace managers before a scandal should take note of what happened at OpenAI. There

is a reason why boards do not routinely and easily replace corporate leadership.

Many investigations of corporate governance are essentially autopsies. The company is dead. The job of the investigators is to understand what happened and it is easy to point to the managers as the culprits. It might be that such criticism is entirely appropriate, but there is a danger that some of the complexities involved in a business crisis are ignored.

The investigation of OpenAI is much more complicated because the organization is still alive and expected to steward the development of an incalculably valuable asset, an AI program that has captured international attention. A simple narrative may or may not put concerns about Altman and OpenAI to rest. The nuances of what happened and what must be done to address any problems will be essential to move forward.

One might wonder if it is foolhardy to expect organizational governance to produce wise decisions about a dangerous technology that could threaten society. It may be that the common criticism that boards simply cannot be trusted to stand up to management is a valid one. On the other hand, we should not uncritically accept the narrative that boards are generally incompetent. We tend to focus on the spectacular failures of boards. The excellent work of competent boards that guide companies through stormy waters is never publicized. Perhaps at some point in the future, we will look back on the decision of OpenAI's board to fire Altman and understand it as an event that may have caused some turmoil in the short-run but had the beneficial effect of prompting stronger governance that saved a company that responsibly developed AI.

#376447

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Edelson says it will open Los Angeles office

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Jan. 3, 2024

The firm decided to open an office in Los Angeles because that's where their attorneys want to live, founder and CEO Jay Edelson said. "There's lots of action in L.A. The fact that people are in L.A. doesn't mean they'll only work on L.A. cases."

Edelson PC, the Chicago-based law firm that brought down now-indicted former plaintiffs' lawyer Thomas Girardi, is expanding its geographic and technological footprint.

The firm is opening an office in Los Angeles, and hired a developer to focus on integrating artificial intelligence into its attorneys' workflows so that they work more efficiently.

Edelson PC is not new to Los Angeles. The firm is involved in the NCAA concussion cases in the Central District of California federal court as well as a lawsuit against a former Girardi Keese partner over the alleged misuse of client funds.

The firm is looking for a temporary space to work from as it searches for a unique permanent space, which could take one to three months to find, the firm's founder and CEO, Jay Edelson, said.

"If you know of anything that is very non-lawyerish, please let us know," Edelson quipped.

They have some ideas on what they're looking for: beachside square footage in Santa Monica so that employees can play volleyball. Edelson has a volleyball court in its Chicago office and is looking to take advantage of Southern California's milder climate.

The firm decided to open an office in the city because that's where their attorneys want to live, Edelson said in a telephone interview on Tuesday.

"There's lots of action in L.A. The fact that people are in L.A. doesn't mean they'll only work on L.A. cases," Edelson said.

The firm focuses on plaintiffs' side class actions and mass torts in state and federal courts. It worked with Girardi on the lawsuit in federal court in Illinois stemming from the 2018 Lion Air crash, and Edelson notified the judge in 2020 that their clients had not been paid after Boeing Co. handed over settlement funds to Girardi.

The firm launched in Chicago in 2007. It has since opened offices in San Francisco, Boulder, Colorado and Washington, D.C., and has grown to just over 100 employees, 50 of them lawyers.

Edelson declined to elaborate on the types of cases his firm is planning to file in Los Angeles, saying only that they would be “interesting ones” involving mass torts and privacy. He noted that workers are much more mobile than they were 10 years ago, and the firm’s L.A. work has up to now been supported by attorneys and staff in the San Francisco office.

“We’re in hyper growth mode right now. A number of partners and key people want to go to L.A. Growing a firm is easier when you have a lot of smaller offices than one big one,” he said.

Max Hantel, a Harvard Law alum and a Rutgers University Ph.D. graduate, will launch the new office. Hantel, an associate, will be joined by more senior attorneys from other cities who will lead the Los Angeles office, Edelson said. They will be hiring laterals as well, likely from L.A.

“We’re trying to figure out how many people we’re going to send and how much it’s going to grow. Our goal is to aggressively expand, so probably going to be a good-sized office even if it’s not filled,” Edelson said.

The firm also announced the addition of Nayan Dixit to work as an AI integration focused developer. Dixit has a master’s degree in computer science from the University of Central Missouri, and will focus on ways to make artificial intelligence work in support of the attorneys.

“We needed more intellectual horsepower, someone who could focus attention on what’s low-hanging fruit [in AI]. It’s been revolutionary,” Edelson said.

The firm has a customized generative AI platform called Chattie that it uses to simplify complex ideas.

“Lawyers often get in trouble because it’s hard for our brains to turn off from legalese when talking to ordinary non-lawyers,” Edelson said.

“When proposing jury instructions, we rely heavily on Chattie. We say, ‘Here’s the jury instruction we’re proposing; can you make it accessible?’ Taking complex ideas and making them simple has been very helpful,” Edelson said. “It’s not replacing jobs but making people a lot more productive and happier. The key in AI is making it customizable to specific areas of practice.”

As Cohen Milstein Grows, Law Firm Names New Managing Partner

 [law.com/2024/01/03/as-cohen-milstein-grows-law-firm-names-new-managing-partner](https://www.law.com/2024/01/03/as-cohen-milstein-grows-law-firm-names-new-managing-partner)



What You Need to Know

- Benjamin Brown, who co-chair of the Cohen Milstein's antitrust practice, is the firm's new managing partner.
- Steven Toll served as managing partner the past three decades, and under his helm, the firm more than tripled its head count.
- The leadership change comes as a number of firms in Big Law have announced transitions over the past year or so.

As Washington, D.C.-founded class action litigation firm Cohen Milstein Sellers & Toll continues to grow its head count and expand its physical footprint, the plaintiff-side firm has named Benjamin Brown as its new managing partner.

Brown, who took the reins as managing partner at the beginning of 2024, succeeds Steven Toll, who served as the firm's managing partner and a member of the executive committee for nearly three decades. Toll remains a partner at the firm and co-chair of the securities litigation and investor protection practice, according to a firm bio.

Ensuring that the "firm culture evolves" as the firm grows in size is one of Brown's main priorities in his new role, he said.

"A lot of my priorities, especially in this hybrid era with large teams working together from different offices, revolve around making sure that our firm culture evolves as we grow," said Brown in an interview. "We're excited about the new way of practicing, balancing working in the office and working from home."

Under the former managing partner's leadership, Cohen Milstein more than tripled its head count to include more than 100 lawyers and grew its physical presence to eight offices, including, Raleigh, North Carolina, and Philadelphia, among others. Last year, the firm

opened offices in Boston and Minneapolis.

Cohen Milstein is currently operating under a hybrid work environment, with two days in-office at its D.C. office. Brown says this “provides a recruiting advantage for new lawyers.”

Brown’s accession comes amid a generational transition for Cohen Milstein, as the firm ushers in new guidelines that promote more frequent turnover in management, he said.

Cohen Milstein’s leadership change comes on the heels of one of the firm’s “most successful years financially,” according to Brown, who declined to discuss the firm’s financials.

Earlier this year, Cohen Milstein secured a \$1 billion settlement for shareholders in a securities fraud class action lawsuit against Wells Fargo. The firm is also serving as counsel for plaintiffs, home sellers, in *Moehrl v. the National Association of Realtors*, which is seeking more than \$13 billion in damages and challenges real estate industry rules.

Brown has been with the Cohen Milstein for almost two decades and serves as co-chair of the firm’s antitrust practice. Brown served as the firm’s managing partner elect for the past year and a half, before his accession as managing partner at the beginning of this year.

Cohen Milstein’s leadership transition follows a number of other law firm leadership changes in the past year. More than two dozen of the largest law firms have announced some type of leadership transition in the last year or so, as Am Law 200 firms name new managing partners and CEOs, and, for some, install multiple co-chairs for the first time.

“A lot of firm leaders who are of a more senior generation are taking stock of where the world is right now, what’s going on in their firms and saying, ‘maybe this is a good time to transition to people in the next generation and get some leadership that is energized by some of these changes that they’re seeing,’” Brown said. “I think it’s an inflection point, not only for Cohen Milstein, but for the legal profession, and I’m excited about the future.”

In another Washington firm leadership change, Zuckerman Spaeder named D.C. partner Caroline Mehta as co-chair of the firm’s executive committee and partnership board as of Jan. 1. Mehta will assume the role of chair starting in 2025, becoming the first female chair in its history.

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Terraform Crypto Assets Are Securities, Rakoff Rules in SEC Case

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- Court rules for SEC on one claim but trial needed on another
- Securities determination conflicts with Ripple Labs ruling

Judge Jed S. Rakoff didn't determine damages on that issue and reserved separate Securities and Exchange Commission fraud claims for trial. He ruled in favor of Terraform and co-founder Do Hyeong Kwon on a third set of claims, for securities-based swap violations. Those claims are dismissed.

Kwon, who is incarcerated in Montenegro, wasn't entitled to submit a declaration opposing summary judgment, Rakoff said for the US District Court for the Southern District of New York. And, in a Dec. 29, 2023, conference described in a docket entry Tuesday, Rakoff invited briefs about whether Kwon must state whether he waives the right to be present and participate at the upcoming trial, which is set to begin Jan. 29.

Rakoff's Dec. 28 holding that Terraform's UST, LUNA, wLUNA, and MIR crypto assets were securities—prefigured in a July 2023 ruling on the adequacy of the allegations—conflicts with a ruling by another judge in the same district that a Ripple Labs token was not a security when sold to the public on secondary markets. The SEC lost a bid to get an immediate appeal of that decision.

Here, Rakoff looked to the US Supreme Court's 1946 decision in *SEC v. W.J. Howey Co.* setting out guidelines for determining whether something is an investment contract governed by securities laws.

"There is no genuine dispute that the elements of the *Howey* test," including a common enterprise with profits to come from the efforts of others, "have been met for UST, LUNA, wLUNA, and MIR," Rakoff said.

The SEC represents itself. Dentons US LLP represents Terraform and Kwon. Kwon is additionally represented by Kaplan Hecker & Fink LLP.

The case is SEC v. Terraform Labs Pte. Ltd., S.D.N.Y., No. 23-cv-1346 .

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Entain PLC

Entain appoints head of US activist investor to board

UK gambling group names Eminence Capital boss to board weeks after exit of its chief executive



Eminence Capital's Ricky Sandler has previously publicly scolded Entain's board for a share price performance that has lagged behind its rivals © Bloomberg

Daria Mosolova 5 HOURS AGO



UK gambling group Entain has appointed the head of one of its largest activist investors to its board, weeks after the company's former chief executive quit following a backlash over a slumping share price.

London-listed [Entain](#) said on Wednesday that Ricky Sandler would join the board as a non-executive director. Sandler runs US activist hedge fund Eminence Capital, which first took a stake in Entain in late 2020 and now owns a stake of between 4 and 5 per cent.

Sandler, who has previously publicly scolded Entain's board for a share price performance that has lagged behind its rivals, will work with the board to pick another non-executive director.

"Ricky has a deep knowledge of our business and a firm belief in the quality of our operations and substantial growth opportunities," said Entain's chair Barry Gibson.

