

McKinsey seeks OK of \$78M settlement with insurers for opioid consulting

DJ [dailyjournal.com/articles/376455-mckinsey-seeks-ok-of-78m-settlement-with-insurers-for-opioid-consulting](https://www.dailyjournal.com/articles/376455-mckinsey-seeks-ok-of-78m-settlement-with-insurers-for-opioid-consulting)

McKinsey & Co. Inc. and health insurers and benefits plans asked a federal judge for preliminary approval for a \$78 million settlement to resolve claims the consultancy played a key role in the opioid epidemic.

“On behalf of lead counsel Elizabeth J. Cabraser [of Lieff Cabraser Heimann & Bernstein LLP] and myself as proposed class counsel, we are pleased to commence the settlement approval process for resolution of the third party payer claims against McKinsey, as a component of our ongoing work in opioids litigation to hold accountable all entities involved — including consultants — in the alleged improper marketing, sales and distribution of these dangerous, addictive drugs that contributed to the public health crisis we continue to face today,” said plaintiffs’ attorney Paul J. Geller of Robbins Geller Rubman & Dowd LLP.

McKinsey is represented by Mark D. McPherson, Caitlin S. Blythe, Jessica Kaufman and Tiffani B. Figueroa of Morrison & Foerster LLP. They did not respond to requests for comment.

McKinsey declined to comment but pointed to the statement it made following the announcement of its September settlement with school districts, local governments and Native American tribes, saying what the company previously said still applies today.

At that time, McKinsey said: “We continue to believe that our past work was lawful and deny allegations to the contrary, and the settlement contains no admission of liability or wrongdoing. The firm entered into this agreement to avoid the time and expense of protracted litigation and ... to help those affected by the opioid epidemic.”

The consultancy also stated: in 2019 it committed to no longer advising clients on any opioid-related business. It added it has and will continue to support organizations working to combat the opioid crisis and has already implemented a “rigorous client selection policy” and invested nearly \$700 million since 2018 to strengthen its risk management teams, capabilities and processes.

In September, McKinsey joined school district and local government plaintiffs in this case to ask for preliminary approval for two settlements totaling \$230 million.

Lieff Cabraser’s website states that Native American tribes settled with McKinsey for \$39.5 million, as well. The school district and local government settlements were granted preliminary approval Nov. 6 and have a final approval hearing set for Feb. 2. According to

filings, McKinsey also reached a \$573 million settlement with states in 2021 for similar claims.

The only remaining plaintiffs in this multidistrict litigation that have not settled are the individuals who sued on behalf of babies who allegedly suffered from neonatal abstinence syndrome, or withdrawal symptoms after no longer consuming opioids via their pregnant mothers. In re: McKinsey & Co. Inc. National Prescription Opiate Consultant Litigation, 21-md-02996, (N.D. Cal., filed June 8, 2021).

Plaintiffs in this case claimed McKinsey cooperated and strategized with Purdue Pharma LP and other opioid manufacturers to create marketing plans to oversupply opioids in order to maximize revenues. As a result, they claimed, public health suffered as people became hooked on addictive drugs. Plaintiffs claimed massive economic harm was also caused because individuals, firms and entities paid for a harmful product as opposed to a safer medicine and they incurred costs to address the detrimental effects of opioid addiction.

#376455

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Dell case's \$267 million legal fee appeal sparks law pros' fierce debate

 [reuters.com/legal/transactional/column-dell-cases-267-million-legal-fee-appeal-sparks-law-profs-fierce-debate-2024-01-03](https://www.reuters.com/legal/transactional/column-dell-cases-267-million-legal-fee-appeal-sparks-law-profs-fierce-debate-2024-01-03)

Alison Frankel



A logo of Dell Technologies is seen at the Mobile World Congress in Barcelona, Spain February 28, 2018. REUTERS/Yves Herman Acquire Licensing Rights 

Jan 3 (Reuters) - What is the optimal way to balance the interests of contingency-fee lawyers and their clients in big-money cases?

Two sets of prominent law professors are offering very different answers to that seemingly simple question in the Delaware Supreme Court appeal of a \$267 million fee award to plaintiffs' lawyers who obtained a \$1 billion settlement with Dell Technologies and its controlling shareholders.

One group backs Pentwater Capital Management, an investment fund with a sizeable stake in the \$1 billion settlement, which resolved claims that Dell (DELL.N) short-changed some shareholders in a 2018 stock swap. Pentwater did not object to the settlement itself but has contended in both Delaware Chancery Court and at the state Supreme Court that the shareholder lawyers who litigated the case to the brink of trial should not receive a windfall based on the magnitude of the recovery.

Pentwater's academic supporters urged the Delaware justices to clarify that lower courts have discretion to award a lower percentage of the settlement fund to plaintiffs' lawyers in megacases — and that, indeed, the so-called declining percentage methodology is the best way to incentivize contingency-fee lawyers while also acknowledging that those lawyers don't have to spend 10 times more money to litigate a billion-dollar case than a \$100 million case.

“The declining percentage approach reflects a reasonable application of economies of scale,” argued Joseph Grundfest of Stanford University and four other professors. “A declining percentage allows courts to enhance recovery to stockholders without deterring meritorious litigation.”

If you follow securities class action litigation in federal court — or if you read my report last summer on Vice Chancellor Travis Laster’s original ruling in the Dell case — you know that trial judges in federal court frequently adopt this methodology: As the size of the settlement increases, the percentage of recovery awarded to plaintiffs lawyers decreases. On average, shareholder lawyers in federal court can expect awards of less than 11% in billion-dollar cases.

Delaware has its own criteria for fee awards, taking into account (among other things) the benefit obtained and the stage of the case at the time of settlement. Delaware Supreme Court precedent gives considerable leeway to Chancery judges, who are not required to use a decreasing percentage fee scale as settlements increase but are also not precluded from departing from the usual range in exceptional cases.

Laster’s 92-page opinion in Dell devoted pages and pages of discussion to the use of declining percentages in shareholder class action fee awards, but the vice chancellor ultimately opted to award fees based on the stage of the case at the time of settlement, without a haircut for the size of the fund.

Pentwater’s law professor amici told the Delaware Supreme Court that Laster wrongly interpreted Delaware precedent to conclude that he was barred from using the declining percentage methodology. His erroneous decision, unless overturned, will “constrain the tools that Delaware judges may apply,” to the detriment of the very shareholders represented by contingency-fee lawyers, the professors said.

The law firms that won the Dell case — including Labaton Sucharow, Robbins Geller Rudman & Dowd and Quinn Emanuel Urquhart & Sullivan — retorted that Laster quite properly exercised his discretion, painstakingly analyzing Pentwater’s arguments for cutting their fees based on the size of the recovery before deciding that the methodology did not suit the facts of the case.

The plaintiffs’ lawyers’ academic amici – Charles Silver and Lynn Baker of the University of Texas and Brian Fitzpatrick of Vanderbilt University – argued not only that Laster reached the right conclusion in the Dell case but, more sweepingly, that the declining percentage method is fundamentally flawed. It’s “obviously false,” they said, to assume that contingency-fee lawyers will fight just as hard to maximize their clients’ recovery when they are effectively penalized for winning bigger settlements.

Even Pentwater's backers, argued Silver, Baker and Fitzpatrick, did not suggest any actual model for how to award fees based on a sliding scale. That's telling, they said, because it's a "tricky business" for judges to decide what marginal percentages ought to apply at various settlement levels.

Should plaintiffs' lawyers receive a certain percentage for the first \$100 million and declining percentages for each additional \$100 million? Or should the declines be at \$200 million intervals? No one in the Dell case has proposed answers, they said, and for good reason: No one knows.

In that context, their brief argued, "the recommendation to apply declining marginal percentages is worse than useless: It is likely to create perverse incentives that harm claimants by discouraging lawyers from maximizing recoveries."

The best evidence against the declining percentage methodology, said Fitzpatrick in an interview, is from the marketplace. When real clients hire contingency-fee lawyers, he said, exceedingly few of them demand fee award reductions based on the size of the recovery. The only exceptions he has found, Fitzpatrick said, are public pension funds in securities class actions — and he and his fellow amici told the Delaware justices that those contracts are "tainted" by political considerations because elected officials don't want to appear to be granting bonanza fees to plaintiffs' lawyers.

So when it comes to aligning the interests of clients and contingency-fee lawyers, Fitzpatrick said, "We don't have to guess. We can look at the real world." (Laster, for what it's worth, reviewed hundreds of retainer agreements produced by the plaintiffs' firms in the Dell case. Only a tiny percentage — well under 5% — called for declining percentage fees.)

Pentwater amicus Grundfest said contingency firms themselves — including firms in the Dell case — prove the fallacy of Fitzpatrick's arguments. "The fact that those firms are happy to litigate in federal courts that apply the declining percentage method proves that the declining percentage method is not a deterrent to meritorious litigation," Grundfest said.

Pentwater counsel Stephen Brauerman of Bayard declined to comment.

Read more:

Whopper \$267 million fee award in \$1 billion Dell case shows why Delaware is different

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Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

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HB 6 Updates: Fact-finding on hold – for now

E energynews.us/newsletter/hb-6-updates-fact-finding-on-hold-for-now



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Pretrial fact-finding is temporarily on hold in a federal class action related to Ohio's nuclear and coal bailout law, House Bill 6. How long the stay continues will affect whether and when plaintiffs' lawyers can question Lt. Gov. Jon Husted and other witnesses under oath, get a FirstEnergy company investigation report, and do other pretrial discovery.

Additional developments over the past several weeks include:

- FirstEnergy wants to conduct interim auctions to buy electricity for ratepayers who don't otherwise have a supplier while its case to tweak that process and to extend and increase rider charges for all customers continues.
 - FirstEnergy also wants to delay the evidentiary hearing for a grid modernization case by about six weeks, saying the added time could help settlement talks. The Office of the Ohio Consumers' Counsel doesn't want the case to move ahead at all until the company shows actual benefits to consumers from \$600 million spent under an earlier case.
 - Company lawyers say a sale of petroleum-based power plants should clear the way for federal regulators to approve a \$6.3 billion deal between Vistra Corp and Energy Harbor for the two nuclear power plants involved in the HB 6 scandal.
 - Production and review of documents is moving ahead in the federal government's criminal case against Sam Randazzo, who formerly chaired the Public Utilities Commission of Ohio.
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On hold

A December 1 order temporarily put pre-trial fact-finding on hold in FirstEnergy shareholder cases until the court rules on whether to stay discovery for a longer time while an appeals court reviews the case's class action status. Class actions typically present larger financial exposure for a company and its leadership than cases that don't have that certification.

Special Master Shawn Judge scheduled oral argument on FirstEnergy's motion for that longer stay for January 4. After hearing from the parties' lawyers that day, he will prepare a report and recommendations for U.S. District Court Judge Algenon Marbley. Under federal court rules, the judge has discretion whether to stay discovery and other trial court proceedings during the appeal.

If the court grants FirstEnergy's request, plaintiffs would have to wait until late 2024 or afterward to question Lt. Gov. Jon Husted and other fact witnesses under oath, get the report on FirstEnergy's internal investigation on matters related to HB 6, and do other pretrial fact-finding.

FirstEnergy's lawyers contend the extended stay could save time and expense by limiting the scope of that discovery or rejecting the class certification altogether. A Dec. 19 brief by plaintiffs' lawyers dismisses those concerns.

"Delay will be particularly prejudicial at this stage of the case, when a substantial number of depositions have been scheduled in the next few months," the brief added. Some witnesses have already testified to forgetting various details, the lawyers added, with references to parts of pre-trial testimony by Jason Lisowski, who is FirstEnergy's controller and chief accounting officer, as well as former executives Mike Dowling, James Pearson and Steven Strah.

A separate FirstEnergy filing on Dec. 20 objected to the special master's order requiring it to produce an internal investigation report relating to HB 6, arguing that the report is privileged. Energy Harbor also objected on Dec. 11 to a special master's order calling for it to produce additional materials to the plaintiffs.

Sam Randazzo, a former chair of the Public Utilities Commission of Ohio who now faces criminal charges related to HB 6, has also objected to producing additional materials to the plaintiffs' lawyers under a Nov. 6 special master's order. A separate order says Randazzo doesn't have to comply until the court rules on his objections, his lawyer Roger Sugarman noted.

Read more:

- *FirstEnergy investor class action will get appellate review in multibillion case (Reuters)*

- *Energy company paid \$43M for dirty bailout. Says it acted in a “legal way” (Ohio Capital Journal)*
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Dinner talk?

If and when the shareholder plaintiffs get to question Husted under oath, one likely line of questioning will be a December 2018 dinner he attended with then governor-elect Mike DeWine, Dowling and former FirstEnergy CEO Chuck Jones. Weeks later, DeWine appointed Sam Randazzo as chair of the Public Utilities Commission of Ohio. A text from Jones to Randazzo the next day noted the open PUCO seat was among the dinner conversation topics.

When asked what was discussed at the dinner, Husted’s spokesperson Hayley Carducci said in 2021 that the governor had addressed it, despite DeWine claiming in a press conference that he couldn’t recall. Husted’s spokesperson avoided the question when the Energy News Network posed it again last month, deferring instead to DeWine’s press secretary, who gave only a general statement on the Randazzo indictment.

Husted and DeWine’s office have already produced documents in response to the shareholder plaintiffs’ subpoenas. A deposition could provide more details about information in those materials. Another likely line of inquiry would be Husted’s apparent role in pushing for a longer bailout for the former FirstEnergy nuclear plants, as reflected in exhibits from last year’s criminal trial of former Ohio House speaker Larry Householder.

Other questions might arise about a possible meeting with Jones in September 2019. At the time, opponents were trying to get a referendum on the ballot to repeal HB 6.

Husted told ABC affiliate WTVG last month that everything he knows “has already been turned over years ago.”

Read more:

- *Husted to be deposed, DeWine subpoenaed in lawsuit over FirstEnergy bribery scheme (Cleveland.com)*
 - *Husted discusses deposition in upcoming FirstEnergy bribery lawsuit (ABC/WTVG)*
 - *Nothing new? Records show startling new info on DeWine, Husted roles in Ohio bailout scandal (Ohio Capital Journal)*
-

FirstEnergy riders

FirstEnergy wants regulators to greenlight interim auctions so the company can buy electricity for non-shopping customers while its combined case continues on proposed changes to the auction process and requests for rider charges. Non-shopping customers are ratepayers who don't otherwise have an energy supplier through their own shopping choice or through a community aggregation program.

The PUCO probably won't decide on the auction and rider issues in the case before sometime in February, FirstEnergy spokesperson Jennifer Young said. Even that may be ambitious. Parties' initial briefs are due Jan. 19, and reply briefs don't need to be filed until Feb. 9.

However, the current "standard service offer" — the terms for non-shopping customers — runs out on May 31. And it takes time to provide required notice to potential bidders. With that in mind, the company plans to conduct one auction in late January or early February and another between mid-March and early April.

So far, no parties in the case have opposed the Dec. 13 request, although the PUCO staff suggested a tweak to account for a commission ruling in an American Electric Power case.

The Office of the Ohio Consumers' Counsel, the Northwest Ohio Aggregation Council and the Ohio Manufacturers' Association Energy Group even enthusiastically supported FirstEnergy's request. From their standpoint, that fits with their Dec. 6 request to stay a delivery capital recovery rider in light of Randazzo's criminal indictment, which was announced on Dec. 4. The same rider is at issue in one of four HB 6-linked cases that have been frozen since August 2022.

The request to put at least one of the FirstEnergy riders on hold in light of the indictment echoes themes from prior requests by multiple parties for the PUCO to take a closer look at issues and review cases where Randazzo played a role. So far the PUCO has not indicated it would conduct such a review.

Even if the PUCO ruled on all the issues in the rider case by late February, any requests for reconsideration may not be resolved before May, when FirstEnergy is due to file a full rate case. Various parties have objected to all the riders in the current case, noting among other things that they should be considered in that full rate case, which is supposed to consider all the FirstEnergy utilities' anticipated costs and revenues.

Read more:

Randazzo indictment sparks renewed calls for full regulatory review in Ohio (Energy News Network)

FirstEnergy grid cases

FirstEnergy also wants regulators to delay the evidentiary hearing for a grid modernization case, referred to as Grid Mod II, which was set to start on Jan. 16. The company's Dec. 21 filing said extra time could help settlement talks.

The Consumers' Counsel has said the PUCO shouldn't let FirstEnergy get any money for the proposals until the company shows actual benefits to consumers from \$600 million spent in an earlier case, known as Grid Mod I.

A Nov. 2022 audit in the earlier case by Daymark Energy Advisors found multiple shortcomings in how FirstEnergy calculated and tracked operational benefits from those investments. A year later, the PUCO accepted the audit and told FirstEnergy to implement its recommendations in the Grid Mod II case. The Consumers' Counsel has asked for reconsideration of that order.

Even if a settlement takes place in the Grid Mod II case, it's unclear whether all parties would join. Prior settlements have come under scrutiny where it appears certain parties got side deals not available to ratepayers generally. That includes the prior FirstEnergy rider case that gave rise to the Grid Mod I and Grid Mod II cases.

Aside from issues raised in the Daymark audit, the Grid Mod II case presents questions about whether those investments will maximize efficiencies for consumers.

One example is incentives for smart thermostats, said Nolan Rutschilling, managing director of energy policy for the Ohio Environmental Council. Without a demand response program that would cycle participating customers' air conditioning on and off during periods of high demand, the grid would continue to face high stress during extreme heat events, and ratepayers would miss out on a lot of energy savings, he said.

Prehearing testimony by John Seryak, a RunnerStone analyst acting as an expert witness for the Ohio Manufacturers' Association Energy Group, also raised concerns about FirstEnergy's proposals to own a battery energy storage system and for an electric vehicle charging pilot.

Energy Harbor deal

The Federal Energy Regulatory Commission plans to rule by April on a proposed \$6.3 billion deal between Vistra Corp. and Energy Harbor, the bankruptcy successor to FirstEnergy Solutions. Under the deal, the two nuclear power plants at the center of the HB 6 scandal would be transferred to a new subsidiary, Vistra Vision.

Vistra Corp.'s lawyers advised FERC on Dec. 18 that the company had made a deal to sell Richland-Stryker Generation, which owns two petroleum peaker plants, to an unrelated party. The company has said that step should remove concerns about reduced competition and market control. However, previous filings by PJM's Independent Market Monitor and the Office of the Ohio Consumers' Counsel have said they would continue to have concerns about concentrated market power in the Ohio service area even if the sale takes place.

Testimony from the Householder and Borges trial last Feb. 14 suggested a long-range goal of selling the Davis-Besse and Perry nuclear plants. Juan Cespedes, a lobbyist for FirstEnergy Solutions, testified that the right-hand assistant to John Kiani, Energy Harbor's chair, inferred Kiani personally stood to make roughly \$100 million from a sale of the plants. Kiani had been an activist investor who operated a hedge fund, and he and others had invested in FirstEnergy Solutions, Cespedes said on Feb. 13.

Energy Harbor's media contact Todd Morgano has not responded to a request for comment.

Read more:

- *FERC extends review of Vistra-Energy Harbor merger, delaying \$6.3B deal's potential close (Utility Dive)*
- *Nuclear exec would have made \$100 million from sale of plants at heart of bribery trial, lobbyist says (Cleveland.com)*
- *Utility and fossil fuel interests still ahead in Ohio under House Bill 6 (Energy News Network)*

Criminal cases

Trial has not yet been set for former PUCO chair Sam Randazzo, who has been indicted on 11 counts of bribery and embezzlement. Randazzo has pled not guilty. The case is before U.S. District Court Judge Timothy Black, who presided over the criminal trial of former Ohio House speaker Larry Householder and lobbyist Matt Borges last year. Both have appealed their criminal convictions, although neither has yet filed their merits brief with the Sixth Circuit Court of Appeals.

The government's production of documents and review of those materials by Randazzo's lawyers is now underway. The next pretrial status conference will be on Jan. 16.

So far, the Department of Justice has not filed criminal charges against any present or former executives of FirstEnergy and its former subsidiary FirstEnergy Solutions.

Read more:

- *Former PUCO chairman Sam Randazzo indicted on bribery, fraud charges in federal court (Cincinnati Enquirer)*
- *Former chair of Ohio's utility regulator indicted in nuclear bailout law scandal (Statehouse News)*
- *Former PUCO chair pleads not guilty for his alleged part in FirstEnergy scandal (Ohio Capital Journal)*
- *Former top utility regulator Randazzo, handcuffed before a judge, pleads not guilty (Cleveland.com)*

Fact or Opinion? 2nd Circuit Raises Bar for Investor Fraud Suits

 [law.com/nationallawjournal/2024/01/04/fact-or-opinion-2nd-circuit-raises-bar-for-investor-fraud-suits](https://www.law.com/nationallawjournal/2024/01/04/fact-or-opinion-2nd-circuit-raises-bar-for-investor-fraud-suits)

NEWS

Court upholds dismissal of Philip Morris investors' claim that the cigarette giant made false statements regarding its clinical studies.

January 04, 2024 at 01:44 PM

Civil Appeals

Avalon Zoppo

The U.S. Court of Appeals for the Second Circuit raised the bar last week for when investors can sue companies for securities fraud over statements about clinical studies for products, securities litigation attorneys said.

A three-judge panel on Dec. 26 upheld the dismissal of a securities fraud lawsuit against Philip Morris International over the tobacco company's statements characterizing its studies of the health benefits of one of its e-cigarettes as "rigorous" and "the best science."

Such "vague descriptions" of studies are opinions rather than verifiable facts—so investors, without additional proof, cannot bring securities fraud claims based on those types of statements, Judge Richard Sullivan wrote for the panel.

"Because these 'vague descriptions' of the studies' methodology 'offer only generally optimistic opinions,' they 'are too general to cause a reasonable investor to rely upon them and therefore are *precisely* the type of puffery that [we] have consistently held to be inactionable,'" added Sullivan, joined by Judges Amalya Kearse and Barrington Parker.

Setting Precedent

Judge Richard J. Sullivan of the United States Court of Appeals for the Second Circuit.
Photo: David Handschuh/NYLJ

In this case, Union Asset Management Holding AG and Teamsters Local 710 Pension Fund accused PMI of making false statements about the results and methodology of its scientific studies used to support its application to the U.S. Food and Drug Administration for permission to market “IQOS” smoke-free tobacco products as safer than traditional, combustible cigarettes.

The decision is especially significant for pharmaceutical and biotech companies and their investors because those businesses often release statements about the progress of scientific studies, said George Naya, Saul Ewing’s securities regulations co-chair.

The ruling means investors must provide concrete evidence at the pleadings stage that can objectively prove the falsity of a company’s statement about a clinical study, Naya stated via email.

“The Second Circuit’s decision in this case has set precedents that will shape the landscape of securities fraud litigation going forward,” Naya said. “Plaintiffs must now clearly differentiate between objectively verifiable facts and inherently subjective opinions when challenging the truthfulness of a company’s statements. The court has made it clear that statements about scientific study methodologies couched in inherently subjective language, such as compliance with ‘Good Clinical Practice,’ are to be treated as opinions rather than factual assertions.”

The court also said if the FDA or other regulatory body eventually accepts a company’s interpretation of scientific data, then securities fraud claims based on the company’s assertions cannot move forward.

The FDA agreed with PMI in approving its application and found that the company’s studies “ha[d] shown that switching completely from conventional cigarettes to the IQOS system significantly reduces [the] body’s exposure to harmful or potentially harmful chemicals”

“This implies that even if there were initial doubts about the company’s interpretation, subsequent regulatory approval might shield the company from allegations of misrepresentation,” Naya said. He added that companies may become more comfortable providing the public with updates regarding ongoing studies following the court’s decision.

The Second Circuit relied upon the U.S. Supreme Court’s 2015 *Omnicare v. Laborers District Council Construction Industry Pension Fund* ruling, in which the justices held that a registration statement for a public offering containing an opinion that later proves incorrect

isn't considered an "untrue statement" under securities law. The high court said plaintiffs must show that a company did not actually believe the opinion.

Since then, lower courts have grappled with applying the precedent in different scenarios.

Last summer, for example, the Second Circuit partially revived a securities fraud suit accusing AmTrust Financial Services of misstating the company's financial condition when the insurer in 2017 restated years of its financial results to correct errors in its quarterly reports filed with the U.S. Securities and Exchange Commission.

Jeffrey Steinfeld, a securities litigation partner at Winston & Strawn, stated in an email that while the PMI case was limited to scientific studies and data, the rationale behind the Second Circuit's ruling might apply to broader contexts.

"[P]laintiffs may have a harder time pleading securities claims based on a company's statements that they believed the company was in compliance with a given set of standards (scientific or otherwise) and, when it comes to interpreting data, if the company's interpretation is endorsed by the relevant regulator, it may be deemed reasonable per se," he said.

Pomerantz LLP and Robbins Geller Rudman & Dowd LLP represented the investors. Latham & Watkins LLP represented PMI.

The Second Circuit rendered its decision in *In Re: Philip Morris International Inc. Securities Litigation*, No. 21-2546.

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January 03, 2024

Veradigm acquires Koha Health as stockholder lawsuit filed

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January 3, 2024

Global Edition
Operations

The lawsuit, filed on behalf of purchasers of Veradigm's common stock, alleges the company and its executives overstated the business's historical revenues by at least \$20 million.

By Jessica Hagen
January 03, 2024

03:09 pm

Share 11

Veradigm, a data-driven healthcare technology company, announced it acquired revenue cycle optimization platform Koha Health the same day law firm Robbins Geller Rudman & Dowd LLP announced it filed a class action lawsuit against the health technology company on behalf of its investors.

The class action lawsuit was filed against Veradigm on behalf of purchasers of the company's common stock between February 26, 2021 and June 13, 2023.

The suit alleges Veradigm and certain of its current and former top executives violated the Securities Exchange Act of 1934, alleging the defendants overstated the company's historical revenues by at least \$20 million, artificially inflated its revenue by recording duplicate transactions for more than two years, inflated its earnings and margins, failed to maintain controls over its financial reporting, and failed to adhere to generally accepted accounting principles regarding revenue recognition practices.

Purchasers of the company's stock have until Jan. 22 to join the class action suit.

"On February 28, 2023, Veradigm announced that it had 'detected certain internal control failures related to revenue recognition that had occurred over the prior six quarters, resulting in a misstatement of reported revenues during those periods.' Veradigm disclosed that the revenue misstatements caused revenue to be overstated by approximately \$20 million from the third quarter of 2021 until the fourth quarter of 2022. On this news, the price of Veradigm stock fell nearly 13%," the law firm alleged in a statement.

"Then, on June 13, 2023, Veradigm revealed that it had identified additional revenue misstatements dating back to fiscal year 2020. Veradigm further disclosed that its internal review on the nature and extent of the accounting and internal control errors would take longer than previously disclosed, and Veradigm's independent auditors needed more time to complete their audit procedures. As a result, Veradigm would not meet the deadline to file its annual report on Form 10-K. On this news, the price of Veradigm stock fell more than 4%."

Chicago-based Veradigm offers technology to biopharma companies, health plans and payers, and healthcare providers, including data solutions, electronic health records, patient engagement tools and revenue cycle services.

Koha Health, the company the firm announced it acquired, offers strategic advisory services focused on improving healthcare providers' financial health through revenue cycle management.

"Today's announcement represents an exciting opportunity for Veradigm to scale our revenue cycle services portfolio by leveraging additional capabilities and subject matter expertise to better serve the needs of the market," Tom Langan, president and chief commercial officer at Veradigm, said in a statement.

Veradigm will add Koha's revenue cycle management services to its musculoskeletal medicine specialty offerings.

The company did not refer to the class action suit in its announcement regarding the acquisition.

Tags:

Veradigm, Koha Health, revenue cycle management

Fourth Circuit Rejects Shareholders' Security Fraud Claims Based on Optimistic Projections for Merged Company

 [law.com/2024/01/04/fourth-circuit-rejects-shareholders-security-fraud-claims-based-on-optimistic-projections-for-merged-company](https://www.law.com/2024/01/04/fourth-circuit-rejects-shareholders-security-fraud-claims-based-on-optimistic-projections-for-merged-company)

The Court of Federal Appeals (Lewis F. Powell Courthouse) and the skyline of Richmond, Virginia, in the early morning from the foot of the Virginia Capitol grounds, in Richmond, Virginia. Credit: Acroterion via Wikimedia Commons

ANALYSIS

Fourth Circuit decision reinforces that securities fraud liability “cannot be ‘predicated solely on an overly optimistic view of a future which may, in fact, encounter harsh economic realities down the road.’”

January 04, 2024 at 12:19 PM

By Mike Mitchell, Ed Roche and Shameka Rolla | January 04, 2024 at 12:19 PM

A U.S. Court of Appeals for the Fourth Circuit decision reinforces that securities fraud liability “cannot be ‘predicated solely on an overly optimistic view of a future which may, in fact, encounter harsh economic realities down the road.’”

In a recent decision, *San Antonio Fire & Police Pension Fund v. Syneos Health*, the Fourth Circuit considered a class action lawsuit brought by shareholders of a biopharma company, INC Research Holdings, Inc. (now Syneos Health Inc.). The shareholders had voted to approve a merger with a private company. They had high hopes for the merged entity, inflated by some optimistic projections INC Research and its executives had made. But the new company struggled and its stock price tanked.

The shareholders sued under federal securities laws, claiming INC Research and its investors misled them by failing to disclose critical, adverse facts. The Fourth Circuit disagreed, upholding the dismissal of the action. The decision highlights the importance of warnings to investors and demonstrates the requirements for an investor lawsuit based on allegedly inaccurate information.

Background to the Case

In 2017, INC Research sought to merge with another biopharma company, inVentiv. When they announced the proposed merger, the companies projected in a press release that INC Research's adjusted earnings per share would increase in the first year following the merger.

Finalizing the merger required approval from INC Research's shareholders. Before the vote, shareholders gathered information through written materials and earnings calls. During one earnings call, INC Research indicated that it was confident in high revenue growth in 2018. During another, INC Research told shareholders it was more optimistic than before about the combined company's growth numbers for 2018 but that inVentiv had to close a number of deals in the second half of the year to hit its projections. Then, INC Research provided shareholders with proxy materials that recommended approval but also contained detailed cautionary language, warning investors that this was a risky undertaking and success was not guaranteed.

The shareholders voted to approve the merger. Soon after, the company's stock price plummeted and INC Research projected roughly flat revenue growth in 2018. The change in projected revenue growth was due, in part, to inVentiv's failure to secure any large sales contracts in 2017.

Soon after, a shareholder filed a class action lawsuit in federal court in North Carolina against INC Research, alleging INC Research violated federal securities laws, i.e., Sections 10(b) and 14(a) of the Securities Exchange Act, and various SEC rules. The shareholders also alleged that several of INC Research's executives were also liable for those violations as "control persons" under Section 20(a) of the act.

INC Research moved to dismiss the shareholders' claims and the district court granted the motion. The shareholders appealed.

The Fourth Circuit's Opinion

A shareholder may bring a claim under Section 10(b), and the SEC rules under that statute, when a company or person controlling the company makes an "untrue statement of material fact" or "omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." For a claim to succeed, shareholders must show that the defendants intentionally or recklessly misled them.

For a shareholder's Section 10(b) claim to survive dismissal, the shareholder must include enough specific facts in the complaint to strongly infer that the defendants intended to deceive them or created such a high risk of misleading them that INC Research must have

known that it was being deceptive. The shareholders did not reach that high bar. They claimed that INC Research must have learned in due diligence that inVentiv had failed to sign large sales contracts and that those contracts were central to inVentiv's business model. But this did not suggest anything more than negligent conduct.

The court next turned to the claim under Section 14(a). To win on a claim under that provision, a shareholder must show that the defendants issued "a proxy statement that contains false or misleading facts or omits any material fact that leaves a proxy statement false or misleading."

The Fourth Circuit explained that because materiality is contextual, it can be negated by adequate warnings and disclaimers in proxy materials. The warnings must be specific and tailored to address the alleged misrepresentation or omission. The court noted that INC Research specifically warned investors that, among other things, the assumptions underlying their projections were uncertain and potentially flawed, its optimism was based on pipeline discussions with customers rather than finalized deals, and inVentiv had struggled to achieve profitability and might do so again. Viewed in context, the court concluded any misrepresentations were immaterial.

Takeaways From the Case

San Antonio Fire & Police Pension Fund shows that a high bar exists for investors in showing the intention or recklessness required for a Section 10(b) claim. The case also reminds public companies of the importance of including specific and tailored cautionary language in their proxy materials. In cases like this, as the Fourth Circuit put it, shareholders "have a right to be disappointed that their company's performance did not meet its optimistic projections, but not "a right to civil remedies under federal securities law."

Mike Mitchell is a trial appellate lawyer and co-chair of the litigation group at Smith Anderson. **Ed Roche**, an attorney with the firm, handles employment and intellectual property cases and **Shameka Rolla**, an attorney with the firm, is a member of the litigation group.

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Cabot Shareholder Claims Over Fracking Violations Nixed by Judge

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- Oil company misleadingly reported revenue, shareholders said
- Shareholders didn't sufficiently plead their claims, judge said

Shareholders of Cabot Oil & Gas Corp. lost their bid to bring claims that company executives made misrepresentations about whether its fracking complied with environmental laws, after a federal judge dismissed the claims with prejudice.

Cabot's fracking in Susquehanna County, Pa., caused the explosion of an residential water well in 2009, which led to a state investigation that found the company's well had been leaking methane gas into residential water supplies. The company entered into a series of agreements but disregarded its obligations to fix its wells and was charged criminally in February 2020.

Shareholders of the company sued in October 2020, claiming that the board of directors wasted corporate assets and misleadingly reported revenue and overall prospects.