The move to install Sandler on the board comes less than a month after Jette Nygaard-Andersen [quit after a three-year tenure](#) as Entain chief executive that saw the FTSE 100 group lose more than 35 per cent of its market value. Investors also attacked a series of acquisitions made under her watch.

In a letter published in June last year, Sandler said that “while we can support the company pursuing seemingly rational acquisitions, funding them with highly undervalued equity is an empire building, shareholder value destroying strategy”.

Entain’s management also drew criticism from investors for walking away from two takeover approaches from US gambling operators MGM Resorts International and DraftKings, that valued it at a premium.

[Eminence](#) was one of several New York-based activist funds, alongside Sachem Head Capital Management and Dendur Capital, which had pushed Entain to grant them board seats.

In a statement on Wednesday, Sandler said he intended to work “with my fellow directors to help Entain achieve long-term success and create lasting value for its shareholders”.

Corvex, another US activist hedge fund with roughly a 4.4 per cent stake in the bookmaker, last month called on the company to [turn around an “unacceptable” performance](#).

Entain shares climbed 1.1 per cent in early afternoon trading on Wednesday.

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Mainstream Media Is Avoiding the Big Story on Jeffrey Epstein and Sealed Court Documents

 wallstreetonparade.com/2024/01/mainstream-media-is-avoiding-the-big-story-on-jeffrey-epstein-and-sealed-court-documents



By Pam Martens and Russ Martens: January 3, 2024 ~

Over the past week, more than a dozen of the biggest mainstream news outlets have published articles about the *possibility* of scandalous news breaking this week from the unsealing of documents in a federal court case involving the sex trafficker of minors, Jeffrey Epstein.

Typically, responsible news outlets wait for the actual news to break before hyping the possibility of it breaking. At 5:59 a.m. this morning, Newsweek updated the story as follows:

“Some on social media are speculating that the public disclosure of more than 150 names associated with the late sex offender Jeffrey Epstein has been delayed.

“Judge Loretta A. Preska signed an order on December 18 for the public release of the identities of more than 150 people mentioned in court documents from a now-settled 2015 civil lawsuit filed by Virginia Giuffre that centered on allegations that Epstein’s associate and former girlfriend Ghislaine Maxwell facilitated her sexual abuse.

“Several prominent figures, including former President Bill Clinton and Britain’s Prince Andrew are expected to be named. The list will also include sex abuse victims and Epstein’s employees.”

Bill Clinton, Prince Andrew, Donald Trump, and dozens of other prominent men in politics, finance and law have already been named, *repeatedly*, in the media as people who socialized or had suspect dealings with Epstein. So this is not a new story.

The *real* story that mainstream media refuses to investigate is why federal judges in New York have been allowed to secret away in sealed documents the puzzle pieces to how Epstein’s network of powerful men were able to run a sex trafficking ring for two decades with the “active participation” of the largest federally-insured bank in the United States, JPMorgan Chase; and right under the nose of its Chairman, CEO and media darling, Jamie Dimon.

This is the Big Story that has been left to wilt on the vine by the likes of the New York Times, Wall Street Journal, Washington Post and their peers.

The answers to this Big Story will not be found in the documents slated to be unsealed by Judge Loretta Preska in the Virginia Giuffre case. They have been sealed and locked up tight in Judge Jed Rakoff’s courtroom after he oversaw multiple Epstein-related lawsuits brought against JPMorgan Chase in late 2022 and 2023.

One case, Jane Doe v JPMorgan Chase, was a class action on behalf of Epstein’s sex assault and sex trafficked victims. Judge Rakoff approved its settlement for \$290 million despite objections from 17 Attorneys General and the settlement’s unconscionable terms that included releasing claims for “harm, injury, abuse, exploitation, or trafficking by Jeffrey Epstein or by any person who is in any way connected to or otherwise associated with Jeffrey Epstein, as well as any right to recovery on account thereof.” Claimants were also required to sign the release form before they learned if they would get a dime from the settlement.

Attorneys for the victims were not left in any such doubt. The settlement terms provided them with \$87 million in legal fees and \$2.5 million in expenses.

Releasing claims against “Any person who is in any way connected to or otherwise associated with Jeffrey Epstein” conveniently includes a number of billionaires referred by Epstein to JPMorgan Chase as clients. There are also literally hundreds of high-profile individuals that were listed in Epstein’s little black book that could be considered “connected” to him.

Many of the individuals listed in Epstein's little black book – a total of 1,571 – have had important banking relationships with JPMorgan Chase. In a court filing on July 26 of last year by the Attorney General of the U.S. Virgin Islands, which has since settled its Epstein-related case against JPMorgan Chase for \$75 million, it listed the following individuals as people Epstein referred as clients to the bank: Microsoft co-founder and billionaire Bill Gates; Google co-founder and billionaire Sergey Brin; the Sultan of Dubai, Sultan Ahmed bin Sulayem; media and real estate billionaire Mort Zuckerman; and numerous others.

Epstein's victims charged in their lawsuit that JPMorgan Chase had, for more than a decade, provided Epstein with cozy banking services, which included sluicing to him millions of dollars in hard cash from his accounts, sometimes as much as \$40,000 to \$80,000 a month. The bank failed to file the Suspicious Activity Reports (SARs) that it is legally required to file with the Financial Crimes Enforcement Network (FinCEN) for those payments in cash. Epstein's alleged quid pro quo with the bank included him referring valuable business deals and clients to JPMorgan Chase. These allegations were substantiated by 22 pages of internal bank emails released in the related case brought against the bank by the U.S. Virgin Islands.

A third Epstein-related case was brought against JPMorgan Chase in Rakoff's court by two public pension funds that owned shares of JPMorgan Chase. That lawsuit named Dimon as a defendant as well as current and former members of JPMorgan Chase's Board of Directors. It was brought by a prominent class action law firm on behalf of shareholders of the bank. The lawsuit's theory of the case was that specific members of the Board of JPMorgan Chase "put their heads in the sand" and ignored that the bank had become a cash conduit for Jeffrey Epstein's child sex trafficking ring because they were hoping that their own verifiable business ties to Epstein "would go unnoticed." (We might add an attendant thesis: that Dimon takes very good care of his Board in return for them taking very good care of him.)

Mainstream media ignored the allegations that members of the JPMorgan Chase Board of Directors had business ties with Epstein and Judge Rakoff wasted no time in dismissing the case on technical grounds. (This was not the first time that a major scandal involving JPMorgan Chase received a news blackout by mainstream media.)

The other Big Story is why after 18 years of police and FBI investigations of Epstein and his wide sex trafficking ring, the U.S. Department of Justice has brought criminal charges against *only two people*: Jeffrey Epstein and Ghislaine Maxwell.

There is also no indication, at present, that the Justice Department is preparing to bring a criminal case against JPMorgan Chase, despite its recidivist history of felony charges (including two felony counts for money laundering) and a former FBI agent's statement on

how the bank “impeded” a criminal investigation of Epstein. (See: New Court Documents Suggest the Justice Department Under Four Presidents Covered Up Jeffrey Epstein’s Money Laundering at JPMorgan Chase.)

Tingo Group Founder Hit by Hindenburg Now Charged Criminally (1)

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Securities Law

Jan. 2, 2024, 1:42 PM PST

Ava Benny-Morrison

Bloomberg News

The founder of financial technology company Tingo Group was charged with securities fraud in New York, accused of orchestrating a massive scheme to inflate the company's finances.

Federal prosecutors said Mmobuosi Odogwu Banye, also known as **Dozy Mmobuosi**, artificially boosted financial statements to make Tingo and its subsidiaries appear cash-rich. He allegedly directed an employee to give false bank statements to Nasdaq to list Tingo Mobile shares on the exchange in 2020 and then generated millions of dollars in profit by selling shares at inflated prices, the US claimed.

"With this indictment Mmobuosi's alleged deceitful scheme comes to an end," Southern District of New York US Attorney **Damian Williams** said Tuesday in a statement. Mmobuosi, who is from Nigeria, is still at large.

Mmobuosi, who is also Tingo's former chief executive officer, faces three charges including making false filings with the US Securities and Exchange Commission. Tuesday's indictment comes two weeks after the SEC sued Mmobuosi, 45, and Tingo Group in December for orchestrating a fraud of "staggering" scope.

Read More: SEC Claims 'Staggering' Fraud by Firm Hindenburg Called Out

According to the SEC's claims, Tingo reported a cash balance of \$461.7 million in March when legitimate bank records showed less than \$50.

Short seller Hindenburg Research claimed last June that Tingo was built on fraud, causing the company's share price to plummet by 48%. Mmobuosi — who for a time was seen as a potential buyer of English football club Sheffield United — allegedly used the his illicit profits to buy luxury cars and travel on private jets, the SEC suit alleged.

(Adds details from indictment and background)

To contact the reporter on this story:

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Softbank Vision Fund

SoftBank's Gen Z social media bust: was IRL the next Facebook or a fraud?

Japanese group claims it was duped, founder says he was a scapegoat and ex-employees say there were problems from the start



Abraham Shafi, the founder of IRL © FT montage/Bloomberg

Joe Miller in New York and **David Keohane** in Tokyo YESTERDAY



In March 2022, as the sun set on a beachside stage in Maui, a rising star at SoftBank Vision Fund lavished praise on the leadership of a social media app the group had backed to become the next Facebook, and valued at more than \$1bn.

The \$150mn [SoftBank](#) had ploughed into IRL, the fund's Serena Dayal said, was among the "fastest cheques" ever written by the Japanese conglomerate, according to two employees flown in for the company retreat. But even as they listened to the speech, several former staffers who spoke to the Financial Times said they were beginning to suspect the platform was a fraud.

Despite claims from IRL's management that it had been downloaded by a quarter of US teenagers, "we had never heard of anyone using this app", one said. "We talked to our friends and no one had ever used it," they added. "We started asking more questions, paying closer attention."

Fifteen months later, IRL, online slang for “in real life”, was quietly shuttered by investors, who said they had found evidence that almost all of its purported 20mn users were fake. The start-up’s collapse is now the subject of two competing lawsuits between IRL’s founders and funders.

Unlike the deal SoftBank did with office space company WeWork, whose sky-high valuation withered under Wall Street’s scrutiny, SoftBank contends that IRL was a “sophisticated, years long” fraud — a “tightly guarded” scheme.

But its founder, a tousle-haired entrepreneur with a penchant for inspirational quotes named Abraham Shafi, maintains that in seeking a “scapegoat”, SoftBank relied on inconclusive data to shut down the site prematurely in order to avoid further embarrassment and recoup its remaining cash.

The acrimonious battle has raised fresh questions about the adequacy of SoftBank’s due diligence in the years after it had been hoodwinked into multibillion-dollar losses by WeWork’s magnetic founder.

Five former IRL employees, who spoke to the FT on the condition of anonymity, said they were able to find ample evidence of bots proliferating across the site, and raised their concerns soon after the Hawaii get-together.

One former employee said they believed SoftBank had been too willing to be persuaded by the “very charismatic” and “very eloquent” Shafi. “He did remind a lot of us of [WeWork’s] Adam Neumann,” they said. “You could see why [SoftBank chief executive [Masayoshi Son](#)] was willing to invest in him.”