But the shareholders didn't make a pre-suit demand on the board to address the issues, and they couldn't establish that a pre-suit demand would have been futile—as required in shareholder derivative actions—Chief Judge Lee H. Rosenthal of the US District Court for the Southern District of Texas said in her Tuesday opinion.

Rosenthal also said that the plaintiffs didn't sufficiently plead their breach of fiduciary duty, disclosure, corporate waste and unjust enrichment, and contribution claims. The judge dismissed the claims with prejudice because additional amended complaints would be futile. The judge had dismissed the case in April 2022 and allowed them to re-plead the case.

The plaintiffs were represented by Rosen Law Firm PC, Glancy Prongay & Murray LLP, and Cochran Law PLLC. Cabot is represented by Norton Rose Fulbright US LLP.

The case is *In re Cabot Oil & Gas Corp. Derivative Litig.*, S.D. Tex., No. 4:21-cv-02046, 1/2/24.

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Icosavax Sued Over AstraZeneca Takeover Conflicts, Projections

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Icosavax Inc. and its directors allegedly misled investors about proposed takeover by AstraZeneca Plc in a regulatory filing last month, a shareholder lawsuit says.

The proposed deal to sell Icosavax to AstraZeneca for up to \$1.1 billion in cash was agreed upon by the parties, but they omitted or misrepresented details about potential conflicts of interest, financial projections and data inputs underlying a financial adviser's valuation, according to the complaint filed Tuesday in US District Court for the Southern District of New York.

The \$15 per share transaction agreed upon in December would have a total value of \$1.1 billion including \$5 per share in contingent payments, according to a press release. But shareholders can't vote to approve the transaction until they receive more information about the deal, the complaint says.

The biopharmaceutical company, which develops vaccines against infectious diseases like RSV, issued recommendation statement that didn't describe the nature of a confidentiality agreement the company entered into with AstraZeneca, or if a committee of independent board members was created to run the sales process, according to the complaint.

The company's board and executive officers are allegedly conflicted because of the unique benefits they would secure from the proposed transaction, given the large portions of company stock and options they own. Employment agreements with certain Icosavax executives and directors entitle them to severance if they should be terminated, and would grant them millions of dollars of compensation, the complaint says.

Investors also need to know what underlying data financial adviser Centerview Partners LLC used to support its fairness opinion and other analysis of the deal. Metrics including which price targets Centerview analyzed and transactions used as comparators were allegedly omitted from the filing, which are necessary to evaluate whether the proposed consideration maximizes shareholder value and serves their interests.

Shareholder Brent Peterson seeks to block the transaction or otherwise rescind it and collect rescissory damages for the company and directors' alleged violations of the Securities Exchange Act and SEC Rule 14d-9.

Icosavax didn't immediately respond to a request for comment.

Brodsky & Smith represents the plaintiff.

The case is Peterson v. Icosavax, Inc. , S.D.N.Y., No. 1:24-cv-00017, complaint filed 1/2/24 .

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DuPont's \$1.2 Billion PFAS Settlement Offer Draws Few Objections

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Class Action

Photo Illustration: Jonathan Hurtarte; Photos: Getty Images

- Only 717 of water utilities opt out of proposed settlement
- Utilities will have to meet EPA's anticipated PFAS standards

Only seven of more than 14,000 drinking water utilities objected to a proposed \$1.185 billion settlement offered by three DuPont-related companies in a national PFAS contamination case, paving the way for the court to decide whether to approve the settlement.

The settlement's administrator filed on Wednesday a summary of the number of water utilities that have opted out of the proposed settlement DuPont de Nemours Inc., the Chemours Co., and DuPont spinoff Corteva Inc. offered in June.

A total of 717 of the utilities on the original class list opted out, the administrator told the US District Court for the District of South Carolina, which oversees the case. Reasons for opting out include failing to meet the class definition.

More than 200 utilities, which weren't identified as potential members of the original settlement class list, also submitted opt out requests, and a review of those requests is ongoing, according to the administrator.

District Judge Richard M. Gergel will rule on whether to approve the settlement. Previous statements suggest he's inclined to do so.

"The bird in hand is worth two in the bush," Gergel told attorneys during a July status conference. Proceeding with more litigation probably would mean "about a decade before it would all be over."

Drinking water utilities need money to address per- and polyfluoroalkyl substances (PFAS) in light of an impending final Environmental Protection Agency rule setting final limits on the amount of up to six PFAS that can be in drinking water. The agency expects to release that final rule early this year.

Gergel is scheduled to preside on Feb. 2 over a final fairness hearing about a separate proposed settlement of up to \$12 billion by the 3M Co. in the same case.

3M's settlement is much higher, because its PFAS were the key ingredients for decades in the specialized fire suppressant, aqueous film-forming foam (AFFF), that's the focus of multidistrict litigation. The foam contaminated sources of drinking water across the country.

The case is In Re Aqueous Film-Forming Foams Prod. Liab. Litig. MDL 2873 , D.S.C., No. 18-mn-02873, settlement administrator update filed 1/3/24 .

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PNC Financial Gets Nod for \$6.1 Million BBVA 401(k) Settlement

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A pedestrian passes in front of a PNC Financial Services Group Inc. bank branch in NY on Jan. 11, 2020.

- Plan investment criticized as ‘stuffing cash into a mattress’
- PNC acquired BBVA Compass Bancshares after lawsuit was filed

PNC Financial Services Group Inc. received preliminary approval for a \$6.1 million class settlement resolving litigation over the conservative investment strategy of a retirement plan sponsored by a Spanish banking subsidiary acquired by PNC in 2021.

The deal, which is expected to benefit about 27,000 people previously covered by the 401(k) plan of BBVA Compass Bancshares Inc., represents about 8% of the plan participants’ maximum potential damages. It allows class members who participate in the PNC retirement plan to receive payouts in their plan accounts, while class members without active accounts will receive individual checks, according to the settlement motion.

Judge Madeline Hughes Haikala of the US District Court for the Northern District of Alabama signed the preliminary approval order Tuesday. She scheduled an April 18 fairness hearing to further evaluate the deal.

The lawsuit challenged the decision by BBVA—formerly the US offshoot of a Spanish multinational banking group—to keep nearly one-fifth of its 401(k) plan’s \$931 million in assets in the Vanguard Money Market Fund. Plan participants said this fund returned no more than .01% and was the equivalent of “stuffing cash into a mattress.”

Hughes has twice declined to dismiss the case based on the plaintiffs’ alleged failure to exhaust the plan’s internal remedies before filing suit.

The participants are represented by Wiggins Childs Pantazis Fisher Goldfarb LLC, White Law Firm LLC, and Law Office of Lange Clark PC. They stand to receive up to one-third of the settlement amount as attorneys’ fees if the deal receives final approval.

PNC is represented by Alston & Bird LLP.

The case is *Ferguson v. PNC Fin. Servs. Grp., Inc.*, N.D. Ala., No. 2:19-cv-01135, 1/2/24 .

NY's Top Court Set to Decide COVID Restaurant Interruption Appeal

 [law.com/2024/01/03/nys-top-court-set-to-decide-covid-restaurant-interruption-appeal](https://www.law.com/2024/01/03/nys-top-court-set-to-decide-covid-restaurant-interruption-appeal)

By Kirti Reddy and Theresa DeAngelis

A restaurant in Williamsburg, Brooklyn posts New York City's COVID safety regulations in their outside dining area Aug. 31, 2020. Photo: Ryland West/ALM

The Court of Appeals' ruling is expected to have broad implications not just for New York—one of the hardest hit states during the pandemic—but nationally, since the court's interpretation of the policy language could impact how other courts rule on pandemic-related business interruption disputes.

January 03, 2024 at 05:37 PM

Insurance Law

Brian Lee
Litigation Reporter

The original version of this story was published on New York Law Journal

A massive COVID-related property insurance dispute that could impact thousands of restaurants and other businesses nationwide is set to go before the New York Court of Appeals, the state's highest court, on Jan. 10.

The court will hear arguments in *Consolidated Restaurant Operations v. Westport Insurance*, answering on behalf of New York “whether the actual, suspected, or threatened presence of COVID-19” in the plaintiff's restaurants caused direct physical loss or damage to the properties within the meaning of an insurance policy issued to by the defendant.

Robin Cohen, lead counsel for CRO and chair of Cohen Ziffer Frenchman & McKenna LLP, and Aidan McCormack of DLA Piper are slated for 30 combined minutes of arguments.

CRO of Texas, which runs and franchises seven restaurant brands, sued Westport Insurance for coverage of business interruption losses it suffered during the pandemic, arguing that since it suffered a physical loss due to a physical substance permeating its properties and physically impairing its functionality, it is eligible for coverage.

A Manhattan trial court dismissed the complaint, and the Appellate Division, First Department unanimously upheld.

The Court of Appeals' ruling is expected to have broad implications not just for New York—one of the hardest hit states during the pandemic—but nationally, since the court's interpretation of the policy language could impact how other courts rule on pandemic-related business interruption disputes.

Cohen said a reversal could resurrect many of the businesses that went out of business during the pandemic.

"I live in New York City, where so many restaurants that went belly up during COVID never came back because they've never been able to recover the insurance for their significant loss," she said. "The loss was over a pretty significant period of time, year to year. And I do believe that the decision by the Court of Appeals could make a very significant difference for a lot of these small businesses that were depending upon the insurance but did not receive it."

Insurance companies have largely escaped having to cover losses sustained from the pandemic.

In pleadings, McCormack says that three other state courts of last resort, in Massachusetts, Iowa, and Wisconsin, all agreed with New York law and the First Department's decision.

But Cohen told the Law Journal that the facts were different in certain of those cases, where it was found that there wasn't coverage.

McCormack, who could not be reached for comment, said in pleadings the appeal should be denied because CRO hadn't identified an error of fact or law, nor did it raise any leave-worthy issues.

"The plain meaning of 'direct physical loss or damage to property' under the insurance contract is clear and unambiguous—it requires that loss or damage to insured property be both direct and physical in nature," McCormack said in argument papers. "That means a distinct, demonstrable physical damage or destruction of property. The economic harm from the temporary, partial loss of use due to business slowdown during the pandemic that CRO alleges here is insufficient."

McCormack called losses CRO sustained by having to comply with government social-distancing orders issued to prevent the spread of COVID-19 "intangible economic harm to CRO's business, no matter how severe or unfortunate."

Meanwhile, the restaurants gained considerable backing by way of friend of court briefs.

The New York State Trial Lawyers Association consisting of more than 3,500 attorneys, the majority of whom specialize in personal injury law, wrote one that said the First Department decision should be reversed because “claims containing well-pleaded factual allegations should not be preemptively dismissed at the pleading stage, but, rather, should be decided on a fully developed evidentiary record, including expert testimony.”

So too did the Erie Medical Society, which is the fifth medical society to weigh in on the matter across various jurisdictions, according to Cohen.

“It’s now over 60,000 medical professionals that have weighed into the issue and basically said that the carrier’s allegations or positions relating to the scientific evidence is ‘junk science,’ and that it’s not valid,” Cohen said.

“A lot of the decisions, especially the federal decisions in New York, have been based upon faulty information without any evidentiary record,” Cohen added.

Another entity, the American Museum of Natural History in New York City also filed an amicus brief on behalf of the restaurants.

“I thought that was great,” Cohen said, “because it just shows that a lot of New York-centric businesses were seriously impacted, especially in 2020, when you didn’t have the medicines or the vaccines or the herd immunity. You really were in a situation where it was very dangerous to go into these various properties—and these businesses bought coverage for a situation where a physical substance like COVID physically made you lose use of your property. The issues that are posed to the Court of Appeals is going to be an issue of first impression for them, and I think it’s an important issue that should be resolved by them.

In the U.S., only a divided 3-2 Vermont Supreme Court has ruled in favor of a policyholder on the issue, when it revived a shipbuilder’s lawsuit in September 2022, in *Huntington Ingalls Industries Inc. et al. v Ace American Insurance Company et al.*

“The Vermont Supreme Court is a very well-respected court,” Cohen said. “They are interpreting physical loss and physical damage in the same way that CRO is, so I do think it’s significant.”

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Exclusive

- Lawsuits poised to surge after filing deadline
- More than 40% of claimants cite two or more illnesses

Quick Camp Lejeune Payout Unlikely for Most, Claim Data Shows

Lawsuits poised to surge after filing deadline

More than 40% of claimants cite two or more illnesses

More than 85% of the people seeking compensation for exposure to toxic water at Camp Lejeune wouldn't qualify for the early resolution payouts offered by the government, according to preliminary data culled from thousands of potential claimants.

The small pool of eligible applicants, as determined in an analysis by data management firm SimplyConvert, suggests an additional tens or even hundreds of thousands of claims filed with the Navy before the August deadline might be disputed and end up in court. It could also mean many claimants will die before collecting a payout.

"So many of these claimants are older, are very sick, and likely do not have years to wait for a trial," Jessie Hoerman, the founder and CEO of SimplyConvert, told Bloomberg Law.

The firm, which calls itself “the premier legal tech platform” for personal injury and mass tort plaintiffs lawyers, built a database of more than 123,000 potential Camp Lejeune claimants, including those who haven’t yet filed with the government, based on client information supplied by more than 220 law firms.

It declined to release the raw data or the names of its firms or their clients, citing confidentiality. But in response to a request from Bloomberg Law, SimplyConvert analyzed the self-reported information and attempted to offer a glimpse of the potential claimants and their common illnesses in a case likely to rival the largest mass torts in history.

Few Quick Settlements?

An early resolution program, also known as the elective option, offers quick payouts, but has requirements that significantly limit the pool of eligibility.

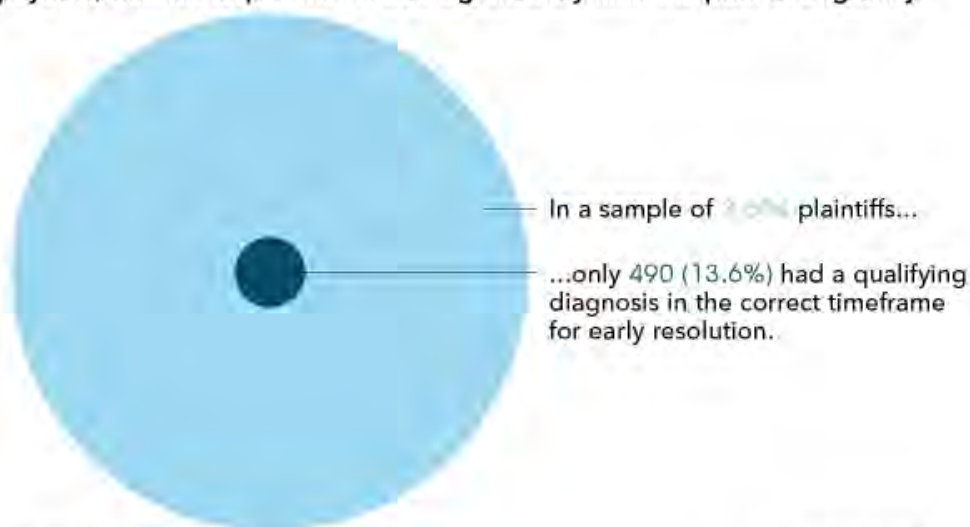


Chart: Jon Meltzer/Bloomberg Law
Source: SimplyConvert

Bloomberg Law

In court filings, the Navy said it has received at least 152,000 claims for compensation on behalf of Camp Lejeune veterans, workers, or other people who spent at least a month on the base when its water was contaminated.

Those whose claims are rejected or unresolved can sue. More than 1,550 lawsuits have already been filed in the Eastern District of North Carolina.

The early resolution program, also called the "elective option," was announced by the Navy in September. It's designed to improve the pace of compensating sick or dying veterans by expediting payouts of between \$100,000 and \$550,000 to those who qualify based on their time at the base and their illness. Confirmed diagnoses must typically occur within 35 years after a claimant left Camp Lejeune.

The elective option was unveiled months after Judge James C. Dever III, one of four North Carolina judges overseeing the Camp Lejeune lawsuits, had warned lawyers that resolving all the claims might take the length of the Roman Empire if they didn't seek to streamline the process.

Multiple Diagnoses

Of 123,236 possible claimants, more than 40%, or 50,915, report having at least two illnesses that could make them eligible for compensation.



Chart: Jon Meltzer/Bloomberg Law
Source: SimplyConvert

Bloomberg Law

The Justice Department declined to comment on the data analysis. In court filings, its lawyers said the department had approved 52 early resolution offers and that 28 other claims currently in litigation appear to meet the criteria for an expedited payout. They also said \$2.05 million has already been paid to resolve eight claims.

A Navy spokesperson said in an email that “more robust metrics related to the new Elective Option framework are anticipated after the New Year.”

John Masslon, a senior litigation counsel for the Washington Legal Foundation, which advocates for limited government and free markets, said limiting options for quick resolutions will likely benefit only the plaintiffs’ lawyers.

“Most plaintiffs are going to have to go through the lengthy administrative process and sue,” Masslon said. “This costs taxpayers a lot of money because they must pay for the administrative process, the legal process, the defense, and any potential judgment.”

J. Edward Bell III, the South Carolina attorney leading the group of plaintiffs’ lawyers overseeing the litigation, declined to comment on the data findings and referred Bloomberg Law to a public relations firm representing the lawyers. That firm, the Dewey Square Group, didn’t respond to a request for comment.

The SimplyConvert analysis also found that 50,915, or 41.3% of all the potential claims in its database, cite two or more diseases that could make them eligible for compensation.

Common Illnesses

Below are some of the serious conditions most often reported from a sample of 46,567 potential claimants.

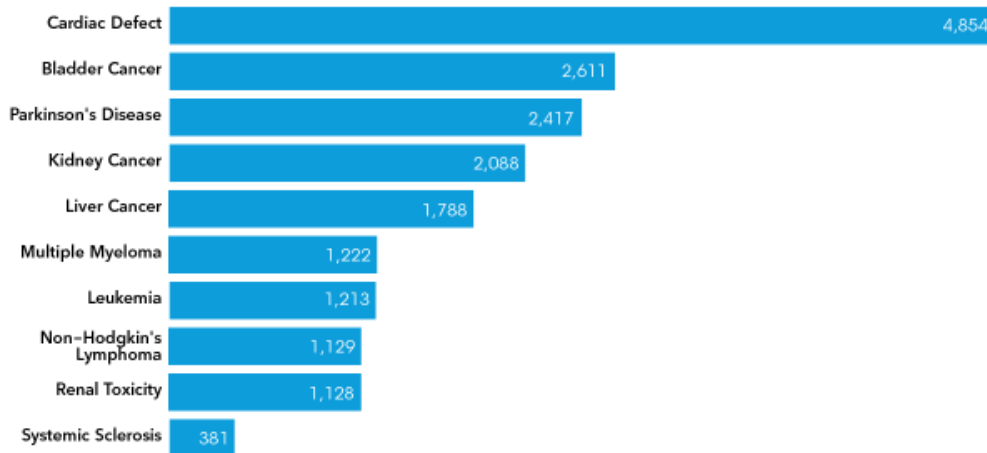


Chart: Jon Meltzer/Bloomberg Law
Source: SimplyConvert

Bloomberg Law

Some are from people still living with their illnesses; others come from the relatives of former Camp Lejeune veterans or workers who have since died. The average age of death for most of the deceased claimants was in the mid-60s, the data shows.

Compensating the families of decedents presents another challenge, according to Samir Parikh, a professor at the Lewis & Clark Law School in Portland, Ore.

"Their relatives will still hold a claim but bills and expenses pending today cannot be addressed with some vague promise of future recovery," said Parikh, who has researched mass tort cases and reviewed the SimplyConvert summary data.

A Ticking Clock

For some diagnoses eligible for early resolution, approximately half the claims involve Camp Lejeune residents or workers who have died. Among claimants with:

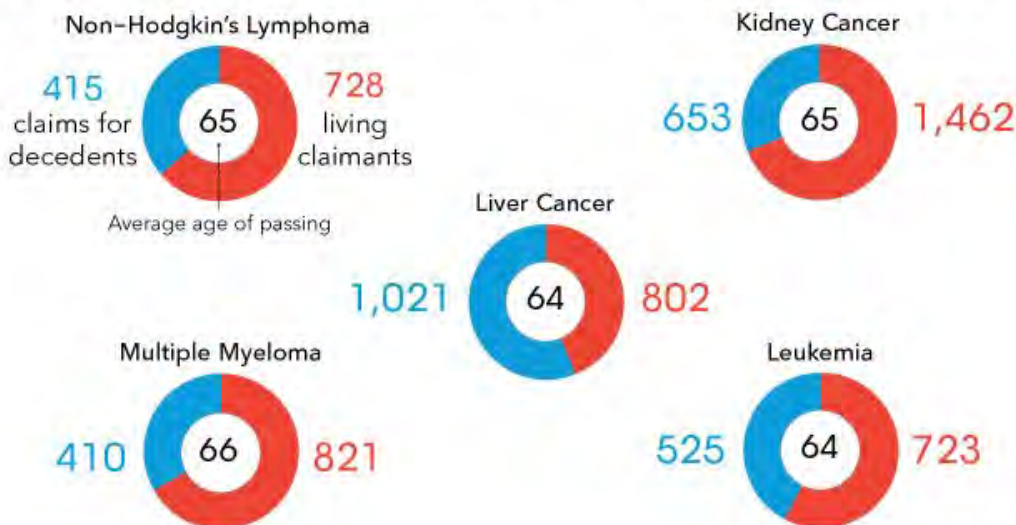


Chart: Jon Meltzer/Bloomberg Law
Source: SimplyConvert

Bloomberg Law

The data also shows at least 19 different medical diagnoses cited by potential claimants. The most common illnesses include various forms of cancer, cardiac defects, and Parkinson's disease. A government-funded study released in spring 2023 found higher-than-normal rates of Parkinson's among Camp Lejeune veterans, and the Department of Veterans Affairs in November expanded health coverage for such veterans.

The North Carolina court is expected to move forward on a handful of bellwether trials, possibly later in 2024. The results of those trials could help accelerate broader settlement talks, but a timeline remains uncertain.

One unresolved legal battle is whether claimants who sue will get jury trials or have their cases decided by a judge. Government attorneys contend Congress didn't intend for jury trials when it passed the Camp Lejeune Justice Act in August 2022. Some claimants and their lawyers say that would rob them of the opportunity to publicly share the impact of the contamination.

The government has projected it could pay as much as \$21 billion to compensate hundreds of thousands of people sickened by the toxic water on the Marine base between the 1950s and 1980s. Barely a year after Congress approved the program, the compensation demands already filed had topped \$3 trillion, government lawyers said.

Hoerman, the SimplyConvert CEO, said she hopes the data analysis will help identify which cases are appropriate for settlement and which cases need to move forward in the courts. For some claimants, she said, the best outcome will be to help them be comfortable in the short term.

— With assistance from Nicole Sadek.

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Cummins' \$1.6B Diesel Tampering Saga Raises More Questions Than Answers

[thedrive.com/news/cummins-1-6b-diesel-tampering-saga-raises-more-questions-than-answers](https://www.thedrive.com/news/cummins-1-6b-diesel-tampering-saga-raises-more-questions-than-answers)

January 4, 2024



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You might have heard by now that Cummins has agreed to pay a colossal \$1.67 billion to settle claims that it violated the Clean Air Act. The United States Department of Justice dropped the bombshell just before Christmas, saying the diesel engine manufacturer installed emissions defeat devices on nearly a million Ram pickups from 2013 to 2023. In turn, the DOJ claims these trucks polluted "thousands of tons" of excess nitrogen oxide (NOx) and now Cummins is paying the department's second-largest environmental penalty ever.

The thing is, no details of how Cummins managed to bypass emissions requirements have been disclosed, and the industry giant denies any wrongdoing.

Now, we've heard that argument before from too many corporations to count. I can't say whether or not Cummins is telling the truth, though what's for certain is the company agreed to pay the single largest civil settlement arranged by the DOJ under the Clean Air Act. But nothing has been released by the feds so far saying explicitly how Cummins tampered with emissions controls on these 960,000 diesel pickups. Attorney General Merrick B. Garland

said simply in a statement, "The types of devices we allege that Cummins installed in its engines to cheat federal environmental laws have a significant and harmful impact on people's health and safety."



The term "defeat device" has evolved into a blanket categorization including software and hardware that illegally increases vehicle emissions for the sake of performance, efficiency, or both. It's become common parlance in the automotive industry, especially as companies including Volkswagen have been caught using said devices to skirt emissions regulations on a massive scale. From there, it spread to the vehicle aftermarket and, particularly, the diesel tuning industry.

That's where Kory Willis, founder of PPEI Tuning, fits into this. I spoke with Willis for a story I wrote in 2020 about the Environmental Protection Agency's war on modified diesel trucks, which he's especially qualified to talk about. That's because the EPA hammered him and his company with \$3.1 million in criminal fines as well as civil penalties for violating the Clean Air Act. He then signed a consent decree which allows PPEI to continue selling performance upgrades so long as they're approved by the California Air Resources Board, or CARB.

Kory Willis *Kory Willis*

Willis went on The Truck Show Podcast recently to talk about Cummins' massive settlement, and he put it plainly: "I don't think Cummins did anything wrong." He emphasized his personal experience with the 6.7-liter engine in question, saying he deals with them "20+ times a day" as PPEI provides owners with tuning adjustments and the like.

"What strikes me more than anything is, if there was a defeat device—or unless it was from day one, which I don't think is necessarily possible because I've passed CARB emissions with this stuff as well—I haven't seen any change," Willis explained. "That's where I'm very curious of what they're calling a defeat device."

The most plausible explanation is a software change within the engine's computer system, though exactly what alteration allegedly violated the Clean Air Act remains unclear. Willis mentioned this during his interview, as well as a particulate matter sensor that may have been absent or changed without approval. It's impossible to say for sure since Cummins and the DOJ have yet to disclose it officially.

Peter Treydte *SEMA*

While genuine insight is hard to come by in this case, there is at least one more source with relevant information to help make sense of Cummins' emissions testing debacle. That's Peter Treydte, the compliance center manager at SEMA Garage who works to help OEMs and aftermarket suppliers alike meet federal regulations. In the same episode of The Truck Show Podcast, Treydte shared some knowledge about the compliance process and what tools manufacturers use to stay within the feds' set parameters.

A crucial component is a vehicle's auxiliary emissions control device, more commonly referred to as an AECD in the manufacturing and testing realm. Both software and hardware can be classified as an AECD, and as Treydte puts it, they exist "to protect components under adverse conditions." He used the example of a device that alters the air-fuel ratio of an engine when under heavy load to prevent the catalytic converter from melting down.

"In this case, it appears that there were some AECDs that were being employed that were undisclosed to CARB and EPA," Treydte said. "So the way I interpret that is the Cummins engineers were doing their job. They were putting the effort in to ensure that the DPF and the catalysts were all protected under certain operating conditions, but in doing so, either the paperwork didn't get done or somehow or another, it wasn't disclosed to the agencies, and as a result, they're now suffering the consequences of that."

Again, this is speculation, but it's informed by Treydte's deep knowledge of the automotive emissions test cycles and regulations. It's very well possible that such a seemingly minor change would go unnoticed by tuners like Willis, especially if the AECD was a form of software that operates deep within the truck's engine control unit. These are complex systems.

Cummins has likely known this day was coming. Company officials have been vocal about their cooperation with the federal government throughout this process, and even now that the ink is dry on the settlement agreement, Cummins maintains its belief that no one acted in bad faith. That doesn't change the result, but understanding the situational context helps paint a fuller picture. Either way, the federal government has landed a real haymaker on one of the industry's biggest players.

Got a tip or question for the author? Contact them directly: caleb@thedrive.com



Google Must Face Privacy On/Off Switch Suit as a Class Action

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Google failed to convince a federal judge to reject class certification of a lawsuit claiming the tech giant covertly collects mobile app user information despite telling users they can turn off that data-mining function.

Lead plaintiff Anibal Rodriguez and others alleged Google effectively “placed itself in the middle of conversations to which it was not an authorized part,” despite telling them they could opt out of the company’s tracking of users’ regular and “supplemental” web and app activity as early as July 1, 2016.

The company, a unit of Mountain View, Calif.-based Alphabet Inc. argued that any harms were individualized and weren’t conducive to class treatment.

But Chief Judge Richard Seeborg at the US District Court for the Northern District of California, signaled during oral argument on Oct. 5 that the plaintiffs had made their case that common issues predominate. On Wednesday, he ruled there were sufficient numbers to proceed in the suit alleging violation of privacy rights under California law.

“Despite Google’s insistence otherwise, whether the amount or nature of data collected is a fact-specific inquiry does not by itself defeat predominance, because the relevant question is whether the members, who shared common conduct, had an objective, reasonable expectation of privacy based on Google’s representation” about its supplemental web and app activity tracking switch. “This is a question capable of resolution class-wide,” Seeborg said.

The judge certified two distinct classes: one consisting of all people who, starting in July 2016, had both regular and supplemental tracking switched and whose activity was still tracked by the company on a non-Google-branded mobile app or on a phone using its Android operating system; and those who had their tracking switched off during the same period, while their activity was still relayed to the company via Firebase or Google Mobile Ads software developer kits.

Expert Testimony

Seeborg also denied the company’s motion to exclude testimony from plaintiffs’ damages expert, Michael Lasinski. Google claimed Lasinski’s models are unreliable, fail to follow basic methodological principles, and would confuse jurors.

Google contends Lasinski “spitballs a damages estimate copied-and-pasted from another case against Google brought by the same Plaintiffs’ counsel.” He is also the damages expert in a lawsuit in which consumers claim the company’s Chrome web browser continued to collect their data even while navigating online in private “Incognito” mode.

“The simple fact that this model was utilized in another case averring Google mishandled private data does not warrant exclusion,” the judge said.

That case, which had been scheduled for trial this month, on Dec. 28 was put on hold for 60 days, pending the parties completion of settlement talks.

Plaintiffs, represented by Boies Schiller Flexner LLP, Sussman Godfrey LLP, and Morgan & Morgan, seek disgorgement of the amount Google allegedly was unjustly enriched.

Wilson Sonsini Goodrich & Rosati and Willkie Farr & Gallagher LLP represents Google. Boies Schiller Flexner, Sussman Godfrey, and Morgan & Morgan represent plaintiffs.

The case is Rodriguez et al v. Google LLC, N.D. Cal., No. 3:20-cv-04688, 1/3/24 .

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Jan. 3, 2024, 2:16AM PST

By the Numbers: Four Practices to Power Big Law Growth in 2024

By Roy Strom

(Bloomberg Law) --

Most Big Law firms are poised to report revenue and profit growth for 2023. To repeat the trick in an uncertain market in this year, managing partners will need strong performances in key practices.

Many expect strong litigation practice performances this year after courtroom activity buoyed the bottom line for plenty of Big Law firms in 2023. It's a similar story for antitrust practitioners, who helped pick up the slack from Big Law's most important profit centers: Mergers and acquisitions and capital markets.

It is hard to envision a successful year across the industry if M&A and capital markets practices don't turn around. But counter-cyclical restructuring groups are poised to continue a strong run, even if transactions come back.

Here's the outlook for four crucial practice groups as we plunge ahead in 2024.

Capital Markets and M&A

M&A practice areas are coming off their worst performances in a decade, according to data from the first nine months of 2023 compiled by Bloomberg Law. Global M&A deals through Q3 were nearly \$1 trillion lower than in 2022, when transactions were nearly \$1 trillion less than the booming 2021 market.

The downturn has lasted longer than managing partners expected: many had targeted the second half of 2023 for a rebound.

Well, that came and went.

Now, there are plenty of fresh calls for a rebound.

"It's certainly our view that 2024 will be a better year than 2023, and one main reason is the inevitability of a rebound in transactional work," said Gretta Rusanow, managing director and head of advisory services at Citi Private Bank Law Firm Group.

A more tempered prediction came from Scott Miller, co-chair of Sullivan & Cromwell, who works on nearly every type of transaction or governance matter.

Miller already sees more activity in the early stages in both M&A and capital markets. He anticipates interest rates to stabilize this year, helping to buoy more work. Two industries poised for transactions, he said, include asset management and technology, particularly around artificial intelligence.

"There's going to be a lot of M&A and capital markets activity around the peripheries of AI," Miller said. "There are a whole bunch of companies out there that have a piece of AI or have an AI story to tell, and there are going to be aggregators of those businesses to try and create a larger AI platform. I think you'll see a fair amount of that beginning in the first half of 2024."

Antitrust

If corporate transactions indeed pick up steam this year, antitrust practices will also kick into a higher gear. That's somewhat by default: there are fewer antitrust merger reviews in a slow environment for M&A.

But antitrust lawyers at some firms have kept busy despite the M&A downturn.

The practice generally has two main drivers of work: merger review and antitrust litigation, which is either brought by the Federal Trade Commission, US Department of Justice or private plaintiffs.

Federal antitrust regulators have taken a more aggressive enforcement approach under the Biden administration, said David Gelfand, senior counsel at Cleary Gottlieb Steen & Hamilton.

"They're challenging transactions, they're challenging conduct, and they're looking for new ways to bring cases," said Gelfand, who served from 2013 to 2016 as deputy assistant attorney general for litigation in the DOJ's Antitrust Division.

Plaintiffs' firms have also recently been filing more private cases against mergers challenged by federal enforcers, Gelfand said, noting a private case that followed a DOJ challenge to the Spirit-JetBlue airlines merger.

There is a looming possibility that antitrust and M&A lawyers could be significantly busier as a result of a rule change requiring far more information to be filed related to mergers.

The FTC-DOJ rule change could boost the amount of time it takes lawyers and executives to file required merger notification documents from 37 to 144 hours on average, the FTC estimated. That would translate to \$350 million more on labor costs for attorneys and executives who work on them, the agency said in June.

That rule change is likely to be challenged and unlikely to be finalized this year, Gelfand said, though it's possible it could take effect toward the end of 2024.

"It's very controversial, and I think it will be tied up in controversy and litigation for a long time," he said.