Launched in 2018, IRL marketed itself as a more “intimate” group messaging platform for a generation tired of the “noise” on older [social media](#) networks.

Shafi, its founder, wooed a series of smaller Silicon Valley investors, before winning the backing of SoftBank, a behemoth of the venture capital universe.

In 2021, SoftBank’s Son was so taken by the pitch for the Gen Z app that he “wanted to meet within 48 hours and offered a \$500mn investment”, Shafi has claimed — five times what the founder had suggested. (People close to the company said they had no recollection of Son saying this, and Son may have made the comment in jest.)

But problems were apparent from the start, some former employees said. For instance, the events app would experience frequent outages, during which it would go dark for several hours at a time, before users came flooding back.

A former employee's cursory examination of several of IRL's largest groups, including those supposedly chock-full of American sports fans, showed that a significant number of the messages were one-word greetings or banalities, suggesting — they claimed — that they were written by bots.

Another staffer's analysis of millions of images ostensibly exchanged by users showed they were actually tens of thousands of identical stock photos. And yet another employee noticed during one outage that traffic from Android devices had dropped precipitously, while Apple devices remained online — an anomaly they claimed would not be expected to occur if the shutdown affected a random selection of genuine users, with various devices.

Others within the company said there were benign technical explanations for such anomalies. People close to former IRL executives contend that outages were dealt with quickly, and that the one-word messages were based on a data set that disproportionately captured the first or last line in more substantial chats. They add the company kicked millions of bots off the platform.

In May 2022, yet another former staffer found that almost all users in the US had suddenly disappeared, only for millions of new users to soon appear in South American countries. The most likely explanation, they proffered, was that these were malfunctioning bots. People close to former IRL executives claim the anomaly was investigated and thought to be caused by defective code.

The former staffers said they were fobbed off when they raised concerns with managers. One, according to SoftBank's lawsuit, was fired soon after highlighting the issue. People close to former IRL executives say two town hall meetings were held to discuss bot concerns.

Shafi, meanwhile, was telling the media that IRL's mission was to help “everyone live their best life”, and to [help “evolve humanity”](#). It was not the first social media venture for the San-Francisco born entrepreneur, who had founded another app, Gather, which sought to help friends plan social events. Shafi apologised after Gather was criticised for allegedly spamming potential users' mobile phones with text messages urging them to sign up.

There were other warning signs, according to former staffers, including the fact that IRL was paying inflated salaries to software developers and other employees, and that many of the senior managers were closely related to Shafi. As well as the Hawaii event, for which some employees were brought in by private plane and which was held at a luxury resort, IRL spent liberally on another company event near Mont Blanc.

Things began to fall apart rapidly at IRL after a report by news site The Information cast doubt on its user base in May 2022. The Securities and Exchange Commission began to look into the company soon after, and in August issued a subpoena seeking information on its internal statistics.

In 2023, IRL's board, which included SoftBank's Dayal, hired a relatively obscure company called Keystone to audit the start-up's user base, which found "clear signs of bot activity" and concluded that fewer than 5 per cent of users after June 2022 were actual human beings. IRL was closed down soon after.

SoftBank sued Shafi and some of his relatives who worked at IRL in July, demanding the return of its \$150mn as well as punitive damages. The lawsuit accuses them of "an elaborate scheme to defraud investors" and paying tens of thousands of dollars "to proxy services to enable an army of bots".

The company defended its "robust due diligence process" in the lawsuit, alleging Shafi and his co-defendants had assured their venture-capital backers that no active IRL user "was generated by any click farm".

Shafi and his team have fired back by accusing SoftBank and its co-investors of perpetuating a "flagrant, outrageous lie" about IRL, in order to recover the \$40mn cash the company still had on hand.

They have countersued to recover the "lost value" in the start-up, and Shafi is seeking damages for alleged defamation.

The founders' complaint claims a prior report in 2021, and another completed in April 2023, found there to be many more real users, that IRL had implemented measures to help identify and remove bots, and that it suffered a user exodus only after a series of much more severe outages under a new CEO brought in to replace Shafi just a few weeks before IRL was hastily shut down.

They said there were at least 17mn unique sign-ins to IRL in April 2023 and allege SoftBank closed the start-up as its “poor investment record” created “a strong reputational incentive . . . to avoid any further embarrassment”.

SoftBank declined to comment as did a representative for IRL, which remains incorporated in Delaware for legal reasons. Stephen Shackelford, a lawyer for the Shafi plaintiffs, said that “instead of supporting IRL through challenging times, [SoftBank and its co-investors] destroyed the company and the reputations of the founders and employees who devoted years to building it”.

The SEC has not yet brought any legal actions against IRL, nor have prosecutors at the Department of Justice, who have interviewed former IRL employees. The DoJ declined to comment. The SEC said it would not comment on “the existence or non-existence of a possible investigation”.

Dayal remains at SoftBank, where she helped fund Picsart, a photo and video editing tool that is capitalising on the boom in artificial intelligence.

Former employees of IRL — some of whom claimed they had initially struggled to find work after being tainted by their association with the tech group — said they originally joined because they were reassured by a supposedly sophisticated investor like SoftBank’s seal of approval.

“I wouldn’t have entertained an offer with the company had it not been backed by some of the biggest names [in Silicon Valley],” said one. “It lent legitimacy.”

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J&J Investors Score Class Cert. In Talc Concealment Suit

By **Katryna Perera**

Law360 (January 2, 2024, 3:29 PM EST) -- A New Jersey federal judge has certified a class of Johnson & Johnson investors who claim the company artificially inflated its stock price by failing to disclose cancer risks associated with its talcum powder products, saying the group has met the standard for certification.

U.S. District Judge Zahid N. Quraishi issued an order and opinion Friday certifying a class including all individuals who purchased or acquired J&J securities between Feb. 22, 2013, and Dec. 13, 2018. The judge also named lead plaintiff San Diego County Employees Retirement Association as class representative and Robbins Geller Rudman & Dowd LLP as class counsel.

The judge thereby rejected an attempt by J&J to have the certification motion denied. Among other things, the company argued that the investors' claims related to corrective disclosures that occurred on six different dates in 2017 and 2018 are inadequate because those disclosures did not contain any "new" information that was not already publicly available, according to the opinion.

J&J also argued the class period should not begin in 2013 because the court previously dismissed alleged misstatements that occurred in 2013 and 2015 as too general, saying they did not specifically address the company's talcum products or J&J's quality assurance process and procedures.

The defendants further argued there was no stock price impact related to disclosures that occurred in 2018.

The investors shot back, saying J&J failed to prove a "total absence" of stock price impact that would prevent certification, Judge Quraishi noted. The investors also said J&J's arguments present a "premature merits-based defense that cannot preclude certification, because it goes to whether entire claims should be dismissed, not whether individual reliance issues will predominate."

Judge Quraishi found the investor group met all the basic requirements for certification, such as numerosity and typicality. He added that while J&J's various arguments against certification point to the possibility that the alleged disclosures did not impact the company's stock price, it is still not enough to completely "rebut the presumption of price impact by a preponderance of the evidence."

"We respectfully disagree with and intend to appeal the decision granting class status. Plaintiffs' claims are premised on articles republishing the mass tort plaintiff bar's unproven and disputed allegations, which are insufficient to sustain a securities class action," Erik Haas, worldwide vice president of litigation for J&J, said in a statement to Law360 Tuesday. "Johnson & Johnson made truthful and fulsome statements regarding the safety of its talc powder products and will continue to vigorously litigate cases that challenge those statements."

Counsel for the investors did not immediately respond to requests for comment Tuesday.

Judge Quraishi's decision comes after another New Jersey federal judge **denied in December** a renewed effort by J&J to subpoena communications between nonparty law firms and media outlets about the company's talcum powder products.

U.S. District Judge Tonianne J. Bongiovanni rejected J&J's second attempt to subpoena law firms Levy Konigsberg LLP, Hobson & Bradley and The Smith Law Firm PLLC, saying the request is time-barred

and failed to show the court erred in denying the initial discovery motion.

The class action alleges J&J concealed its knowledge of asbestos in its baby powder products to keep up stock prices. Those prices allegedly cratered when news outlets, including Reuters, published articles exposing the company's knowledge of the presence of asbestos. The suit also references a 2018 Law360 article quoting one of the attorneys.

Since 2021, J&J has sought communications between media outlets and the three law firms, as well as a plaintiffs expert and two of the firms' managing partners, in an attempt to prove the news reports were rehashes of public information which had already been factored into the stock price.

The investor plaintiffs are represented by James E. Cecchi of Carella Byrne Cecchi Olstein Brody & Agnello PC and Darren J. Robbins, Tor Gronborg, Robert R. Henssler Jr., Nathan R. Lindell, Hillary B. Stakem, Matthew J. Balotta and Joseph J. Tull of Robbins Geller Rudman & Dowd LLP.

Johnson & Johnson is represented by Jack N. Frost Jr. of Faegre Drinker Biddle & Reath LLP and Walter C. Carlson, Kristen R. Seeger, John M. Skakun III, Christopher Y. Lee, Neil H. Conrad and Abigail B. Molitor of Sidley Austin LLP.

The case is Frank Hall v. Johnson & Johnson et al., case number 3:18-cv-01833, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Henrik Nilsson. Editing by Caitlin Wolper.

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2nd Circ. Stubs Out Philip Morris E-Cig Investor Suit

By **Sarah Jarvis**

Law360 (January 2, 2024, 8:00 PM EST) -- The Second Circuit has denied a bid from Philip Morris International investors to revive their suit over e-cigarette sales, finding in an opinion that answered questions of first impression that a lower court was right to toss a proposed class action alleging the tobacco giant lied about sales and regulation efforts for its IQOS electronic device.

Circuit Judge Richard J. Sullivan, writing for the panel, said in an **opinion** published on Dec. 26 that arguments brought by lead plaintiffs Union Asset Management Holding AG and Teamsters Local 710 Pension Fund boil down to an allegation that Philip Morris engaged in "bad science."

The panel said some scientists share the investors' view that the results of studies on the IQOS electronic device — which heats but does not burn tobacco — were not compelling enough or lacked sound methodology. But the Food and Drug Administration scientists who ultimately approved Philip Morris' application for a marketing order "are not among them."

"In a consumer-protection case, a mass tort case, or an administrative-law challenge to the FDA's orders, the views of those FDA scientists might be open to challenge," Judge Sullivan wrote. "But in this securities-fraud case, they are conclusive."

The appellate court's opinion affirms a decision by the Southern District of New York to **dismiss the case** against Philip Morris and several current and former executives. U.S. District Judge Ronnie Abrams said in September 2020 that the shareholders had not shown sufficient grounds for **reconsidering** her February dismissal of the suit, in which she found the company did not mislead shareholders with statements made in securities filings from 2015 to 2017.

Judge Abrams had found in that prior decision that some of Phillip Morris' statements about its IQOS electronic device were true at the time they were made. Other statements, such as the tobacco giant's claims that it was conducting "extensive and rigorous scientific studies," were too general for a reasonable investor to rely on, the judge said.

The U.S. Food and Drug Administration **said in April 2019** that Philip Morris can sell its IQOS and Marlboro Heatstick devices in the U.S., although it does not mean they are safe or "FDA approved."

The investors filed suit in May 2019, claiming the company misled investors about the clinical trials it conducted in seeking FDA approval, as well as the effect the FDA's early rejection of the product had on its sales in Japan.

The shareholders alleged that Philip Morris' future depended on securing FDA approval to sell IQOS and market it as a product that is significantly safer than conventional cigarettes, the Second Circuit noted in last month's opinion.

According to the opinion, the FDA eventually found that while the company did not show that IQOS will significantly reduce harm and the risk of tobacco-related disease to individual tobacco users, the "dramatic changes in exposure relative to combusted cigarettes are reasonably likely to ... translate to lower risk of tobacco-related morbidity and mortality."

The panel found that the challenged statements in the shareholders' suit — which were allegedly intended to assure wary investors that clinical trials could persuade the FDA to grant the approvals it sought — were either immaterial or ultimately proved to be true by the FDA's eventual rulings.

The panel also answered two questions of first impression in the Second Circuit, per the opinion. First, the court found that securities-fraud defendants stating "in general and inherently subjective terms" that their scientific studies complied with recognized methodology standards constitute statements of opinion, not facts.

Secondly, the panel said that statements from those defendants interpreting scientific data that is ultimately endorsed by the FDA are, per se, reasonable as a matter of law.

A Philip Morris International spokesperson said in a statement, "we are pleased with the Second Circuit's decision affirming dismissal of the case, and we appreciate the court's careful consideration of the issues presented."

Counsel for the investors declined to comment. Counsel for Philip Morris was not immediately available to comment Tuesday.

Judges Amalya L. Kearse, Barrington D. Parker and Richard J. Sullivan sat on the panel.

The investors are represented by Andrew S. Love, Samuel H. Rudman, David A. Rosenfeld, Robert D. Gerson and Mark T. Millkey of Robbins Geller Rudman & Dowd LLP and Jeremy A. Lieberman, Emma Gilmore and Brian Calandra of Pomerantz LLP.

Philip Morris is represented by James E. Brandt, Kevin M. McDonough, Jooyoung Yeu, Andrew B. Clubok, Kenneth J. Parsigian, Matthew Valenti and Brent Murphy.

The case is In re: Philip Morris International Inc. Securities Litigation, case number 21-2546, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Vaqas Asghar.

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Kessler Beats 2 Firms To Lead Wells Fargo Gov't Fines Suit

By **Bonnie Eslinger**

Law360 (January 2, 2024, 9:56 PM EST) -- Kessler Topaz Meltzer & Check LLP on Tuesday beat out two other firms when a California federal judge appointed it as lead counsel and consolidated litigation for a proposed class of shareholders alleging Wells Fargo executives harmed the company and its investors by failing to comply with regulatory consent orders.

U.S. District Judge Jon S. Tigar said while each proposed lead plaintiff and lead counsel would adequately represent the shareholders' interests, the complaint filed by Kessler Topaz on behalf of the City of Hollywood Firefighters' Pension System was set apart from the others because its actionable period began earlier.

The pension system for Hollywood, Florida, firefighters slapped Wells Fargo & Co. with its Section 220 demand — a books and record request often used by stockholders in preparation for litigation — in September 2021. As a result, under the law, they can assert claims based on conduct dating back to September 2018, the judge said.

In contrast, the Fire and Police Pension Association of Colorado, the lead plaintiff for one of the other two suits, issued its books and records demand in March 2023, so it can only assert claims based only on conduct dating back to March 2020.

The lead plaintiffs for the third suit, trustees for Sheet Metal Workers Local 33 (Cleveland District) Pension Fund, did not make a Section 220 demand, the judge noted, so their claims are based only on conduct dating back to July 2020, three years prior to the filing of the complaint.

The actionable period for the Hollywood Firefighter's is 18 months and 21 months longer, respectively, than the suits from the two other plaintiffs, the judge added.

The Hollywood Firefighters argued that the extended period is critical because Wells Fargo's misconduct between September 2018 and March 2020 informed the **\$250 million fine** imposed by the U.S. Treasury Department's Office of the Comptroller of the Currency in September 2021 as well as the **\$3.7 billion** the U.S. Consumer Financial Protection Bureau ordered Wells Fargo Bank to pay in December 2022 for charging illegal fees and interest on auto and mortgage loans.

The Hollywood Firefighters' suit alleges that during this period, the bank's improper focus on earnings concerns and the asset cap imposed by the Federal Reserve and the board's "unwillingness to hold senior management responsible" resulted in years' worth of noncompliance with several consent orders "as well as additional violations of federal law."

The litigation from the Hollywood Firefighters also claims that from late 2018 through 2022, the board "ignored numerous red flags warning that the bank's compliance efforts were insufficient and could invite further fines and sanctions from regulators."

In his order, Judge Tigar agreed that allegations from the earlier period could prove key to issues of liability in the litigation as well as damages.

The Fire and Police Pension Association of Colorado argues in a filing to the court that even though it commenced its 220 investigation later than the Hollywood Firefighters, its lawsuit still has allegations of red flags prior to March 2020 that the court could still consider.

While pre-limitations period actions can be relevant under certain circumstances, liability claims still turn on what the officers and directors did during the actionable period, Judge Tigar said.

"The Court does not find other considerations raised by the parties to be convincing," he added.

He noted that the Fire and Police Pension Association of Colorado complaint asserts a claim under Section 14(a) of the Securities Exchange Act not found in the other complaints, but said that could easily be incorporated into a consolidated amended complaint.

"The Court appoints City of Hollywood Firefighters' Pension System as lead plaintiff, and appoints Kessler Topaz Meltzer & Check, LLP as lead counsel," the judge said in his conclusion.

In addition, he order the Hollywood Firefighters and their counsel to either file a consolidated complaint or "designate a previously-filed complaint as the operative complaint" within 60 days.

The derivative suit filed by the Hollywood Firefighters seeks unspecified damages on behalf of the company against nine Wells Fargo board members, including its CEO Charles Scharf, over what one shareholder claims is a pattern of illegal and fraudulent conduct dating back to at least 2002.

Filed in May 2023, the Hollywood Firefighters' complaint points to a series of settlements made with regulators dating back to 2016 as well as its own investigation into Wells Fargo's books to come to the conclusion that the board failed "to fulfill its oversight and legal regulatory compliance responsibilities in the face of **numerous red flags**."

The October 2023 suit filed against Wells Fargo's brass by the Fire and Police Pension Association of Colorado accuses the executives of harming the company and its investors by treating regulatory consent orders over consumer abuses as just the **cost of doing business**.

The shareholder derivative action from the Sheet Metal Workers Local No. 33 contends that despite getting hit with nearly \$5 billion in fines, penalties and settlement payments, "Wells Fargo's lawless ways continue."

The bank in 2016 was hit with billions of dollars in fines and settlements after it created millions of deposit accounts for customers without their knowledge or consent. Following that scandal, in 2018, the Federal Reserve implemented a \$2 trillion **asset size cap** until the bank fixed "its widespread and pervasive problems."

Two months later, the CFPB and the OCC each entered into consent orders with Wells Fargo related to deceptive auto insurance practices and improperly charging "rate lock" extension fees on mortgages.

Then, in September 2021, the OCC imposed a \$250 million fine against the company over flaws in its home loan loss mitigation program and unsatisfactory remedial progress under the 2018 consent order.

The suit from the Hollywood Firefighters claims breach of fiduciary duty and violations of the Exchange Act. It seeks damages and restitution for Wells Fargo, and litigation costs and attorney fees for the FPPA. It also seeks to cancel the votes to reelect the directors in connection with annual shareholder meetings in 2020, 2021 and 2022, and an order that those defendants disgorge to Wells Fargo all compensation they received for service on the board following those elections.

A representative for Wells Fargo and counsel for the bank's Executive Chairman John Baker and other defendants declined to remark on the court's decision Tuesday. Counsel for the plaintiffs did not immediately respond to Law360's request for comment.

The FPPA is represented by Richard M. Heimann, Katherine Lubin Benson, Nicholas Diamand, Sean A. Petterson, Gabriel A. Panek and Margaret J. Mattes of Lieff Cabraser Heimann & Bernstein LLP.

The City of Hollywood Firefighters' Pension System is represented by Eric L. Zagar of Kessler Topaz Meltzer & Check LLP.

Thomas E. Martin is represented by Travis E. Downs III, Randall J. Baron, Benny C. Goodman III, Shawn A. Williams and Erik W. Luedeke of Robbins Geller Rudman & Dowd LLP.

John D. Baker and other defendants are represented by Alexander L. Cheney, Charles Dean Cording, Todd G. Cosenza and Michelle Anne Polizzano of Willkie Farr & Gallagher LLP.

Charles W. Scharf is represented by Jennifer Kennedy Park, Mark E. McDonald and Victor L. Hou of Cleary Gottlieb Steen & Hamilton LLP.

Wells Fargo and other defendants are represented by Brendan P. Cullen of Sullivan & Cromwell LLP.

The cases are Fire and Police Pension Association of Colorado v. John D. Baker II et al., case number 4:23-cv-05112, Thomas E. Martin et al. v. Steven D. Black et al., case number 4:23-cv-03564, and City of Hollywood Firefighters' Pension System v. Wells Fargo & Co. et al., case number 4:23-cv-02445, all in the U.S. District Court for the Northern District of California.

--Additional reporting by Jon Hill, Hailey Konnath, Lauren Berg and Jessica Corso. Editing by Kristen Becker.

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Myovant, Sumitomo Beat Investor Suit Over Skadden Advice

By **Katryna Perera**

Law360 (January 2, 2024, 10:22 PM EST) -- Sumitomo Pharma America Inc. and Myovant Sciences Ltd. have escaped for good a proposed class action alleging the companies' merger was undervalued because the lawyers from Skadden Arps Slate Meagher & Flom LLP who helped negotiate the deal had undisclosed conflicts of interest.

U.S. District Judge Jed S. Rakoff issued an **opinion and order** on Thursday saying the amended complaint, filed in October, fails to plausibly allege any false or misleading statements or omissions made by the executives.

The suit does not name Skadden or any of its lawyers as defendants, but instead names Myovant, its CEO David Marek, its general counsel Matthew Lang, several board members and Sumitomo Pharma.

The defendants **moved for dismissal** in November, saying the amended complaint failed to identify any alleged misstatements related to Myovant's financial performance, the valuations underlying the merger, or the independence of the financial adviser that guided the negotiations.

Instead, the alleged misstatements were only about publicly disclosed, unrelated transactions on which Skadden advised, the defendants argued. And these can't be considered conflicts because, in these transactions, Skadden only represented "legally distinct entities" of Sumitovant Biopharma Ltd. — a wholly owned subsidiary of Sumitomo Pharma — such as Sumitomo Mitsui Banking Corp., SMBC Nikko Securities Inc. and Sumitomo Mitsui Trust Bank Ltd., among others.

Judge Rakoff agreed, saying the amended complaint does not claim that Skadden ever represented Sumitovant Biopharma or Sumitomo Pharma, the entities most directly related to the merger.

He noted that the Second Circuit has held that corporate affiliates that are not "operationally integrated" with a parent company should not be wrapped up into a single entity when it comes to conflict of interest issues.