Litigation

Demand for law firms' time was flat through three quarters of 2023, according to Thomson Reuters data. It would have been a much worse story if litigation practices, which comprise roughly 50% of Big Law capacity, hadn't seen demand jump 2%.

Litigation cycles typically last for longer than a 12-month period, and there's no reason to believe disputes practices will meaningfully slow down this year, said Brad Hildebrandt, chairman of Hildebrandt Consulting. Some of the momentum is driven by cases coming back online after Covid-related court closures, he said.

"Litigation is booming," Hildebrandt said. "Some firms are turning work away because they don't have the capacity. Part of that is a washout from the pandemic when courts were closed, and all of the cases are getting worked on now. I expect litigation, which has been the counterbalance for a pretty successful year, will remain pretty strong next year."

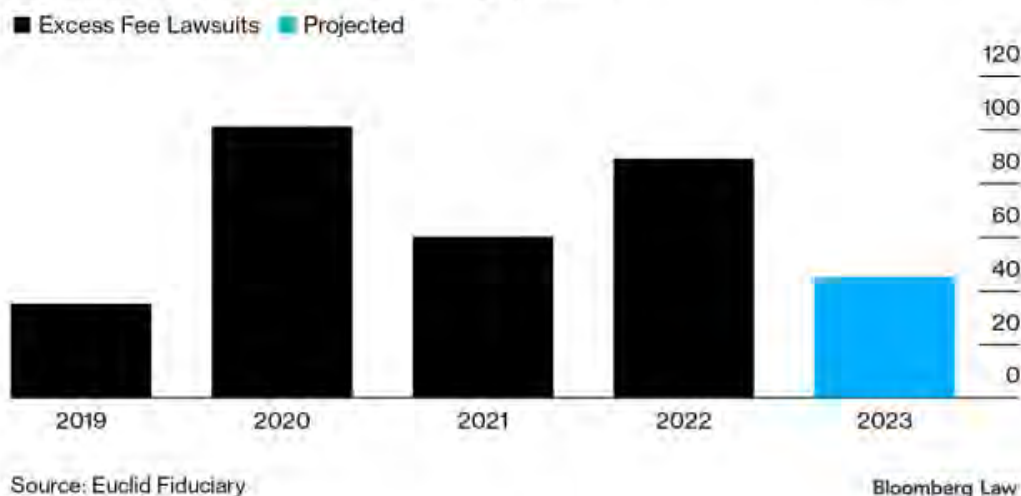
One area that could deliver growth this year: Lawsuits filed against 401(k) plans for charging allegedly excessive fees. Litigation over retirement plans' fiduciary duties under ERISA has become popular in recent years.

But the litigation has developed a distinct characteristic. It comes in waves, and if previous patterns continue, 2024 is poised to be a big year of filings.

Excessive fee lawsuits hit a record in 2020, with 101 cases filed, according to data from Euclid Fiduciary, an insurance underwriter. After a relatively quiet year in 2021 (with 60 cases filed), the practice surged again in 2022, when 89 cases hit dockets. Projections for 2023 showed another moderately slow year, with 45 filings.

Some Years Are More Excessive Than Others

The number of excessive fee lawsuits brought against retirement plan fiduciaries displays a peak-and-trough pattern.



The peak-and-valley cycle is driven by capacity constraints at plaintiffs' firms who typically file these cases, Euclid Fiduciary says.

Michael Hines, a partner at Skadden, Arps, Slate, Meagher & Flom who defends these cases, expects high levels of activity in 2024. Some plaintiffs firms have sent a surge in demand letters seeking a settlement before cases are even filed, Hines said.

"We're likely nowhere near the end of this area of litigation," he said. "These cases don't get dismissed and they very often settle for high numbers for individual complaints. And that's attracted more and more plaintiffs' firms."

Restructuring

With M&A in the doldrums, the counter-cyclical restructuring practice picked up steam in 2023. The year will be among the busiest for major US Chapter 11 filings since 2010, according to data from S&P Global Market Intelligence.

Through October, 561 companies tracked by S&P had filed for bankruptcy protection, a figure eclipsed only once (in 2020, by two filings) since 2010.

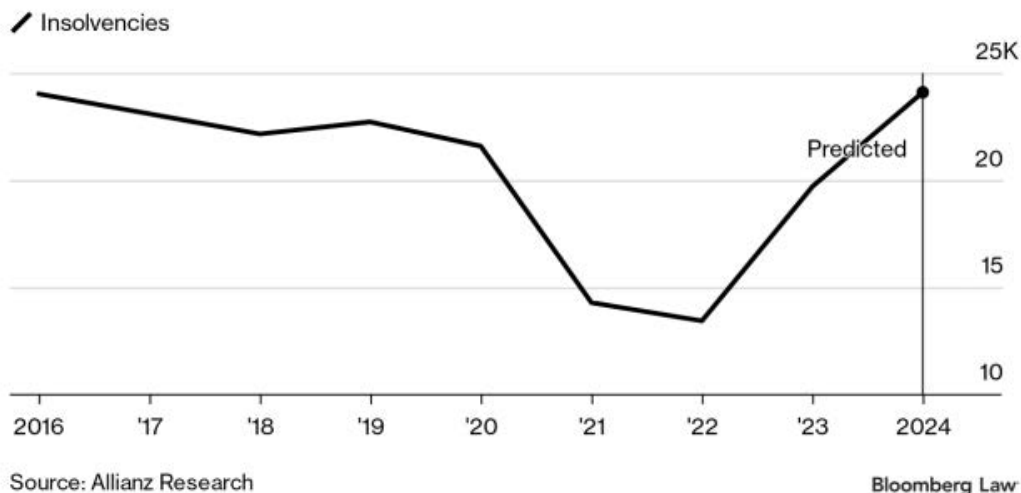
Bankruptcy practices saw some of the highest demand growth of any law firm practice in 2023. Hours were up 6% through three quarters compared to the same period in 2022, according to Thomson Reuters Institute data.

While the restructuring practice can be volatile, there are predictions for a continued increase in bankruptcies.

US insolvencies are expected to rise in 2024 by 22% from 2023 levels, according to insurer Allianz Global, putting the post-Covid bankruptcy nadir firmly in the rear-view window. Tighter credit conditions and the possibility of deteriorating economic conditions will drive the acceleration of cases, the insurer said.

Dead-Company Bounce

US insolvencies are expected to rise by 22% in 2024.



All in all, if these four practices deliver growth, 2024 could be a Goldilocks year for Big Law. Transactional practices don't typically rebound amid a resurgence in bankruptcy filings, but that's what some are predicting. And litigation and antitrust practices will continue to deliver strong performances.

"I don't think there's a lot of unrest among law firm leaders," Hildebrandt said. "In many ways I think in 2024 we are returning to a more normal growth cycle as the anomalies of 2022 go further into the past."

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Cohen Milstein Appoints Benjamin D. Brown Managing Partner (1)

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Law Firms

Cohen Milstein

- Brown named managing partner Wednesday
- Brown will double as antitrust co-chair

Benjamin D. Brown has been named managing partner of Cohen Milstein Sellers & Toll, as the mid-size firm addresses hybrid work and rapidly-changing AI tools.

He succeeds Steven J. Toll who held the position for over two decades, the firm said. While Brown has no radical mandate in taking leadership of the plaintiff-only firm, he said the goal is to continue organic growth.

“We always keep our ears to the ground in terms of where the strongest cases are,” Brown said. “Traditionally that has led to some stability in the firm in terms of antitrust and securities litigation being the two main engines of the firm.”

Brown said he will remain co-chair of the antitrust practice simultaneously with his managing partner position. He previously served in the antitrust division of the Justice Department.

He represents Japanese transport company Mitsui O.S.K. Lines Ltd. and Japanese shipping company NYK Japan in antitrust cases against other transport companies, including Norfolk Southern Corp. in the US District Court for the Northern District of California and US District Court for the District of Columbia.

“I’m not ready to scale back entirely on my active litigation and will probably get in one or two fewer cases in the years to come,” Brown said.

The firm has over 150 employees and eight offices, including in Chicago, New York and Washington, DC.

An earlier version of this story was produced with the assistance of Bloomberg Law Automation.

(Adds Brown comment starting in second paragraph.)

After 'Breakthrough Years,' Edelson Grows With DC Hire and Launches in LA

LAW [law.com/therecorder/2024/01/03/after-breakthrough-years-edelson-grows-with-dc-hire-and-launches-in-la](https://www.law.com/therecorder/2024/01/03/after-breakthrough-years-edelson-grows-with-dc-hire-and-launches-in-la)

By Abigail Adcox



What You Need to Know

- Aaron Colangelo, former chief litigation counsel of the National Resources Defense Council, joined Edelson as a partner in D.C.
- The firm is looking to expand in several growth areas, including environmental, mass torts and trial practice, according to the firm's founder.
- Edelson is also launching an L.A. office and eyeing a N.Y. branch.

Plaintiffs boutique Edelson has hired Aaron Colangelo, former chief litigation counsel of the National Resources Defense Council, as a partner in Washington, D.C., as the firm seeks to build its bench in targeted practice areas, including environmental cases.

The Chicago-founded firm also said this week, in a further nod to its growth, that it is expanding its in-house artificial intelligence team with the addition of Nayan Dixit, an AI integration-focused developer, as well as growing its physical footprint with the launch of an office in Los Angeles. The firm, which has more than 50 lawyers in six locations, is also eyeing other potential office locations, such as New York.



“We are absolutely in growth mode right now,” Jay Edelson, founder and CEO of Edelson, said in an interview. “We’ve had some breakthrough years the last couple of years, and see that we have a lot of opportunities, and we want to capitalize on that, which means that we need more talented lawyers and other professionals at the firm.”

The firm’s growth follows a “watershed year” for the firm, said Edelson, who declined to discuss the firm’s financials.

Jay Edelson, founder and CEO of Edelson. Courtesy photo

Colangelo joins Edelson after two decades at the NRDC, the nonprofit international environmental advocacy group. Colangelo has litigated more than 100 environmental cases, including lawsuits related to coastal water quality, migrant farmworker health and endangered species protections, among other topics, according to the firm.

Environmental work is one of several “growth areas” for the firm over the next five years, Edelson said, adding that the firm is also going to be “aggressively expanding” its mass torts group and its trial practice group, as well as its antitrust group.

Edelson added that the growth areas are driven by “where we think our firm can add unique value.”

“We tend to like more cutting-edge cases where we think that it really makes a difference that we’re on the case,” Edelson said.

Among other cases, Edelson is representing Liz Turnipseed in an unlawful-marketing lawsuit against Smith & Wesson, the manufacturer who made the gun used in the 2022 shooting at a Fourth of July parade in Highland Park, Illinois.

Edelson’s growth plans for physical office spaces are, in part, decided by where the firm’s attorneys want to live.

“The reason we started in L.A. is because a bunch of people within the firm said, ‘We want to move to L.A.’” Edelson said. “New York is another place that we’re going to be looking at in the next 12 to 24 months. D.C. We’re really going to be building up [there] as well. But it’s

not based on where the work is because people can be in L.A. and be working on cases in Florida.”

Los Angeles is the firm’s sixth physical office location. The firm launched its D.C. office in 2022, and now has three lawyers there with the addition of Colangelo, according to the firm’s website.

Max Hantel, who has joined the firm’s trial practice and mass torts groups as an associate, “launches” the firm’s new L.A. office, the firm said.

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Jan. 4, 2024, 1:30 AM PST

Whistleblower Program Promises to Reform Anti-Corruption Efforts

Anti-money laundering rules are increasingly playing a key role in US global anti-corruption endeavors, Kohn, Kohn & Colapinto's Stephen Kohn says.

Bloomberg Law News 2024-01-04T10:28:23172704505-05:00**Whistleblower Program Promises to Reform Anti-Corruption Efforts****By Stephen Kohn2024-01-04T04:30:50000-05:00**

The Anti-Money Laundering Whistleblower Improvement Act has potential to be the most effective transnational anti-corruption law on the books.

In 2024, the law, and the AML Whistleblower Program it established, should start to deliver on this potential as whistleblower award programs continue to play a more central role in US global anti-corruption efforts.

The program dates to 2020 and the passage of the AML Act of 2020. This version of the law was undermined by loopholes, notably including a lack of mandatory whistleblower awards. Whistleblower advocates quickly called for reforms to the law while reporting showed that whistleblowers were unwilling to report to the program because of these deficiencies.

The AML Whistleblower Improvement Act, signed into law on Dec. 29, 2022, directly addressed the deficiencies with the AML Whistleblower Program. Qualified whistleblowers are now entitled to monetary awards of 10% to 30% of the funds collected in an enforcement action connected to their disclosure.

Furthermore, in light of Russia's invasion of Ukraine, the Improvement Act expanded the AML Whistleblower Program to cover sanctions violations.

Under the reformed AML Whistleblower Program, individuals from across the globe may anonymously report money laundering and other violations of the Bank Secrecy Act as well as sanctions violations.

While the war in Ukraine and the need to track down illicit funds of Russian oligarchs was the major impetus behind the Improvement Act's passage, the scope of the AML Whistleblower Program is truly global. The law's jurisdiction covers traditional banks as well as cryptocurrency exchanges.

As can be seen from the Financial Crimes Enforcement Network's crackdown on cryptocurrencies such as Binance, the new AML and sanctions whistleblower law's scope and potential to stop criminals from using international monetary systems is vast.

For violating the BSA and "multiple sanctions programs," Binance was forced to settle with FinCEN and pay a civil penalty of \$3.4 billion. Its failure to implement the BSA rules on money laundering—such as proper know your customer requirements and the filing of suspicious activity reports—facilitated numerous criminal and terrorist entities to use its crypto exchange and violate sanctions laws.

Global Efforts

Money laundering is at the core of corruption worldwide as noted in the Biden administration's anti-corruption strategy, the nation's first whole-government approach to combating international corruption.

The United States Strategy on Countering Corruption explicitly endorses full use of the AML Whistleblower Program, noting the US "will implement newly established tools for investigating and prosecuting money laundering offenses" such as "financial rewards to incentivize reporting on Bank Secrecy Act violations in financial institutions."

US whistleblower laws have already effectively incentivized international anti-corruption whistleblowers. The Dodd-Frank Act, whose whistleblower provisions the AML Whistleblower Improvement Act was modeled on, created whistleblower programs at both the Securities and Exchange Commission and Commodity Futures Trading Commission.

The AML, SEC, and CFTC whistleblower programs all have a transnational scope: Whistleblowers from anywhere can report on misconduct occurring overseas and qualify under the programs. Thousands of non-US citizens already use the Dodd-Frank programs to report securities law violations, fraud in commodity markets, and violations of the Foreign Corrupt Practices Act (which are covered under the SEC program).

In May 2023, the SEC issued a record \$279 million whistleblower award, and reporting suggests it stems from a \$1.1 billion FCPA settlement with Swedish telecommunications company Ericsson Inc. over allegations of a multi-year bribery scheme across the globe, including in Djibouti, China, Vietnam, Indonesia, and Kuwait.

The CFTC entered the field of global anti-corruption enforcement when it sanctioned Vitol Inc. \$95.7 million in December 2020 for engaging in fraud and manipulation of markets—by paying foreign state-owned entities for confidential information and preferential treatment and engaging in manipulative trading activity.

Looking Ahead

The table is clearly set for the AML Whistleblower Program to take a leading role in the US' global efforts in 2024, but two major questions remain in determining the program's success: Will the Treasury Department and FinCEN fully use the program, and will the regulations for the program align with unique needs of international anti-corruption whistleblowers?

So far, the answer to the first question is reassuring, as FinCEN's fiscal 2024 budget shows a real commitment to fully implementing the program. The budget includes a \$29.35 million increase in previous year's budget for purposes of implementing the AML Act, as well as 60 new full-time employees dedicated to AML Act implementation.

The second question remains up in the air, as Treasury and FinCEN are drafting the regulations to implement the AML Whistleblower Program. While most of these regulations could be copied from those for the Dodd-Frank programs, key changes need to be made if the whistleblower program is to be as effective in global anti-corruption efforts as it is positioned to be.

When writing the regulations for their whistleblower programs, the SEC and CFTC were unaware how expansive the programs' transnational anti-corruption reach would be, and no rulemaking comments were filed from international groups. Certain aspects of their regulations thus unintentionally exclude a large-swath of international anti-corruption whistleblowers.

In particular, a narrow definition of "voluntary" whistleblowing that excludes whistleblowers who go to the news media, nongovernmental organizations, US embassies, and foreign law enforcement unfairly prejudices against international whistleblowers who are likely unaware of the strict requirements of US programs.

Treasury and FinCEN have the benefit of learning from these mistakes and can pass regulations that consider international whistleblowers' unique needs.

If Treasury and FinCEN implement the AML Whistleblower Program in full accordance with White House strategy, it can live up to its promise to be the US' most effective transnational anti-corruption law for years to come.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

Author Information

Stephen M. Kohn is founding partner of whistleblower law firm Kohn, Kohn & Colapinto, which collaborated with congressional offices to draft amendments to the Anti-Money Laundering Improvement Act.

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ANALYSIS: Why Don't More Companies Disclose Bad Behavior to DOJ?

By Kate Azevedo

Bloomberg Law News 2024-01-04T10:26:44771366827-05:00

ANALYSIS: Why Don't More Companies Disclose Bad Behavior to DOJ?

By Kate Azevedo 2023-12-29T05:00:36000-05:00

As we emerge from the holiday season, when many children learned if they were naughty or nice, companies may similarly hope to find themselves on the “nice list” when it comes to their corporate misconduct.

These are the companies that voluntarily self-disclosed (VSD) corporate misconduct, fully cooperated with any government investigation into these actions, and remediated any discovered wrongdoing under the US Department of Justice's Corporate Enforcement Policy (CEP).

The Justice Department has offered detailed guidance on the CEP to clarify how companies have been successful in “fully cooperating” or “remediating the misconduct.” This year, DOJ's Criminal Division revised the policy to incentivize companies to proactively disclose any corporate misconduct by rewarding those who do with substantial reductions in penalties or fines—between 50% and 75%—and a possible deferred prosecution agreement or complete declination to pursue any form of criminal disposition.

But not surprisingly, companies are seemingly wary of being the first ones to proactively expose any wrongdoing. Based on my analysis of the DOJ's publicly available enforcement agreements related to the CEP, it doesn't appear that companies find it worthwhile to voluntarily self-disclose.

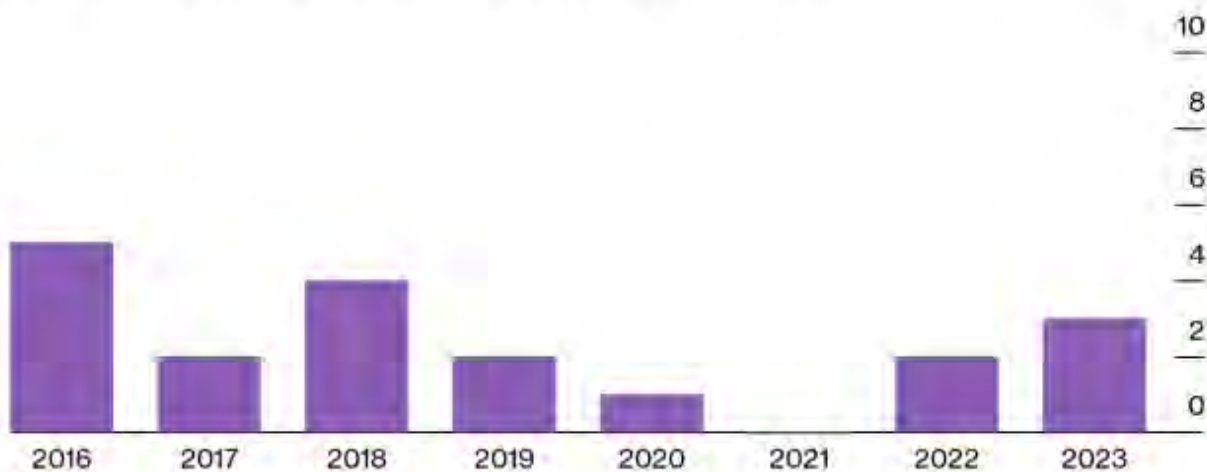
DOJ Awards Few Declinations, DPAs

My initial take-away from the analysis is that very few companies successfully cross the threshold to receive either a declination or a deferred prosecution agreement (DPA). To better understand the profile for a company that qualifies for the CEP, I analyzed all declination letters issued since 2016 and also reviewed the number of DPAs awarded to companies in the same time period.

Since the policy's inception in 2016, only 19 companies that voluntarily self-disclosed, fully cooperated, and remediated the misconduct were rewarded with a not-guilty charge. During this time, there were over 60 criminal corporate enforcement actions.

Only 19 Declinations Awarded in Eight Years

Companies awarded a declination from DOJ criminal enforcement



Source: www.justice.gov/criminal/criminal-fraud/corporate-enforcement-policy/declinations

Bloomberg Law

Interestingly, DOJ established the CEP in April 2016 as a pilot program available to companies that voluntarily self-disclosed violations of the Foreign Corrupt Practices Act (FCPA). The DOJ had a strong start, with five declinations awarded to companies in 2016. However, in the subsequent years, the program didn't gain much traction, with only two to four companies receiving declinations each year, and none in 2021 (possibly due to the Covid-19 pandemic).

The Justice Department in 2023 broadened the scope of the CEP to include any corporate misconduct—not solely FCPA violations. But the expanded definition had little effect, with only three companies receiving a declination for voluntarily self-disclosing their wrongdoing.

A similar result is evident for DPAs. Under the revised CEP, companies that don't voluntarily self-disclose prior to the government investigation, but that fully cooperate and remediate the misconduct once an investigation is launched, may still avoid prosecution. However, according to my analysis of DPAs for FCPA enforcement actions, only three companies received a DPA in 2023 and eight in the last three years.

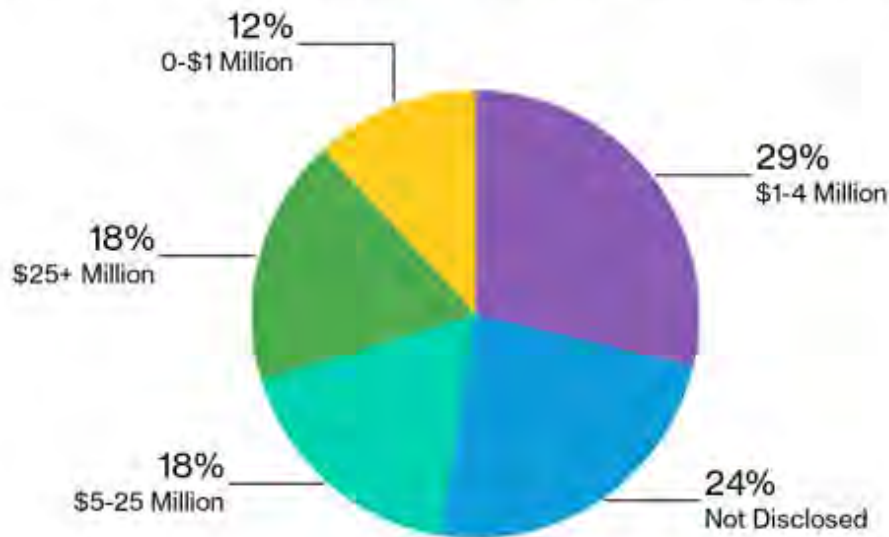
Companies With Large Profits Had Declinations

Is there a detail in the declinations or a provision in the policy to explain why so few companies benefit from voluntarily self-disclosing? I analyzed the declinations to identify the companies' determined profits from their misconduct to potentially uncover a clue.

Under the CEP, companies that voluntarily self-disclose may not receive a declination if there are “aggravating” circumstances, such as criminal recidivism, egregious or pervasive misconduct, or “significant profit” from the misconduct. The CEP defines “significant profit” relative to a company’s overall profit.

This requirement could explain why the DOJ has awarded so few declinations in recent years. Companies may have feared that if they profited millions of dollars from the misconduct, they’d be ineligible for a declination. But my analysis of DOJ data shows that companies that profited in the millions from their misconduct were still awarded declinations.

65% of Companies Had More Than \$1 Million in Profits Profits from misconduct for companies with declinations, 2016-2023



Source: CEP Declinations on Department of Justice Website
www.justice.gov/criminal/criminal-fraud/corporate-enforcement-policy/declinations

Bloomberg Law

Based on the data, over two-thirds of companies profited over \$1 million, and over one-third profited over \$5 million from their misconduct. And in 2023, a declination was awarded to the company with the highest-recorded such profit: \$32.7 million. Therefore, the “significant profit” requirement wouldn’t likely eliminate companies’ chance of a declination.

But the answer may lie in the detail of the CEP. While it seems that companies are able to profit significantly from their misconduct and still see a reduction in punitive measures, the provision does require companies to pay all “disgorgement, forfeiture, and/or restitution” of these profits. A closer look at the declinations indicates that several companies had an exceedingly tight turnaround period of 10 business days to hand over the large profits to the DOJ, which may not be feasible for many companies.

CEP Is Slow Burn, But Model Spread to Agencies

While the data in my analysis demonstrate low CEP participation, the Justice Department continued to revise, broaden, and promote the policy in 2023. DOJ officials are still standing behind the notion that all parties will benefit if companies voluntarily self-disclose, fully cooperate, and remediate their corporate misconduct. And the model is spreading to other federal agencies.

For example, the EPA Audit Policy offers incentives to companies to voluntarily disclose and remediate violations of federal environmental laws and regulations. The SEC Enforcement Division Cooperation Program similarly provides incentives, such as reduced sentences and sanctions in enforcement actions. Time will tell how the self-reporting model—as well as the revamped CEP—will fare.

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Emojis are a compliance problem, for real

F fcpablog.com/2024/01/04/emojis-are-a-compliance-problem-for-real

January 4, 2024

The FCPA Blog

They appear in just about every Slack thread, sometimes strung together — a moon face, a rocket ship, a thumbs up. They're shorthand substitutes for thoughtful responses that might come later. Because they're shorthand, emojis are often ambiguous and intentionally non-committal, and that's a problem for compliance.

"There are 200+ cases a year referencing emojis or emoticons," according to Eric Goldman, a professor at Santa Clara University School of Law. He's an IP specialist who tracks court cases involving emojis.

In one such case, DC federal district court judge Trevor McFadden said emojis are symbols and "may be actionable if they communicate an idea that would otherwise be actionable. . . . Just like with words, liability will turn on the emoji's particular meaning in context."

Judge McFadden denied a defense motion for summary judgment last year in a shareholder class action against a widely followed investor, Ryan Cohen.

The plaintiffs allege Cohen misled them when he used a side-eyed moon in a tweet about meme stock Bed Bath & Beyond. They interpreted that to mean Cohen thought the stock would go up ("to the moon"), so they bought, too.

When the stock went up, he sold all his shares, raking in gains of \$60 million. The stock then crashed on news of his sale.

Cohen's side-eyed moon emoji is at the center of the plaintiff's' pending case.

In Canada last year, a judge ruled that a thumbs up emoji can be the basis for a binding contract.

The defendant, a farmer, argued that his thumbs up "simply confirmed that [he] received the flax contract," not that he had agreed to the terms of the deal.

The judge said a thumbs up emoji might be a non-traditional way to sign a document. Nonetheless, in the context of the parties' dealings, it "conveyed [the defendant's] acceptance" of the contract and was legally equivalent to a signature.

Lora Kelley, an associate editor at the *Atlantic*, wrote about those cases and the vagueness of many emojis. “The possibility of misinterpretation—or plausible deniability—might be part of the appeal of using emoji at work,” she said.

Emojis can be evidence of corporate malfeasance or worse, even when used inside companies among coworkers.

As the *Wall Street Journal* reported,

At FTX Group, expenses and invoices were submitted on Slack and were approved by emoji. These informal, ephemeral messaging systems were used to approve transfers in the tens of millions of dollars, leaving only informal records of such transfers, or no records at all.

Emojis also bring cross-cultural complications. Eric Goldman, the law prof who writes about emojis, said the thumbs up can be an affirmation of contractual assent. But in some cultures, it’s “offensive (it has the same meaning as the middle finger).”

Despite the ambiguity, or because of it, people in every company use emojis to talk to each other and, more dangerously, to outsiders (including intermediaries and government officials).

It’s nearly certain some of those emojis will lead to misunderstandings. An intermediary may think there’s a green light to buy a foreign official a nice gift, sponsor some travel, or agree to terms in a government contract that raise FCPA compliance issues.

I know. Emojis save a lot of time. That’s why we like them. We’ll respond with words later. But for now, the smiley moon face, thumbs up, or rocket ship will have to do.

Compliance officers have a lot on their plates, more than enough. But everyone, from board members to field staff, should know that emojis at work are dangerous.

My humble hope (cue the moon face with a crooked smile followed by praying hands) is that compliance officers will grasp the risks attached to emojis and include that message in compliance training sessions starting now.

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Matt Levine's Money Stuff: Coal Plants for Green Investors

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Coal Plants for Green Investors

By Matt Levine 2024-01-03T14:14:04481-05:00

Transition finance

I used to write a lot about crypto. The reason I liked writing about crypto is that it seemed to be rediscovering all of regular finance from first principles, quickly, in public. It was a fabulous laboratory for understanding financial structures. If you wanted a public demonstration of why, I don't know, infinitely leveraged shadow banks were bad, you could wait 20 minutes and crypto would give you one. (One reason I write about crypto less now is that this has stopped: When FTX collapsed, a lot of the fun financial experimentation in crypto collapsed with it.)

Climate investing isn't *really* like that, but it's a *little* like that. Sometimes, reading stories about green-investing stuff, I get the feeling that I am listening to dorm-room conversations about capitalism, people rediscovering finance from first principles. "Trees are good for the climate, what if we paid people not to cut them down?" "Great idea, I wonder if there will be unintended consequences." And then there are a million amazing stories about how that sort of regime can be gamed — and how it can be made more sophisticated to stop the gaming, and how those more sophisticated regimes can then be gamed, etc. Because green investing regimes really *are*, sort of, a whole alternative financial system, designed to mobilize money to maximize some function of "returns plus climate" rather than simple returns. And if you are building an alternative financial system from scratch there will be bugs. And meanwhile — just like in crypto — there will be people over in the regular financial system, trained over the years to identify and exploit bugs in financial systems, and they'll happily hop over to your system to exploit your bugs.

So from first principles, if you want to be a climate investor, should you invest in coal companies? The intuitive answer is no:

- 1. Burning coal is bad for the climate and you want less of it.
- 2. Presumably your investment choices matter: You invest in things you want more of, so that there can be more of those things.

And so there is a lot of green investing that takes the form “do not finance fossil-fuel companies,” or do less of it or whatever. And that is a reasonable experiment to run. But there are complications. For one thing, it’s not like *every* investor will be climate-focused. Coal companies will still have investors, and if all the climate-focused investors dump the coal companies, they will be owned by the non-climate-focused investors. A coal company owned by climate-focused investors might make some choices to be cleaner, to dig up less coal, to transition to cleaner energy, whatever. But a coal company owned by investors *specifically selected for their indifference to climate considerations* will make different choices.

A related objection is that that *point* of avoiding coal companies is to raise their cost of capital: If green investors dump coal companies, that will raise the cost of capital of coal companies, and if the cost of capital of a thing is higher, you will get less of it. But we have talked a few times around here about a paper by Samuel Hartzmark and Kelly Shue arguing that this is counterproductive, because raising the cost of capital — the discount rate — of an activity also tends to make it *faster*. Companies with high discount rates have to focus more on the short term, and a coal company that focuses on the short term will probably dig up coal as fast as it can and not worry about the environment. A coal company with a low discount rate can care more about the far future, presumably a future in which we use less coal and it has to pivot to geothermal energy or whatever. Hartzmark and Shue write: “Sustainable investing that directs capital away from brown firms and toward green firms may be counterproductive, in that it makes brown firms more brown without making green firms more green.”

So from second principles, if you want to be a climate investor, maybe you should invest *only* in coal companies, take over their boards and make them stop mining coal. There are some examples. But there are some problems with this too. For one thing, if you go around buying up coal companies, you raise the price of coal companies, lowering their cost of capital and incentivizing other people to get into the coal mining business so they can sell to you.

For another thing, there is a lot of worry about “greenwashing” in climate investing, a lot of concern that investors *advertise* themselves as having rigorous environmental principles without actually doing anything about them. If you go around calling yourself a green investing firm and you own a lot of coal companies, people will complain. You might have a perfectly good answer, but at first glance it looks bad. And the whole field is so new that some people will be judging you at first glance; there are not yet clear norms about what does and doesn’t work.

Anyway here’s a good Bloomberg Green article about transition finance:

“Transition finance” is shaping up to be one of the new year’s most important subjects for anyone professing to care about the climate crisis. ...

The phrase “transition finance” is loosely defined as investments mainly in industries and infrastructure that help drive efforts to achieve a net-zero economy. It’s distinct from green finance, which generally targets so-called climate solutions like wind farms or battery plants. ...

The Glasgow Financial Alliance for Net Zero is proposing that the investment strategy include financing of traditional green activities, like renewable energy or electric vehicles, as well as polluting companies that plan to decarbonize and even high emitters like coal plants—as long as they’re on the way to being shut down.

What unites most proposals around transition finance is the belief that, instead of simply cutting ties with high-emitting companies, financial institutions should help polluters either phase out their activities or put them on a so-called emissions-light pathway.

“You’ve got to go where the emissions are and try to bring those down,” said Curtis Ravenel, a senior adviser to GFANZ. The group is co-chaired by [Mark] Carney, a former Bank of England governor who’s also chair of Bloomberg Inc., and Michael R. Bloomberg, founder and majority owner of Bloomberg News-parent Bloomberg LP.

For sustainability-minded investors, however, all of this begs the question: Do any assets fail to qualify? And for the polluters that do, how can investors be confident they’ll decarbonize at the speed and scale envisioned?