In the amended complaint, no operational or ownership connection is established between Sumitovant or any of the Sumitomo Group entities that Skadden represented, the opinion states. Additionally, the entities referenced in the amended complaint own minor holdings in a completely different Sumitomo Group company, Judge Rakoff noted, which is insufficient to establish a conflict.

The facts and narrative included in the amended complaint about the merger special committee's negotiations also "throw cold water" on plaintiff Joseph Zappia's claims that Skadden, because of its alleged conflicts, caused Myovant's shareholders to approve a deal that wasn't in their or the company's best financial interest, the opinion states.

The amended complaint details, among other things, how the special committee engaged in a series of negotiations that consistently raised the bid price, the judge said. He added that Zappia is "merely speculating about Skadden's motives and actions rather than making a plausible allegation based on information and belief."

Judge Rakoff also said that even if the court were to accept the assertion that Skadden had a conflict, the suit's claims would still fail because a reasonable investor would not have found the merger proxy statement to be materially misleading in light of other information that was publicly available at the

time.

"The amended complaint nowhere alleges that Skadden's representation of other Sumitomo Group entities was kept secret or was unknown to the public at the time of the proxy statement. Indeed, Zappia was himself aware of that information — and was able to allege it in the amended complaint — precisely because it was reasonably available to the public," the opinion states.

Finally, Judge Rakoff said Zappia did not sufficiently allege negligence on the part of the individual defendants.

He called the amended complaint's claim that the defendants were negligent in filing the merger proxy statement a "threadbare recital of an essential element of a Rule 14a-9 claim," which does not suffice.

Counsel for the defendants declined to comment on Tuesday, and counsel for Zappia did not immediately respond to requests for comment.

The suit, dismissed with prejudice, was **initiated** in September on behalf of a proposed class of individuals and entities that were Myovant common shareholders as of the close of business on Jan. 20, 2023, which, according to the complaint, was the record date for determining which shareholders were entitled to vote on the merger.

Myovant is a biopharmaceutical company that develops and commercializes drugs to treat prostate cancer, uterine fibroids and endometriosis. In October 2022, it and Sumitomo Pharma's wholly owned subsidiary, Sumitovant Biopharma, announced that the parties had entered a merger agreement, in a deal with an enterprise valuation of about **\$2.9 billion**, under which Sumitovant would acquire all of Myovant's outstanding common shares for \$27 per share in cash.

Myovant's board retained Skadden to advise the special committee negotiating the merger. Zappia claimed that the proxy statement filed with the U.S. Securities and Exchange Commission did not disclose the firm's alleged conflicts and misled most of Myovant's minority shareholders into voting to approve the merger at a price "less than Myovant's full and fair value."

Zappia and the proposed class are represented by Joshua E. Fruchter of Wohl & Fruchter LLP, and Joshua M. Rubin and Michael A. Rogovin of Weiss Law LLP.

The defendants are represented by David Yury Livshiz, Elena Hadjimichael, Boris Feldman, Peter J. Linken and Nathan A. Hembree of Freshfields Bruckhaus Deringer LLP.

The case is Zappia v. Myovant Sciences Ltd. et al., case number 1:23-cv-08097, in the U.S. District Court for the Southern District of New York.

--Editing by Adam LoBelia.

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Space Broadband SPAC Investors Launch Suit In Chancery

By **Jeff Montgomery**

Law360 (January 2, 2024, 9:54 PM EST) -- Investors in a special purpose acquisition company that took satellite-to-smartphone venture AST SpaceMobile public in April 2021 have sued organizers of the deal in Delaware's Court of Chancery, pointing to a stock plunge and alleging disclosure failures and unfair actions skewed to insiders.

The six-count suit, filed under seal Dec. 27 and made public on Tuesday, accused architects of blank-check company New Providence Acquisition Corp. of failing to disclose delays and downsides in ASTS' plans to launch a fleet of satellites to create a new, space-based, global broadband cellular network.

Shares at closing were valued at \$11.39, compared with the \$10.10 that investors could have claimed if they abandoned the deal pre-closing. But stock prices slumped to \$7.22 per share within weeks, and were listed at \$4.85 per share Tuesday afternoon.

"Unfortunately for NPA's public stockholders, NPA's directors caused the proxy and other NPA [U.S. Securities and Exchange Commission] filings to materially mislead" on key topics, including launch and growth timetables, "thereby deceiving them out of exercising a \$10.10 per-share pre-closing exit right," the complaint said.

Blank-check companies, also called SPACS, are shell entities that raise money through an initial public offering for future acquisitions. Their popularity for some going-public company deals has spun off a series of suits alleging the transactions include terms that benefit early investors while keeping public shareholders uninformed about risks.

NPA had indicated that investors could redeem their shares before its merger with ASTS for \$10.10 per share, but in reality, the venture's resources amounted to only \$6.25 per share.

Although few investors redeemed their shares and walked away, those who remained soon learned that ASTS' public outlooks were well off target. Post-closing company disclosures showed that the launch schedule for its BlueWalker 3 test satellite was "wildly inaccurate," according to the complaint.

Documents provided during an investigation for stockholders showed "no due diligence regarding BW3," the suit said, despite multiple opportunities over several months for deal organizers to examine and disclose plans and prospects.

"A reasonable stockholder would find it important that the director defendants failed to review any due diligence regarding BW3," the suit said. Instead, the SPAC allegedly told investors that BW3 satellite production was fast-tracked, claiming that a test orbiter was to be launched in 2021, and that commercial-version launches would occur in 2022 or early 2023.

"The BW3 timeline was quickly proven false and misleading," and failed to disclose a need for months of post-launch testing, the suit said.

Prior to closing, NPA reported that the combined company would have an estimated post-transaction enterprise value of \$1.4 billion. The disclosures cited up to \$662 million in gross proceeds, including \$232 million from NPA and \$232 million from a public investment in private equity agreement.

The PIPE was described as including investments from Rakuten, Vodafone, American Tower, UBS

O'Connor and "a broad base of financial institutions."

Also materially misleading, the suit said, were plans and timetables for deployment of commercial satellites.

"The proxy represented that it sought to provide satellite coverage in 49 countries along the equator with 20 satellites by early 2023. This was wildly unrealistic. In fact, AST is still testing the prototype BW3 in late 2023," class attorneys said in the complaint.

Earnings before income taxes, depreciation and amortization were estimated at \$1 billion by 2024 in the run-up to the merger.

In mid-November, ASTS SpaceMobile Chairman and CEO Abel Avellan — one of those named in the Chancery suit — reported in an SEC filing that "the manufacturing of our first five commercial satellites is at full speed at our Texas facilities, and we are looking forward to our expected launch in [quarter one] 2024."

Initial commercial service for both mobile network operators and governmental entities, Avellan said, was projected to begin the same year. The company reported that its test-bed BW3 had made its first-ever connection to an "everyday smartphone" only in the third quarter of 2023.

In the same report, the company said it was "seeking to close and fund with multiple strategic partners in November or December 2023," but also said that "there can be no assurance that we will enter into any such transactions on acceptable terms, on this timing or at all."

Alleged in the suit are breach of fiduciary duty claims against the SPAC's controllers and directors. Unjust enrichment and aiding and abetting breach claims were lodged against ASTS for efforts to discourage redemptions through a "materially deficient proxy" in order to preserve cash for the business.

Separate aiding and abetting and unjust enrichment claims were lodged against Avellan.

ASTS did not immediately respond to a request for comment Tuesday.

Lead stockholder Earnest Taylor and the proposed class are represented by Stephen E. Jenkins, Richard D. Heins and Tiffany Geyer Lydon of Ashby & Geddes PA, Donald J. Enright and Noah R. Gemma of Levi & Korsinsky LLP, and D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC.

The case is Earnest Taylor v. Alexander Coleman et al., case number 2023-1292, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.



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9th Circ. Won't Revive Walgreens Consumer's ADA Suit

By **Henrik Nilsson**

Law360 (January 2, 2024, 10:00 PM EST) -- The Ninth Circuit on Tuesday upheld a lower court's order dismissing a proposed class action accusing Walgreens of discriminating against people with disabilities by unfairly restricting access to opioids, saying the pharmacy's opioid policy applies regardless of disability status.

The three-judge panel agreed with California federal judge Charles R. Breyer that Susan Smith's proposed class action under the Americans with Disabilities Act failed to state a claim for facial discrimination and disparate impact. The judges found that Walgreens' policy of instructing its pharmacists to avoid filling high-dose and long-duration opioid prescriptions does not specifically target people with disabilities.

"Any customer with a prescription exceeding the dose-and-duration threshold might encounter burdens in filling that prescription," the opinion stated. "Thus, Walgreens' alleged policy does not deny people with a disability meaningful access to a service that remains open and easily accessible to others."

Smith filed her third amended complaint in November 2021, alleging Walgreens adopted policies in 2016 aimed at protecting itself from suits filed by governmental agencies and victims of opioid abuse for promoting irresponsible use of opioid treatments. Smith alleged that the policies have gone too far and restrict access for patients with valid prescriptions for medical treatment of their conditions.

Walgreens' policies are based on the Centers for Disease Control guidelines. The policy recommends limits on daily dosages as well as the duration of the prescription, according to Smith.

However, the CDC targeted clinicians, not pharmacists, which has resulted in Walgreens interfering with the doctor-patient relationship, causing Smith and other putative class members to be profiled and subjected to discriminatory practices, she alleged.

According to the suit, Walgreens' pharmacists are discouraged from straying from the guidelines for fear of getting fired.

Judge Breyer dismissed the complaint in September 2022, which prompted the underlying appeal.

The panel on Tuesday found Judge Breyer correctly found that Smith failed to state a claim for facial discrimination because she did not show that the guidelines are a proxy for disability and that the policies specifically targeted people with disabilities, according to the opinion.

Smith alleged that Walgreens knew its policy would negatively impact people with disabilities, pointing to public complaints and the CDC stating that the guidelines were intended for clinicians, not pharmacists. However, the panel said these allegations are "too general to support an inference that Walgreens knew its policy would specifically affect people with disabilities."

Smith's claim that Walgreens failed to provide meaningful accommodations failed for the same reason as her disparate impact claim, the panel wrote.

"Every customer that has an opioid prescription exceeding the CDC dose-and-duration threshold might encounter burdens in filling their prescription," the opinion stated. "Thus, both people with

disabilities and people without disabilities have a 'like experience' under Walgreens' alleged policy and an accommodation is not necessary."

Counsel and representatives for the parties did not immediately return a request for comment on Tuesday.

U.S. Circuit Judges Sidney R. Thomas, Danielle J. Forrest and Salvador Mendoza Jr. sat on the panel for the Ninth Circuit.

Smith is represented by Thomas D. Haklar and Peggy J. Real of the Law Office of Thomas D. Haklar, Robert L. Redfearn Jr. of Simon Peragine Smith & Redfearn LLP, Scott D. Hirsch of Scott Hirsch Law Group, Mark Kepple of Bailey & Wyant PLLC, Joseph Bruno of Bruno & Bruno, and by Ted Huge of Harris & Huge LLC.

Walgreens is represented by Theodore J. Boutrous Jr. and Lauren M. Blas of Gibson Dunn & Crutcher LLP.