A norm like “climate-focused investors should avoid coal companies” is simple but possibly counterproductive. A norm like “climate-focused investors should buy coal companies and make them better” is more nuanced but harder to police.

Convertible bonds

I used to be, among other things, a convertible bonds investment banker. This meant that I traveled around the country pitching companies on issuing convertible bonds. The basic pitch is that a convertible bond lets you sell debt with a lower interest rate, by throwing in an equity option. Instead of selling a bond that pays 7% interest, you sell a bond that pays 2% interest, and if your stock goes up by 30% the bond converts into stock.

There are various add-ons to this pitch — I should have worn a button saying “Ask Me About Tax Structuring!” — but that’s the basic pitch. Intuitively, there is a sort of interest-rates sweet spot for that pitch:

- 1. “Instead of selling a bond that pays 1.5% interest, you sell a bond that pays 0% interest and can convert into stock”: Bad pitch. When straight debt is super-cheap, there’s no reason for good companies to mess around with converts.

- 2. “Instead of selling a bond that pays 7% interest, you sell a bond that pays 2% interest and can convert into stock”: Good pitch. You save a lot of money!
- 3. “Instead of selling a bond that pays 17% interest, you sell a bond that pays 11% interest and can convert into stock”: Bad pitch. When the convertible interest is super-high anyway, it's not that attractive.

I was a convertibles banker during a decent interest-rate environment for convertibles. I remember it being cool when we could show a company a convertible with a 0% interest rate. Zero was an excitingly low number, certainly much lower than whatever the company could get in the regular bond market. “Zero percent interest,” we'd say. “You can't afford not to!” But that was a long time ago. A few years ago Apple Inc. issued a six-year straight bond that paid 0.00% interest. Convertibles can't compete with that.

Probably 90% of everything in financial and business news over the last decade could be described as a low-interest-rates phenomenon, but convertible bonds are very much a medium-interest-rates phenomenon, and now that medium interest rates are back so are convertibles. The Financial Times reports:

US companies have been piling into the market for convertible bonds as they search for ways to keep their interest costs down, in a rare flurry of activity in otherwise subdued corporate fundraising markets.

Issuance of convertible debt climbed by 77 per cent last year to \$48bn, according to data from LSEG, making it one of the only areas of capital markets to return to pre-pandemic averages after 2022's market downturn.

Experts say the boom in convertibles, a type of bond that can be swapped for shares if a company's stock price hits a pre-agreed level, is likely to continue this year as companies refinance a wave of maturing debt.

The debt has traditionally been popular with younger technology and biotech groups that struggle to access mainstream bond markets. But more established companies have also dived in as the Federal Reserve's interest rate hikes have driven up borrowing costs even for investment-grade companies.

I confess that I am always rooting for the convertibles market, both out of nostalgia and also because it seems vaguely like some sort of career security for the skills of converts bankers to be in demand.

Insider trading

US insider trading law is weird. Most people have some rough intuition like “if you know about a merger that hasn’t been announced yet, it is illegal to trade the stock of the target,” and in many countries that is roughly the law. (Not legal advice, in any countries.) In the US, though, the law does not match closely with that intuition. In the US, if you know about a merger that hasn’t been announced yet, it’s *probably* illegal to trade on the stock of the target, but there needs to be some extra factor: You have to have gotten the information from an insider in exchange for a personal benefit, or you need to have violated some duty of confidentiality to the person you got the information from, or the merger needs to be a tender offer. (Not legal advice, anywhere.) There is not just a rule that says “if you know about a merger that hasn’t been announced yet, it is illegal to trade the stock of the target.” Instead there is a hodgepodge of other rules that almost, but not quite, add up to that general rule.

I think this is broadly good — a rule saying “you can never trade on any information that isn’t public” would discourage analysts from finding out new facts — but that’s not the point. The point is that US insider trading law is complicated, a collection of specific rules rather than a general prohibition, and it changes over time.

In particular, for a long time, it was *roughly* true that:

- If you worked for the *target* of a merger, and you knew about the merger in advance, you couldn’t trade your company’s stock: You were an insider, and that would be insider trading. As an insider of the company, you had a fiduciary duty to the shareholders not to take advantage of them by trading on inside information.
- If you worked at the *acquirer*, and you knew about the merger in advance, you *could* trade the target’s stock. You weren’t an insider of the *target*, just of the acquirer; you had no fiduciary duty to the target’s shareholders so you could go ahead and trade.

Not legal advice, in the past, or now. But at least some courts took this view. And then in 1997, the US Supreme Court expanded the law in a case called *US v. O’Hagan*, endorsing a “misappropriation” theory that made it illegal for anyone to trade on nonpublic information that they misappropriated from anyone, including acquirer insiders trading target stock.

Intuitively you might think something like: “Well, before 1997, it was basically legal in the US for people who knew about a merger in advance — not all of them, but at least the acquirer’s employees and bankers and lawyers — to trade in the target’s stock, so there must have been a ton of insider trading in advance of merger news. And then after 1997, it was basically illegal for most of those people to do that, so all that insider trading must have stopped.” There are of course flaws in that logic:

- Before 1997 it was at best ambiguously legal to do this. (O'Hagan himself — who worked at an acquirer's law firm and bought call options on the target — was arrested and convicted of insider trading, though an appeals court threw out his conviction, before the Supreme Court reinstated it.)
- After 1997 the legality is still somewhat complex, and there is not a clear blanket ban on trading on inside knowledge of a merger.
- Not everyone who might do insider trading follows the nuances of Supreme Court insider trading jurisprudence, so they might not update their behavior immediately.
- Some people wouldn't have done this even when it was legal, because it seemed shady, and other people will do it even when it's illegal, because it's lucrative and they don't expect to get caught.

Still you could imagine that 1997 would be a step change in the amount of insider trading on mergers. And I suppose it was. Here are a fun paper and related blog post by Fernan Restrepo about "How the Misappropriation Theory Affects the Amount of Insider Trading":

My paper tests this hypothesis by examining the impact of *O'Hagan* on a common proxy for insider trading: target run-ups in mergers and acquisitions ("M&A") – that is, the cumulative abnormal returns for the shares of the target company before the transaction is publicly announced. The intuition behind this proxy is that individuals who hold non-public information about mergers and acquisitions can make significant profits if they buy shares in the target company before the transaction is announced (since mergers typically involve the payment of a large premium over market prices); as a result, a significant increase in the target's pre-merger price is likely indicative of a high incidence of trading on confidential information about the transaction. ...

The results show that the run-ups in fact decreased significantly in relation to the announcement returns after *O'Hagan*. Before *O'Hagan*, the average relative run-up was 7 percentage points lower than the announcement returns; after the decision, the difference became 9 percentage points. In this sense, after *O'Hagan*, there was less anticipatory trading explaining the overall valuation effect of M&A bids, which is consistent with the notion of less insider trading.

I suppose a thought experiment would be: If the US got rid of its current rules and replaced them with a simpler, "if you know about a merger that hasn't been announced yet, it is illegal to trade the stock of the target"-style rule, would that change the average run-up? My guess is no: My guess is that the current hodgepodge of rules covers basically every practical situation, so expanding them wouldn't have much effect. But I'm not sure.

Co-location

I wrote yesterday:

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.

Not literally 200, but, yes, I heard from a lot of readers about front-running sportsbooks. It is classically called “courtsiding,” because the way to get data faster than the sportsbooks’ direct feeds is by sitting courtside. One reader even pointed me to a book about it; from the Amazon summary:

Brad Hutchins has been living a young bloke’s dream: getting paid to travel the world and watch sport. Sitting court-side on the pro tennis circuit, he uses his phone to transmit results to a gambling syndicate, taking advantage of the time delay in TV broadcasts to beat other online punters to the big pay-offs. His stories from life on the road capture the adventures and mishaps that come with following the world’s best tennis players and partying in a new country every week. But like card counters in casinos, courtsiders are despised by the tennis establishment. The more time Brad spends at tournaments, the harder it becomes for him to evade the security guards who are hell-bent on ejecting him from matches. The resulting cat-and-mouse chases will appeal to anyone who loves the roguish spirit of *The Wolf of Wall Street* or *Catch Me If You Can*.

Or *Flash Boys* I guess. Another reader pointed me to a UK legal case about it, which “arose out of an agreement for the provision of live betting and horseracing data from certain racecourses”:

Lewison LJ (with whom Phillips LJ agreed) took what may be regarded as a less legalistic and more pragmatic approach towards the question of confidentiality. In his view, the fact that a large amount of the information concerned would be broadcast live on television, and thereby almost instantly available to the public at large, made it difficult to argue that the information – at least individually – was confidential. His Lordship cited Lord Walker’s minority opinion in *Douglas v. Hello!* suggesting that commercial value alone is not enough, and that “*the confidentiality of any information must depend on its nature, not its market value*”. Lord Walker stated that the law of confidentiality should not “*afford the protection of exclusivity in a [public] spectacle*”.

But that was the minority view. Another reader pointed out that the *reason* venues eject courtsiders is the economic value of their live feeds: Venues make money by selling live feeds to sportsbooks, but courtsiders reduce the value of those feeds to the sportsbooks and, thus, the venue.

Yet another reader sent me this 2021 Wired story with the impeccable title “The Horse, the Drone and the Epic Fight for Gambling Success.” I have not read it yet; I assume it’s about someone using drones to front-run online bookmakers on horse races, though I suppose it is possible that it’s about someone using horses to front-run online bookmakers on drone races.

Things happen

Disney Will Work With ValueAct to Counter Billionaire Nelson Peltz. Fisher Investments in Sale Talks. Hedge Funds Millennium, Eisler Close Out 2023 With 10% Gains. LPs Doubt Venture Funds' Startup Valuations. Hong Kong's IPO Drought Casts Pall Over Region's Businesses. KKR-Backed BrightSpring Is First to File in 2024 for Big IPO. SoftBank's Gen Z social media bust: was IRL the next Facebook or a fraud? SoftBank Veteran Is a Billionaire After Another Huge Payday. Saving the Panama Canal Will Take Years and Cost Billions, If It's Even Possible. SpaceX Launches First Cell Service Satellites With T-Mobile.

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- 1. "I still do, but I used to, too." I try to do less.
- 2. In part because it's hard for a convertible bond to pay negative interest rates. Though not impossible; ask a convertibles banker about Berkshire Hathaway SQUARZ sometime.
- 3. I'm being loose here, and the "classical" theory also captures "temporary insiders" like the advisers of the target, but close enough.
- 4. There is a very important exception to this, which is "toeholds": Under current US law it is more or less obviously legal for a potential acquirer *itself* to buy a bunch of stock of the target, without disclosing it in advance, and *then* announce a merger proposal. (This is what Elon Musk did in buying Twitter Inc., though he did manage to break the law while doing it.) A broad rule that prohibited an acquirer from acting on its own inside information about itself would prevent this sort of trading ahead of mergers, and thus could reduce average run-ups. But toeholds aren't that common anyway, and even a broad anti-insider-trading rule might exempt them.
- 5. And about being front-run by them: I heard from at least one reader who placed bets that he thought were mispriced because he was looking at a video feed, only to find out that the sportsbook had updated its odds based on its faster direct feed.

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Citi Alumni Plan Bitcoin Securities That Don't Need SEC Approval

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As speculation about the upcoming approval or denial of spot-Bitcoin ETFs reaches a fever pitch, a group of former Citigroup Inc. executives is starting to offer securities backed by the oldest cryptocurrency that they say don't need the blessing of US regulators.

The new offering, called Bitcoin depositary receipts, will be similar to American depositary receipts that represent foreign stocks. The startup, called Receipts Depositary Corporation, or RDC, said it plans to issue the first Bitcoin depositary receipts to qualified global institutional investors in transactions exempt from registration under the Securities Act of 1933.

Known as BTC DRs, the offering will give institutions access to Bitcoin securities through US regulated market infrastructure and cleared through the Depositary Trust Co., according to a release from the company.

"We are really a conversion tool for asset owners today, whether they are hedge funds, family offices, corporations, large institutional investors, that want to take their Bitcoin and convert it into a DTC-eligible security and enjoy direct ownership in the US clearances," **Ankit Mehta**, the co-founder and chief executive of RDC and a former executive at Citigroup, said in an interview.

Broadridge Corporate Issuer Solutions will serve as the transfer agent and Anchorage Digital Bank National Association will handle custody of the underlying Bitcoin. RDC is backed by investors including Franklin Templeton, BTIG and Broadhaven Ventures, according to its press release.

Bitcoin this week broke above \$45,000 for the first time in nearly two years as optimism grew over the likelihood that the US Securities and Exchange Commission will soon approve exchange-traded funds that invest directly in the original cryptocurrency. RDC's offering will provide a product that's "complementary" to Bitcoin ETFs, according to Mehta. He and his co-founders **Bryant Kim** and **Ishaan Narain** worked for Citi's depositary-receipt team prior to starting RDC.

Compared with Bitcoin ETFs that will be redeemed for cash, Mehta said that depositary receipts offer direct ownership of Bitcoin for qualified institutions. Buying Bitcoin directly isn't the most-preferred option for some regulated institutions, he added, since crypto markets face challenges including security risks and regulatory uncertainty. Some of the challenges are similar to those once seen for Americans investing in foreign companies, which were mitigated by American depositary receipts.

“These market-infrastructure issues and challenges obviously took some time to evolve in the digital-asset marketplace,” Narain in an interview, “which is why when we set up this product, we made sure we partner with the right partners to provide those segregated services that these institutions look for.”

To be clear, the oldest cryptocurrency is supposed to eliminate the need for a centralized clearinghouse since it uses a decentralized blockchain, or public ledger, that automatically verifies, records, and settles transactions between users. Bitcoin holders also can store the tokens themselves instead of relying on an independent custodian. However, the co-founders of RDC believe Bitcoin depositary receipts will be something institutions are more “comfortable with.”

“Bringing market standards from traditional finance — like depositary receipts — to the digital-asset ecosystem will be a major theme heading into 2024,” Diogo Mónica, co-founder and president of Anchorage Digital, said in an email. “The majority of traditional institutions want direct exposure to Bitcoin, but some are still on the sidelines due to regulatory uncertainty. For these players, using Bitcoin depositary receipts unlocks the best of both worlds.”

Citigroup briefly began developing a similar product back in 2018, as Bloomberg reported. A representative for the bank declined to comment about the project in 2018. The three co-founders were in the group developing the digital-asset receipts at Citi, as the firm was exploring depositary receipts for a variety of asset classes. Mehta said RDC’s offering is “separate” from what was explored at Citi.

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Illinois Speaker's Bribery Trial Awaits Supreme Court Ruling (1)

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The public corruption trial of Illinois' longest-serving speaker of the House was postponed six months while a federal judge waits for a US Supreme Court ruling that could alter the case.

"I'm not going to stay the case, but I am going to move the trial," US Judge John Robert Blakey of the US District Court for the Northern District of Illinois told a crowded Chicago courtroom Wednesday.

Michael Madigan, the country's longest-serving state House speaker before leaving office in 2021, and Michael McClain, a longtime Madigan associate, are charged with racketeering and bribery, among other charges. Their lawyers argued on Wednesday a pending US Supreme Court case expected to be decided by July, *Snyder v. United States*, could materially affect their case. They asked Blakey to stay the Madigan trial until the US Supreme Court case is decided.

Blakey didn't grant the defendants a stay pending the outcome of the *Snyder* decision. Instead, the judge moved the trial date from April 1 to Oct. 8—allowing the government and the defense to build their cases after the *Snyder* decision is announced.

If the case began in April and the US Supreme Court changed the meaning of the federal statute used to charge the defendants during or after the Madigan trial, a second trial might be necessary. "I don't do this lightly and I do it reluctantly, I'll say that. But it's better to do it right than to do it twice," said Blakey.

McClain was already convicted of conspiring to bribe Madigan to benefit Exelon Corp. subsidiary Commonwealth Edison Co. in a separate trial in May, one of eight successful convictions won by federal prosecutors in 2023 alleging public corruption in Illinois.

Law's Language Debated

The *Snyder* case involves whether a federal statute criminalizes gratuities—payments in recognition of actions a public official has already taken or committed to take—without any *quid pro quo* agreement to take those actions. The high court could also address whether a *quid pro quo* is required to prove a bribery theory under the statute, as Madigan claims.

Madigan lawyer and Katten Muchin Rosenman LLP partner Daniel Collins said the US Supreme Court could interpret terms such as bribery, reward, and gratuity in ways that would directly affect how Madigan's defense is formed. "It really affects every stage in this case," he said.

And McClain lawyer Patrick Cotter, an officer at Greensfelder Hemker & Gale PC, said the high court's interpretation will be critical to his client's defense. "We can't prepare for trial unless we know that the law is," he said. Going ahead with the Madigan trial before the Snyder decision is announced "would be extremely unwise," he said.