The case is Susan Smith v. Walgreens Boots Alliance Inc. et al., case number 22-16468, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Vaqas Asghar.

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Blue Cross Slashed Benefits, But Not Premiums, Suit Says

By **Danielle Ferguson**

Law360 (January 2, 2024, 5:30 PM EST) -- A putative class action in Illinois state court has alleged Blue Cross Blue Shield and some of its subsidiaries reduced death benefits for life insurance customers when they turned 65 and again at 70, and then refused to refund the involuntary overpayments.

P&G Keene Electric Rebuilders alleged in a Friday complaint that Blue Cross Blue Shield Association, Health Care Service Corp. and Dearborn Life Insurance Co., an independent licensee of Blue Cross Blue Shield, dropped benefits but didn't drop premium costs, without notifying customers.

P&G Keene has had a contract with Dearborn to provide life insurance for its employees for "many years," the electrical rebuilding company said. In December 2022, a chief financial officer and shareholder of P&G Keene discovered beneficiaries of those over 65 did not receive a full benefit when the insured died, even though P&G Keene had been paying full price for their life insurance premiums, according to the complaint.

The company alleged Dearborn reduced the death benefit of life insurance customers to 65% of the policy value at age 65 and to 50% at age 70, without reducing the premium, since at least 2017. Dearborn would not pay a refund, P&G Keene said.

According to the complaint, Blue Cross Blue Shield of Illinois, on behalf of Dearborn, said in a February 2023 email to P&G Keene's insurance agent that the insurer could give a credit of one year of premium overpaid.

P&G Keene brought claims on behalf of itself and a proposed class asking for the court to declare that Dearborn and Blue Cross's refusal to refund overpayments is illegal under Illinois law, that the insurers breached the contract by refusing to refund the overpaid premiums and that the insurers were unjustly enriched by the involuntary overpayments. P&G Keene also brought claim alleging the companies violated the Illinois Consumer Fraud and Deceptive Business Practices Act by deceiving customers.

A spokesperson for BCBS declined to comment Tuesday.

Representatives for P&G Keene did not immediately respond to requests for comment Tuesday.

P&G Keene Electrical Rebuilders is represented by Paul A. Castiglione and Kasif Khowaja of The Khowaja Law Firm PLLC, James X. Bormes and Catherine Sons of the Law Office of James X. Bormes PC, and Elizabeth M. Al-Dajani and Karnig S. Kerkonian of Kerkonian Dajani LLP.

Counsel information for the insurers was not immediately available Tuesday.

The case is P&G Keene Electrical Rebuilders LLC v. Blue Cross Blue Shield Association et al., case number 2023CH10306, in Cook County Circuit Court.

--Editing by Alex Hubbard.



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Comcast Is Sued Over 35M Xfinity Customer Data Breach

By **Jared Foretek**

Law360 (January 2, 2024, 8:35 PM EST) -- Comcast customers whose personal information was compromised in an October data breach are bringing a class action against the company and its software provider, Citrix, alleging that the companies failed to adequately protect customer information or warn them of vulnerabilities.

The proposed class would include all customers whose data — including Social Security numbers — was breached in the attack, which took place between Oct. 16 and 19. The plaintiffs in the Dec. 26 complaint argue that lack of protections from Comcast and the Florida-based Citrix amounted to negligence.

"Defendants failed to adequately protect plaintiffs' and class members' [personally identifying information] — and failed to even encrypt or redact this highly sensitive information. This unencrypted, unredacted PII was compromised due to defendants' negligent and/or careless acts and omissions and their utter failure to protect ... customers' sensitive data," the complaint, filed in Florida federal court, reads. "Hackers targeted and obtained plaintiffs' and class members' PII because of its value in exploiting and stealing the identities of plaintiffs and class members. The present and continuing risk to victims of the Data Breach will remain for their respective lifetimes."

According to a Comcast filing with the office of Maine's attorney general, the total number of individuals affected by the breach could be as high as 35.9 million.

Citrix — a software provider for Comcast Xfinity — announced last month that it had detected the vulnerability in one of its products used by Xfinity that allowed unauthorized users to access Citrix's internal systems in October.

By November, the company determined that personal information had "likely" been acquired in the hack, and by Dec. 6, Citrix found that the information "included usernames and hashed passwords" for some customers. For others, though, more information was gained, including "names, contact information, last four digits of Social Security numbers, dates of birth and/or secret questions and answers," according to a notice to customers from Citrix.

But according to the suit, the company's disclosure amounted to "no real disclosure at all" as it failed to explain the root cause of the breach. And, the plaintiffs say, the breach could have been prevented by encrypting the files and servers holding the customer information.

They include negligence, breach of implied contract, unjust enrichment and breaches of state laws in Florida and New Jersey as claims in the complaint.

"Defendants had a duty to adopt reasonable measures to protect the PII of plaintiffs and class members from involuntary disclosure to third parties," the suit reads. "Moreover, Comcast had a duty to audit, monitor, and verify the integrity of its IT vendors and affiliates. Defendants have a legal duty to keep Comcast's customers PII safe and confidential."

Neither Comcast nor attorneys for the plaintiffs could immediately be reached by Law360.

The plaintiffs are represented by Jonathan B. Cohen of Milberg Coleman Bryson Phillips Grossman PLLC.

Citrix is represented by W. Kyle Tayman of Goodwin Procter LLP.

Counsel information for Comcast was not immediately available.

The case is Hammond et al. v. Citrix Systems Inc. et al., case number 0:23-cv-62409 in the U.S. District Court for the Southern District of Florida.

--Editing by Rich Mills.

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Lye Buyers Denied Class Cert. In \$861M Price-Fixing Fight

By **Dorothy Atkins**

Law360 (January 2, 2024, 9:27 PM EST) -- A New York federal judge refused to certify a proposed class of direct buyers accusing lye-makers of colluding to inflate the price of products containing the commonly used commodity chemical and costing them \$861 million in overcharge damages, finding individual issues predominate and damages can't be determined on a classwide basis.

In a redacted Dec. 28 order, U.S. District Judge Elizabeth A. Wolford found that six plaintiff companies that directly purchased lye — Miami Products & Chemical Co.; Amrex Chemical Co. Inc.; Main Pool and Chemical Co. Inc.; Midwest Renewable Energy LLC; Perry's Ice Cream Company Inc. and VanDeMark Chemical Inc. — cannot adequately represent the proposed class of direct purchasers.

The judge ruled the lead plaintiffs' claims are not typical of the proposed class, and the proposed class is not objectively ascertainable. She also held that individual issues predominate the proposed damages and defenses, particularly since the companies entered individual detailed and complex contracts with the defendant lye suppliers and the direct purchasers have "no common means of proving classwide antitrust impact."

"The complexity of the contractual pricing mechanisms used in the caustic soda industry makes it infeasible to accurately categorize the transactional data without reviewing the individual contracts," the order says.

The ruling is the latest development in sprawling **consolidated** antitrust litigation that landed on Judge Wolford's docket in 2019. The litigation asserts claims on behalf of direct and **indirect buyers** of lye, which is also known as caustic soda or sodium hydroxide, against six companies that produce up to 90% of lye made in the United States.

The commodity chemical is sold in solid or liquid form. Although caustic soda was traditionally used to make soap, and it's now used in a variety of industries, including in the production of paper, aluminum, textiles and certain chemicals.

The litigation generally alleges that the lye-makers — Occidental, Formosa Plastics Corp., Shintech Inc. and others — colluded to give lagging caustic soda prices a boost. With no demand increase on the horizon, the companies allegedly illegally concocted a plan to reduce the amount of lye on the market, raise prices and split customers, cutting noncompete agreements in violation of Section 1 of the Sherman Act, the litigation claims.

This was coordinated through "secret co-producer supply agreements," price index manipulation and the swapping of private business information, according to the suit.

During the proposed class period, which runs between Oct. 1, 2015, and Dec. 31, 2018, the total volume of commerce in the market for caustic soda in the U.S. accounted for by defendants was approximately \$9.81 billion, according to court documents.

In April 2022, the direct purchasers asked the judge to certify a class of individuals and entities that bought liquid forms or diaphragm grade caustic soda during the proposed class period, arguing in a heavily redacted motion that the alleged cartel illegally raised caustic soda prices by roughly 9.6%.

The direct purchasers argued common evidence will be used to determine whether the defendant companies' 14 price increase announcements, issued in close proximity over a three-year period, were the product of collusion.

To support the motion, the direct purchasers pointed to a report by their economics expert Russell L. Lamb, who is the president of the consulting firm Monument Economics Group. Lamb conducted an economic regression analysis that concluded putative class members incurred \$861 million in damages during the proposed class period due to the alleged collusion.

But the defendant companies fired back, offering testimony by their own economic expert, John Johnson, who is the CEO of Edgeworth Economics LLC. Johnson criticized Lamb's analysis, taking issue with multiple aspects and claiming it is fundamentally flawed.

For instance, Johnson said, Lamb's analysis doesn't identify the relevant transactions, relies on a classwide-average overcharge instead of a customer-specific average overcharge and fails to account for major world events that affected global supply of caustic soda and increased demand for U.S.-produced caustic soda, among other issues. Johnson also performed his own regression analyses, which found no statistically significant overcharge.

Both parties filed dueling motions to strike portions of their opponent's expert testimony; the court held a two-day evidentiary hearing on the motions in June and heard oral arguments in August before taking the motions under submission.

In her Dec. 28 order, Judge Wolford was persuaded by most of Johnson's critiques of Lamb's analysis, calling some of Lamb's opinions "internally inconsistent," and agreeing with Johnson that Lamb's methodology cannot accurately determine if a particular transaction falls within an exclusion to the class definition.

Ultimately, she concluded Lamb's regression analysis is "unsound and insufficient to serve as common proof of antitrust injury."

However, she also noted that even if Lamb's analysis were admissible, class certification still isn't warranted, so she denied the motion to strike Lamb's opinion as moot. She also denied the direct purchasers' request to strike Johnson's opinion, finding his explanation of his methodology "reasonable and persuasive."

Counsel and representatives for the parties didn't immediately respond to requests for comment Tuesday.

Days before Judge Wolford issued her ruling denying class certification, class counsel filed a motion seeking to preliminarily approve Shintech's \$12 million class action settlement with direct purchaser plaintiffs.

If the court approves Shintech's deal, along with Formosa's proposed \$7.5 million settlement and Westlake's \$19 million deal, the total amount recovered on behalf of the direct purchasers would come to \$38.5 million, leaving Olin and OxyChem as the only remaining defendants against the direct purchaser claims, according to the motion for preliminary approval.

The motion notes that class counsel would request no more than 30%, or roughly \$12.8 million from the total settlements, for attorney fees, and up to \$3.85 million in litigation costs.

As of Tuesday, a hearing on the motion had not yet been scheduled by the court.

The direct purchaser plaintiffs are represented by interim liaison counsel Marco Cercone, R. Anthony Rupp III and Arthur N. Bailey of Rupp Pfalzgraf LLC, interim co-lead class counsel Robert N. Kaplan and Elana Katcher of Kaplan Fox & Kilsheimer LLP and Solomon B. Cera and C. Andrew Dirksen of Cera LLP.

Olin and its subsidiary K.A. Steel Chemicals are represented by Paul C. Cuomo and Jeffrey S. Oliver of Baker Botts LLP, Stephen A. Sharkey of Bond Schoeneck & King PLLC and Corey Roush of Akin Gump Strauss Hauer & Feld LLP.

Occidental Petroleum Co's subsidiary OxyChem is represented by Steven E. Bizar, Julia Chapman, George G. Gordon, John McClam, Forrest E. Lovett, David Costigan and Agnese Nadalini of Dechert LLP and Timothy J. Graber, Brian P. Crosby and Melissa M. Morton of Gibson Mcaskill & Crosby LLP.

Westlake Chemical Corp. is represented by William R.H. Merrill, James T. Southwick and Elizabeth B. Hadaway of Susman Godfrey LLP and Terrance P. Flynn of Harris Beach PLLC.

Formosa Plastics Corp. USA is represented by Alan M. Unger, Tom A. Paskowitz and Peter J. Mardian of Sidley Austin LLP.

Shintech Inc., which is a subsidiary of Shin-Etsu Chemical Co. Ltd., is represented by John DeQ. Briggs, Richard B. Dagen and Angela M. Farren of Axinn Veltrop & Harkrider LLP and Randall D. White of Connors LLP.

The consolidated case is Miami Products & Chemical Co. et al. v. Olin Corp. et al., case number 1:19-cv-00385 in the U.S. District Court for the Western District of New York.

--Additional reporting by Nadia Dreid and Piper Hudspeth Blackburn. Editing by Caitlin Wolper.

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Mich. Officials Ask 6th Circ. To Toss Lead In Water Claims

By **Mike Curley**

Law360 (January 2, 2024, 1:11 PM EST) -- City officials for Benton Harbor, Michigan, are asking the Sixth Circuit to grant them qualified immunity in a class action alleging they misled the public about the safety of the city's drinking water, saying the trial court was wrong to find the complaint alleged they violated residents' constitutional rights.

In an **appellant brief** filed Dec. 27, Mayor Marcus Muhammad and the former superintendent of its municipal water plant, Michael O'Malley, told the circuit court that the complaint fails to identify any statements they made that were misleading.

Instead, they wrote, the allegations rely on conclusory and vague assertions that they repeatedly lied, without pointing to any particular statements they made, and that is not enough to allege a constitutional violation that would bypass their qualified immunity.

In addition, the pair wrote that allegations that Muhammad failed to "get back to" one plaintiff can't be a constitutional violation, as the substantive due process clause is a bar on government action, not government inaction.

And even if their actions amounted to a constitutional violation, Muhammad and O'Malley argued that their actions were not "conscience-shocking" nor were they established to be violations.

While the complaint alleges that O'Malley told one individual — who is not a named plaintiff — that the water would be safe after the first flush, that statement is in keeping with instructions from the U.S. Environmental Protection agency, and following a federal agency's guidance isn't "constitutionally repugnant."

"A single false statement — particularly one based at least in part on applicable public health recommendations — is not the sort of egregious government action against which the Fourteenth Amendment protects," the pair wrote.

The residents' lawsuit blames municipal leadership for failing in its oversight responsibilities and falling short in its response to the discovery of elevated levels of lead contamination in drinking water from 2018 to 2020. They claimed the mayor wasn't sufficiently transparent about the problem and misled the public about the safety of the water supply in the months immediately following the discovery of the elevated lead levels. They also said the city's actions to try to control the corrosion of lead pipes were insufficient and prolonged the crisis.

Muhammad and O'Malley, are the only defendants left in the suit after U.S. District Judge Hala Y. Jarbou **dismissed** all other defendants, while denying Muhammad and O'Malley's bids for qualified immunity. The judge in November **agreed** to stay the litigation while the officials appealed that decision to the Sixth Circuit.

While the district court found that the pair were on notice that their actions could violate residents' constitutional rights based on findings in litigation surrounding the Flint, Michigan, water crisis, the pair argued in the brief that unlike in that case, they did not cause the crisis, but instead they immediately took action to inform residents and remediate the problem.

"Mr. O'Malley and Mayor Muhammad did not knowingly distribute unsafe water for consumption, nor

did they intentionally cover up contamination," they wrote. "Instead, aging infrastructure caused elevated lead levels, and when testing revealed this, both Mr. O'Malley and Mayor Muhammad immediately began taking steps to notify the public and remediate the situation."

They also pushed back on the court's finding that any official policy led to the alleged violations, saying the complaint does not identify any such policy or how it created the issue, and the district court was wrong to find that the court could infer from Muhammad's role as "official policymaker" that his statements were effectively official policy subjecting the city to liability.

Mark P. Chalos of Lieff Cabraser Heimann & Bernstein, representing the residents, told Law360 on Tuesday that the "government failed the citizens of Benton Harbor."

An attorney for Muhammad and O'Malley declined to comment Tuesday.

The defendants are represented by Thomas J. Rheaume Jr. and Alexandra C. Markel of Bodman PLC.

The plaintiffs are represented by Mark P. Chalos and Annika K. Martin of Lieff Cabraser Heimann & Bernstein LLP.

The case is *Brazier et al. v. Whitmer et al.*, case number 23-1954, in the U.S. Court of Appeals for the Sixth Circuit.

--Additional reporting by Carolyn Muyskens. Editing by Alyssa Miller.

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P&G Beats Tide False Ad Suit As Judge Calls Out Plaintiff Atty

By **Gina Kim**

Law360 (January 2, 2024, 7:14 PM EST) -- A New York federal judge on Tuesday permanently tossed a proposed class action challenging Tide's labels over laundry loads, noting that "context matters" when reading the label and questioning how plaintiff's counsel Spencer Sheehan "can continue to bring such claims in good faith."

In a 19-page order, U.S. District Judge Cathy Seibel granted The Procter & Gamble Co.'s motion to toss plaintiff Aja Adege's first amended complaint claiming Tide's laundry detergent label didn't contain as much product as advertised, which was 64 loads. Adege asserted claims under New York General Business Law, breach of warranty, unjust enrichment and violations of consumer protection statutes of eight different states.

Judge Seibel said that the term "load" is ambiguous, as demonstrated by Adege's allegations, "none of which show that the term '64 loads' is susceptible to only one interpretation."

Washing machines vary in their capacity, and consumers have varying needs and preferences when doing laundry, so it's not plausible that they'd see the term "load" on the product label and believe that Procter & Gamble meant the amount of laundry that would fill their respective machines, the judge added.

"Simply put, a reasonable consumer viewing the product's label as a whole would not conclude that the product contained enough detergent for 64 full loads of laundry," Judge Seibel said.

The judge observed in a footnote that "[o]ne of plaintiff's lawyers, Spencer Sheehan, regularly brings such claims and then withdraws them (whether personally or, as here, through a brief signed by co-counsel) in the face of a motion to dismiss."

"The court again questions how counsel can continue to bring such claims in good faith, as he plainly knows he will be unable to justify them," the footnote continued.

Later in the opinion, the judge referenced similar consumer protection and warranty breach suits that Sheehan unsuccessfully pursued in the Northern District of New York against Starbucks Corp., Monster Beverage Corp. and Adidas in recent months.

In one such case, **Brownell v. Starbucks Coffee** , the court held that the failure to identify specific consumer protection statutes made it impossible for the company to see what the consumer ultimately hoped to demonstrate and fell short of meeting federal pleading requirements, Tuesday's ruling said.

In **Smith v. Adidas Am. Inc.** , the court held that the plaintiff failed to identify relevant state law statutes or otherwise identify the applicable state law theories of liability to give Adidas notice of the claims against it, Judge Seibel said.

In a footnote, the judge said, "Mr. Sheehan was counsel in both Brownell and Smith," adding that she wondered why Sheehan "continues to plead in an insufficient fashion, when a modicum of legal research would avoid the problem."

Judge Seibel also refused to grant Adege a chance to amend her suit a second time, stating that

Adeghe doesn't indicate that she possesses facts that would fix the issues the judge identified Tuesday.

"I join my Northern District colleagues in noting that, thanks to Mr. Sheehan and his colleagues, 'courts around the country have been inundated with a seemingly endless supply of trivial (bordering on frivolous) lawsuits, asking the courts to read the labels of consumer goods in manners that strain credulity or to simply ignore other relevant language provided on the labels,'" the order said, quoting a decision in [Van Orden v. Hikari Sales USA Inc.](#) "The case before the court here is one of many that should give pause to Mr. Sheehan and serve as a reminder that CONTEXT MATTERS and that a label should be read in its entirety."

Tuesday's ruling puts a permanent end to a proposed class action Adeghe initiated last year against Procter & Gamble over its Tide detergent, which she said she bought on various occasions in 2021 and 2022 in New Rochelle, New York, for \$12.99 each. She later amended the suit on March 20, 2023. Adeghe claimed the Tide label deceives shoppers into believing the product contains enough detergent for 64 full laundry loads in a high-efficiency machine.

Last summer, Procter & Gamble moved to toss the suit, arguing that Adeghe brought nothing to back up the theory that customers would be tricked since they would expect 64 loads to refer to full loads as opposed to medium loads.

Procter & Gamble further contended that Adeghe doesn't say she suffered any harm from Tide's use of the term "64 loads" and that she doesn't allege any elements of the eight separate consumer protection statutes she asserted. Nor did she provide timely pre-suit notice of her warranty claims, the company argued.

On Tuesday, Judge Seibel concluded that Adeghe failed to identify the specific consumer fraud acts at issue in her suit, or how the company allegedly violated them. Furthermore, Adeghe vaguely said she only recently discovered the alleged breach of the product's warranties, but claimed she provided notice to Procter & Gamble of the alleged breach. The judge said, however, "such a vague allegation is insufficient to avoid dismissal."

Judge Seibel pointed to another suit Sheehan brought, [Budhani v. Monster Energy Co.](#), where the court held that the pre-suit notice requirement is only waived in personal injury cases. The court subsequently struck down the breach of express warranty claim brought in that case since the plaintiff didn't allege any physical or personal harm from the purported breach.

"Mr. Sheehan was counsel for plaintiff in Gordon, Smith and Budhani," the footnote said, adding that the court had previously admonished him in another recent decision, so Sheehan should by now be aware that his "sweeping notice argument" is "frivolous."

"That this time the frivolous argument was made in a brief signed by co-counsel is hardly comforting," Judge Seibel wrote. "Mr. Sheehan and those with whom he works should consider the provisions of Rule 11 before attempting to raise this argument in the future. Indeed, they should do so before including an express warranty claim in a complaint."

The judge also axed Adeghe's implied warranty claim since she only said the detergent is defective because it contained less product than expected, and that there's nothing in the suit alleging that the product is unsafe for use to the point that it's rendered unusable.

Nor does Adeghe make any factual allegations unique to her unjust enrichment claim or allege why that claim is separate from her other causes of action, Judge Seibel concluded.

The judge's comments on Tuesday about Sheehan follow a November 2023 decision by a New York federal judge **holding him in civil contempt** for filing a "meritless" false advertising lawsuit over the amount of potassium in a Starbucks coffee flavor. Ashley Furniture **sued Sheehan** in Florida state court last month accusing him of lodging a "clearly frivolous" suit and dropping it only after the manufacturer had spent over \$116,000 on legal fees.

Sheehan and representatives for Procter & Gamble did not immediately respond to requests for comment on Tuesday.

Adeghe is represented by Spencer Sheehan, Angele Aaron and Katherine Lalor of Sheehan & Associates PC, and James Chung of the Law Office of James Chung.

Procter & Gamble is represented by Andrew Stanner and Gawon Go of Covington & Burling LLP.

The case is Adeghe v. The Procter & Gamble Co., case number 7:22-cv-10025, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Aaron West and Adrian Cruz. Editing by Kristen Becker.

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Quaker Oats Sued After Contaminated Granola Recall

By Celeste Bott

Law360 (January 2, 2024, 5:36 PM EST) -- A new putative class action in Illinois federal court alleges The Quaker Oats Co. negligently failed to ensure the safety and quality of its granola products, leading to the recall of over 90 different formulations of breakfast items and snacks believed to have been contaminated with salmonella during production.

The Chicago-based company announced Dec. 15 that it was recalling certain granola and oat bars and cereals because of potential exposure during processing to salmonella, which can cause serious illness, lead plaintiff Teresa Herendeen noted in a **complaint** submitted Dec. 27.

Among the potentially tainted products are Quaker Chewy Bars in various flavors, multiple varieties of Quaker Simply Granola Oats and several Quaker snack mixes, the U.S. Food & Drug Administration stated at the time.

Herendeen, a South Carolina resident who said she regularly buys Quaker Oats products, argued that the company owed her and other customers a duty of care to adequately test for harmful bacteria in its food products.

"Defendant knew that consumers purchased the recalled products based on the reasonable expectation that defendant manufactured the recalled products to the highest safety and sanitation standards, as to be fully fit for human consumption, particularly by those seeking defendant's products for its health benefits," the consumer's filing read. "Defendant knew or should have known that consumers would reasonably infer that defendant would hold the recalled products to the highest sanitation and safety standards, as to prevent bacterial contamination."

Some consumers ingest the oat and granola products daily, increasing their potential exposure to salmonella, and Quaker Oats recklessly or knowingly sold those products without disclosing the contamination, the lawsuit asserts.

"Defendant's omissions are material, false, misleading, and reasonably likely to deceive the public," according to the complaint. "This is especially true, considering the long-standing campaign that markets the recalled products as healthy and high quality, as to induce customers to purchase the products."

While the products in question are advertised on Quaker Oats' website as a good option for digestive health, salmonella "actually destroys the digestive system," the suit said.

Herendeen seeks to represent a class of all people in the U.S. who purchased the recalled products within the applicable statute of limitations, as well as a subclass of South Carolina consumers.

She brought claims of negligence, breach of express warranty, breach of implied warranty of merchantability, fraudulent misrepresentation, fraud by omission and unjust enrichment.

In addition to monetary damages, the suit requests that the court also issue injunctive relief by requiring the food producer to design and implement a new system for monitoring bacteria levels in its granola products.

"Being the father of four young children my heart goes out to parents and kids affected by salmonella as a result of the recalled Quaker Oats' products," Roy Willey IV, one of the attorneys for the putative class, told Law360 in a statement Tuesday. "It's unsettling that a product aimed at children is

involved, namely their chewy granola bars, and we urge Quaker to act fast and ensure parents who chose their bars over other options aren't left worrying about their kids' safety and hard-earned money spent."

A representative of the company did not immediately respond to a request for comment.

The consumers are represented by Roy T. Willey IV, Blake G. Abbott and Paul J. Doolittle of Anastopoulo Law Firm.

Counsel information for Quaker Oats was not immediately available.

The case is Herendeen v. The Quaker Oats Co., case number 1:23-cv-17103, in the U.S. District Court for the Northern District of Illinois.

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What Insurers Gain When Litigating Coverage Denials

By **Courtney Horrigan, John Ellison and Liz Taylor** (January 2, 2024, 4:50 PM EST)

Business risk is inevitable, even in highly regulated industries. Companies work to mitigate business risks in many ways, but for many, obtaining multiple lines of insurance coverage is a substantial component of risk management.

The core purpose of insurance is to allow policyholders to transfer business risks, whether first-party losses or third-party liability, to insurance companies in exchange for a premium. As risks evolve, the insurance market also evolves to supply new products or expand existing coverages to mitigate those risks — e.g., cyber and data privacy insurance.

Insurance companies have been in the business of risk transfer since the industry developed in London coffee houses with patrons betting as to whether a ship at sea would make it to port with its cargo intact.

Insurers have the opportunity to evaluate whether a particular type of business fits within their risk appetite before offering that coverage to the market generally, or to a particular policyholder. During the underwriting process, insurers determine what coverages and exclusions fit their risk profile and set a policy premium to reflect its predictions as to the risks the company will face during the policy period.

Underlying all of this is the fundamental principle recognized as far back as *Carter v. Boehm*, Lord Mansfield's decision in 18th century England that an underwriter is presumed to know and understand the nature and ordinary risks of the businesses it chooses to underwrite.

Yet, insurance companies attempt to avoid application of that principle each time a new risk surfaces out of a policyholder's regular business operations that threatens the insurance industry's profitability.

Lately, insurance carriers have denied coverage for lawsuits alleging liability relating to conduct that forms part of the ordinary operations of highly regulated businesses, such as those in the pharmaceutical and energy sectors, where insurers argue that engaging in business activities is not an "occurrence" or an "accident."

Insurance companies use these legal challenges as a means to reduce or eliminate coverage for historically covered types of claims.

Opioid and Climate Change Litigation

Approximately 10 years ago, government entity plaintiffs filed the first of what would become thousands of lawsuits against participants in the pharmaceutical supply chain, seeking to recover costs plaintiffs allegedly incurred for prescription opioid-related misuse, addiction and death. Many of those pharmaceutical companies sought defense and indemnity coverage under liability insurance policies — and were met with across-the-board claim denials from their insurers.

One of those companies was North Carolina Mutual Wholesale Drug Co., a wholesale distributor that allegedly caused bodily injury and death by failing to monitor and detect its pharmacy customers'



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"suspicious orders" of prescription opioids.

Mutual Drug tendered its claim for coverage to Federal Insurance Co., which denied coverage under the policy's "contract" and "professional services" exclusions.

The insurer, referred to in the decision as Chubb, argued that: (1) a "contract" exclusion applied because Mutual Drug's business as a wholesale pharmaceutical distributor is "accomplished through contracts with its customers," and therefore the lawsuits "arise from" Mutual Drug's contracts; and (2) a "professional services" exclusion applied because Mutual Drug performed certain compliance services for customers pursuant to federal and state regulations.

On Aug. 17, 2023, the U.S. District Court for the Northern District of North Carolina rejected both arguments in *N.C. Mutual Wholesale Drug Co. v. Federal Insurance Co.*

In its ruling, the court flagged that the underwriting file proved that the insurer knew Mutual Drug was "in the business of wholesale distribution of pharmaceuticals," and was aware of the risk of lawsuits relating to prescription opioids when it underwrote the policy.

The court then conclusively rejected the insurer's argument that no coverage was available because Mutual Drug uses contracts and performs statutorily mandated compliance reviews for customers as part of its ordinary business operations, noting it would be "hard to think of anything the policy would cover" under Chubb's overly expansive reading of those policy exclusions.

Other policyholders in the pharmaceutical sector have taken to the courts to enforce their rights.

At issue in *AIU Insurance Co. v. McKesson Corp.* is the U.S. District Court for the Northern District of California's holding that McKesson was not entitled to coverage because McKesson's shipments of prescription opioids — i.e., one of McKesson's core business functions, and the conduct on which the underlying plaintiffs allege novel theories of liability — was "deliberate."^[1]

Argument on McKesson's appeal is scheduled for Jan. 10 at the U.S. Court of Appeals for the Ninth Circuit.

Companies operating in the energy sector are facing similar challenges securing liability insurance coverage for recent lawsuits alleging that the companies' legal emissions of carbon dioxide and other greenhouse gases have contributed to climate change which, in turn, has resulted in bodily injury and property damage.

Insurance companies seek to escape coverage by arguing that: (1) the conduct at issue — emissions of greenhouse gases — is intentional, and therefore the lawsuits do not allege an "accident" or "occurrence" within the meaning of the policy; and (2) certain "pollution" exclusions apply.

The energy sector policyholders defending the climate change lawsuits purchased liability insurance coverage to mitigate risks associated with their ongoing business operations. The carriers that issued policies know their insureds operate in a highly regulated industry, and that such regulations — including those concerning legal limitations on certain greenhouse gas emissions — have changed over time and with new presidential administrations. Yet, when those policyholders are sued in lawsuits alleging novel theories of liability based on those legal, regulated emissions, their carriers abandon them.

One energy company, Aloha Petroleum Ltd. sued its insurer National Union Fire Insurance Co. for coverage in Hawaii federal court.^[2] Faced with an absence of precedent, the U.S. District Court for Hawaii certified two questions to the Hawaii Supreme Court, including whether underlying allegations of "reckless" emissions can amount to an "accident" or "occurrence" under a general liability policy.

On Oct. 13, the Hawaii Supreme Court accepted the certified questions, and the parties filed their opening briefs on Nov. 30. The court has not yet scheduled oral argument.

Perspective

The prescription opioid liability lawsuits and climate change lawsuits are some of the more recent

examples of insurers choosing to litigate claims that fall within historical coverage grants in hopes of reducing or eliminating their own exposure. But this strategy is hardly new. Insurance companies sued their policyholders decades ago in hopes of avoiding their coverage obligations for asbestos liability lawsuits and used a nearly identical playbook in their efforts to avoid exposure for environmental contamination liability lawsuits brought under the Comprehensive Environmental Response, Compensation, and Liability Act.

The impetus for choosing interminable legal challenges is simple: Where novel theories of liability result in potential exposure for the insurance company that exceeds the potential exposure they anticipated during the underwriting process, litigation becomes a means by which carriers can mitigate their own damages. Any court rulings in a carrier's favor are helpful, and even unfavorable rulings can be tied up in appeals for years, allowing the insurance companies to continue to earn money on policyholders' premiums.

And while that litigation is ongoing, tacitly discouraging policyholders without considerable resources from asserting claims, insurance companies can reevaluate their policy language and add new exclusions. Thus, even if the weight of authority eventually settles in the policyholders' favor, insurance companies' challenges to coverage for claims squarely falling within historical coverage grants will continue as the insurance industry reorients.

It is critical in these types of disputes that policyholders put these insurance industry arguments and positions in context against this historical backdrop. The insurance industry is effectively trying to take back via litigation the coverage it originally sold when the policy was underwritten.

In that light, courts will have a much harder time accepting and endorsing insurance companies' after-the-fact arguments that devalue the insurance product they sold. Policyholders should push to secure the insurance protection they reasonably expected at the time the insurance transaction was consummated.

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[1] See, e.g., *AIU Insurance Co. v. McKesson Corp.*, No. 22-16158 (9th Cir).

[2] See *Aloha Petrol. Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.* , No. 22-cv-372 (D. Haw.).

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