Blakey said it's likely the high court won't rule the statute unconstitutional but could change its nuance, which introduces "uncertainties in the law." The US Supreme Court's decision could also affect the instructions he'll give to the jury about the law, Blakey said. The Snyder case won't impact every element of the Madigan trial "but enough of the case" to cause the need for a second trial, which would waste government resources and drive up legal bills for both defendants, Blakey said.

The judge also said moving the trial to October wouldn't unduly delay justice, in part because the government has already spent about eight years building its case against Madigan, Blakey said.

Petitioner's brief in the *Snyder* case is due Feb. 5 and respondent's brief is due March 11. US Supreme Court rules make it likely oral arguments in the case will be heard in March or April.

Madigan faces 29 counts of racketeering, bribery, conspiracy to defraud the US, unlawfully accepting property of another, wire fraud, interference with commerce by threat or violence. McClain faces nine counts of racketeering, fraud, unlawfully accepting property of another, and conspiracy to defraud the federal government.

The case is USA v. Madigan , N.D. Ill., No. 22-cr-00115, 1/3/24 .

—With assistance from Kimberly Robinson

(Adds details throughout)

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Ex-Illinois House speaker wins six-month raincheck in federal corruption trial

 [courthousenews.com/ex-illinois-house-speaker-wins-six-month-raincheck-in-federal-corruption-trial](https://www.courthousenews.com/ex-illinois-house-speaker-wins-six-month-raincheck-in-federal-corruption-trial)

Dave Byrnes



Then-Illinois Speaker of the House Michael Madigan, D-Chicago, left, speaks with Illinois Rep.

Thaddeus Jones, D-Calumet, right, while on the House floor after adjoining veto session, Thursday, Nov. 7, 2013 in Springfield Ill. (AP Photo/Seth Perlman, File)

CHICAGO (CN) — A federal judge in the Windy City decided Wednesday to postpone the corruption trial of Mike Madigan, former Illinois House speaker and ex-chairman of the Democratic Party of Illinois. The court's decision pushes back the trial start date from April 1 of this year to Oct. 8.

The 81-year-old Madigan came to the hearing on the issue in person at Chicago's Dirksen Federal Courthouse. It was the first time he has set foot in the building in connection to the case since being indicted in March 2022. Wearing a black suit and deep blue tie, he uttered only five words in court, affirming that he consented to the change in the trial date.

"Yes I do, your honor," the once-powerful politician told presiding U.S. District Judge Robert Blakey.

Madigan, who led the Illinois House for 36 years, currently faces 23 charges for racketeering, fraud, conspiracy and bribery. Many of them are related to his alleged involvement in energy utility Commonwealth Edison's — or ComEd's — admitted bribery scheme in the Illinois Legislature between 2011 and 2019.

Former Democratic state Rep. Michael McClain — one of the "ComEd Four" convicted this past May on multiple counts for his own connection to the utility's bribery efforts — is also listed as Madigan's co-defendant in this case and faces six new fraud, racketeering and bribery charges. Both men have pled not guilty on all counts.

Central to the charges involving bribery against Madigan and McClain is U.S. Code Title 18, Section 666, which lays out what defines "bribery" for public officials. The Supreme Court threw a wrench into the government's case against the pair last month, along with the post-trial ComEd Four proceedings and the perjury case against Madigan's former Chief of Staff Tim Mapes, when it agreed to hear a bribery case out of Indiana challenging the interpretation of 666.

Known as *Snyder v. United States*, the case specifically questions whether the law criminalizes gratuities — that is, payments the official may have taken in recognition of their past actions or actions they have committed to take, absent any direct quid pro quo exchange.

The government's indictment against Madigan cites 666 multiple times as one of the laws he violated while leading the Illinois House and state Democratic Party. But it specifically does not accuse him of ever taking direct quid pro quo payments. Instead, it alleges that he helped ComEd and others in exchange for payments and jobs directed to his associates and political allies, and that he had legal work illicitly funneled to his private law firm Madigan & Getzendanner.

Given this uncertainty over 666, Madigan and McClain's attorneys successfully argued to Blakey on Wednesday that trial should be delayed until the Supreme Court handed down its take on the law in *Snyder*. To begin trial while a major element of the charges their client faced was up for debate, they said, would unfairly hurt Madigan and McClain's defense and may even botch the trial process.

Madigan's attorney Daniel Collins framed the delay in the case as better not just for the defense, but for the court as a whole.

"We're not putting it on the shelf," Collins said. "We're just saying that in a couple of months, we'll have more clarity that will be better for us all."

Patrick Cotter, one of McClain's attorneys, added that he wouldn't be able to adequately do his job if one of the trial's central elements was still up for debate.

"I won't be able to prepare for trial if I don't know what the rules are," he said.

Even Assistant U.S. Attorney Amarjeet Bhachu, who argued that the Supreme Court likely wouldn't change the law's interpretation so radically that it would nullify the relevant charges against the former state legislators, conceded "it would be helpful to know what the Supreme Court thinks of the statute."

Ultimately Blakey agreed to delay the start of trial, but not to freeze the case entirely, saying there was still "plenty of work to be done" before the first day of jury selection. He warned against "reading tea leaves" regarding the high court's decision in *Snyder*, but agreed with the defense attorneys that it would be unwise to begin trial without knowing that decision.

He likened the issue to a football game changing to a baseball game at halftime, or when he stepped on his children's Lego blocks at home.

"What I fear is that you, and me, and you," Blakey said, gesturing to the attorneys in the courtroom, "are going to be walking into a dark room and the Supreme Court's going to give us a Lego."

Citing the same concerns, attorneys for the ComEd Four — including McClain — moved in December to have the Four's cases put on hold pending *Snyder*. Similar to Blakey, District Judge Manish Shah only partly obliged. He did not completely halt the cases, but cancelled the Four's pending January sentencing dates without setting new ones. A hearing on the matter is scheduled for Thursday morning.

Mapes, who was convicted in August of lying to a grand jury to protect Madigan, has also moved for a stay of proceedings pending *Snyder*. The court has yet to rule on his motion.

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Accountancy

UK accounting watchdog urged to raise threshold for enforcement action

Head of accountancy body says changes needed to make profession more attractive



Michael Izza: 'If you want good people to come in, if you want good firms, you've got to give them a profession where they feel their view is valued' © Anna Gordon/FT

Simon Foy in London YESTERDAY



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The UK's accounting watchdog should raise the threshold for bringing enforcement action against auditors, according to the boss of one of the industry bodies.

Michael Izza, chief executive of the Institute of Chartered Accountants in England and Wales, said the [Financial Reporting Council](#) should soften its approach to make the profession more attractive.

"Prior to 2017, if the FRC brought a case against an auditor, the threshold test that they were looking to meet was 'misconduct'. That was lowered to non-compliance with the relevant auditing standards," he told the Financial Times.

"That is now the lowest threshold of any professional in the UK. And it is our view that threshold is now too low. It probably shouldn't go back to 'misconduct', but there's somewhere in between that would be a more sensible area."

His comments come after Kemi Badenoch, the business secretary, [gave the FRC a new remit](#) in November to promote economic “competitiveness”, as part of wider efforts by the government to cut red tape on businesses.

Izza said: “It all comes back to the FRC’s competition role. If you want good people to come in, if you want good firms, you’ve got to give them a profession where they feel their view is valued.”

The FRC has imposed record fines on audit firms in recent years in a bid to crack down on poor quality in the sector. This followed high-profile corporate scandals at companies where auditors fell short of required standards, such as at outsourcer Carillion, which collapsed in 2018.

In the last full financial year to March 2023, the FRC levied fines of £40.5mn for misconduct and breaches of standards, slightly below the record £46.5mn in the previous 12-month period.

Izza said that although the regulator was still waiting for the government to pass legislation to give it enhanced powers “some of the things that potentially are a barrier to competition are actually within the FRC’s control”.

He pointed to the increased level of fines in recent years and the public rebuking of individual audit partners, a practice that he said could “effectively end someone’s career”.

He added: “If there is a deficiency, and let’s say at one extreme it’s incompetence or outright deception, people should have the book thrown at them. But if the issue is one of judgment . . . you should be more forgiving of that.”

Richard Moriarty, who took over as chief executive of the FRC in October, has already [signalled](#) a more moderate approach to his predecessor Sir Jon Thompson in an effort to help the industry attract talent.

Thompson had often [struck](#) a harsher tone but Izza, who has led the ICAEW since 2006 and is set to step down at the end of March, said the FRC under his leadership deserved “a lot of credit” for the way it had “raised [its] game post-Carillion, and clearly the regime is more punitive than it was historically”.

The FRC said it had taken measures to “significantly raise audit quality standards in recent years”, adding: “We believe that this progress demonstrates the merit, balance and proportionality of our current enforcement approach, which includes addressing matters through constructive engagement as well as through investigations, in addition to our ongoing work as an improvement regulator.”

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Top India Court Clears Adani From More Probes in Hindenburg Saga

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- Supreme Court asked Sebi to close its investigation in 3 mths
- All 10 Adani Group shares were trading higher in Mumbai

India's Supreme Court ordered the country's markets regulator to conclude its investigation into the Adani Group within three months and said no more probes were needed, in a reprieve for the billionaire who cheered the verdict as the "truth" prevailing.

The three-judge bench on Wednesday also urged the federal government to implement an expert panel's recommendations to bolster the regulatory framework. But it didn't go further, drawing a line, at least domestically, under the year-long saga triggered by a US short-seller which alleged widespread corporate malfeasance by **Gautam Adani's** conglomerate.

The verdict "is in favor of Adani Group prima facie," said **Kranthi Bathini**, equity strategist at WealthMills Securities Pvt. in Mumbai. While clarity is needed on pending probes from Securities and Exchange Board of India, or Sebi, he said the court had reiterated that scathing external reports against the Adani Group were "not triggers for an external investigation."

The rally in the stocks of Adani's 10 listed firms added \$7.5 billion, pushing the group's market value to \$181.5 billion — the highest level since Jan. 27 last year, according to calculations by Bloomberg. The combined market capitalization is still more than \$50 billion short of the pre-Hindenburg level.

Intense Scrutiny

The ruling from India's apex court comes after nearly a year of intense scrutiny for the ports-to-power conglomerate, which had repeatedly denied Hindenburg Research's allegations of stock price manipulation and related party transactions among other charges in a bombshell report.

Gautam Adani

Photographer: Kobi Wolf/Bloomberg

The short-seller's broadside last January triggered a massive rout in Adani stocks and bonds, wiping out more than \$150 billion in equity market value at one point.

It also catalyzed other damaging investigations, like one in August from the Organized Crime and Corruption Reporting Project which identified potentially controversial shareowners of Adani companies that had longtime business ties to the founders and had spent years trading hundreds of millions of dollars' worth of Adani Group stocks. The conglomerate also rejected these allegations.

The group spent much of 2023 in damage control, which included paying down debts, assuaging investor concerns through road shows across the world's financial hubs, and scaling back its non-core businesses.

Months-Long Probe

India's top court in March ordered Sebi to probe Hindenburg's allegations and submit the findings within two months. It also set up a six-member expert panel to assess if there were any regulatory lapses. The panel said in May no regulatory failures could be concluded nor was there any conclusive evidence of stock-price manipulation by the conglomerate.

[Read More: Court Probe of Adani Shortseller Saga Tests India's Institutions](#)

The verdict on Wednesday asking Sebi to wrap up its investigation in three months marks a further extension after the regulator failed to meet the court-mandated deadline twice.

Sebi, which has struggled to get data from overseas agencies, told the Supreme Court in August that it had closed its probe in 22 out of 24 issues concerning the Adani Group. It is still looking into alleged violations of minimum public shareholding rules and trading activity in Adani stocks before and after the Hindenburg report.

'Final Findings'

"From a legal and political perspective, it is positive for the group" though final findings are still awaited, said Shriram Subramanian, founder of InGovern Research Services, about the court ruling. The conglomerate "needs to go further on corporate governance to attract a wider set of investors."

[Read More: Adani Contractor Probed by India Resurfaces Under a New Name](#)

Even before the Supreme Court's verdict, the Adani Group had been steadily regaining investor and lender confidence. The conglomerate has secured investments from GQG Partners Inc. and Middle-Eastern sovereign wealth funds, funding from a US government agency, refinanced a \$3.5 billion loan and pledged \$100 billion in green energy investment.

“I don’t think anybody is worried about Hindenburg anymore,” **Abhay Agarwal**, founder and portfolio manager at Piper Serica Advisors, said. “Investors’ focus is now on earnings and valuations of individual companies.”

(Updates with the gains in group market value in the fourth paragraph.)

--With assistance from **Chiranjivi Chakraborty** and **Advait Palepu**.

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Mobileye NV

Mobileye shares plunge on profit warning

Nasdaq-listed maker of autonomous driving technology says customers have scaled back orders



Mobileye: 'As supply chain concerns have eased, we expect that our customers will use the vast majority of this excess inventory in the first quarter of the year' © Reuters

John Aglionby and **Euan Healy** in London 5 HOURS AGO



Shares in Mobileye Global tumbled by more than a quarter on Thursday after one of the world's biggest makers of autonomous driving technology warned that its customers had scaled back orders.

The group, which was spun off from chipmaker Intel and listed on the Nasdaq in 2022, said that an excess of inventory had prompted carmakers to cut orders for the first quarter.

As a result, revenues for this year would be between \$1.83bn and \$1.96bn. That is below analyst estimates of \$2.58bn, according to LSEG data. For the first quarter, revenues would be "significantly below" the same period last year.

[Mobileye](#), which was founded in Israel in 1999 and counts the likes of Porsche and Volkswagen as customers, first focused on producing "collision-avoidance" technology, but has subsequently expanded to enabling "fully autonomous driving".

Shares in the company were down 25 per cent in New York, slicing roughly \$8bn from its market capitalisation.

Mobileye said that carmakers were saddled with surplus inventory because they had stockpiled during the supply chain disruptions caused by the Covid-19 pandemic.

“As supply chain concerns have eased, we expect that our customers will use the vast majority of this excess inventory in the first quarter of the year,” said Mobileye, adding that it expected the picture to normalise by the end of the year.

The group’s operating loss for the year was expected to balloon to between \$378mn and \$468mn, the company said, up from an estimated loss of between \$33mn and \$39mn in 2023.

Pierre Ferragu, an analyst at New York-based New Street Research, said that “there was probably a slight belief among analysts and investors that Mobileye would be pretty immune to inventory corrections. That was a mistake”.

While there have been similar inventory corrections among suppliers to the car industry, few have been of the scale of Mobileye’s.

In November, US semiconductor manufacturer Analog Devices cut its outlook and partly blamed weaker demand from carmakers.

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Vedanta Inks Deal to Delay Due Dates for \$3 Billion of Bonds

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Securities Law

- Miner needed creditor backing to revise maturities of 3 bonds
- S&P warned the deal likely to trigger a selective default

Debt-laden Vedanta Resources Ltd inked a deal with creditors to extend the maturities of three dollar bonds, a move a ratings agency has warned may trigger a default label.

The junk-rated miner said bondholders voted in favor of the proposed changes in terms without any amendments, according to a statement on Thursday. The company had already announced it won the requisite bondholder backing, but has now executed the amendments.

The agreement is the culmination of months of talks between Vedanta and its bond holders, as it sought to come up with a plan to tackle more than \$3 billion of bonds maturing in 2024 and 2025. Under the deal, the company will pay \$779 million upfront, with the remaining principal extended by as much as four years.

While the deal is designed to give the firm financial room to maneuver, S&P Global Ratings said it constituted a distressed exchange that would probably result in a downgrade to selective default.

Burdened by a heavy debt load amassed due to a string of acquisitions, the group controlled by billionaire Anil Agarwal already cut about \$3 billion worth of borrowings. India-based subsidiary Vedanta Ltd. also announced plans to split up and spin off parts of the business.

In order to generate cash for the up-front dollar bond payments, Vedanta late last year inked a \$1.25 billion credit facility with lenders including Cerberus Capital Management and Davidson Kempner Capital Management.

The following was Vedanta's proposal for bondholders. It proposed to revise a covenant on its 2026 bond but did not ask to change the maturity or coupon:

--With assistance from **Swansy Afonso** and **Giulia Morpurgo**.

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FirstEnergy Says Cert. Appeal Justifies Pausing Investor Case

By **Ryan Harroff**

Law360 (January 3, 2024, 6:35 PM EST) -- FirstEnergy Corp. has again urged an Ohio federal judge to pause an investor class action brought against it over its role in a notorious bribery scheme by the Buckeye State's house speaker, arguing that its pending appeal of class certification could alter the case "in almost every respect."

Investors cannot be allowed to continue pursuing their claims brought after former Ohio House Speaker Larry Householder was **arrested and charged with bribery** for taking payments from FirstEnergy in exchange for pushing a bill to bail the company out for its nuclear losses, the energy firm said, because it is not yet clear how many of those class claims the Sixth Circuit will agree should have been certified at all.

According to FirstEnergy's Tuesday **brief**, the investors' arguments against pausing the Ohio federal court proceedings rest on a faulty belief that a ruling on the interlocutory appeal would not substantially narrow the claims at issue should the company prevail.

"Plaintiffs claim that defendants have 'conceded' that — even if they prevail in the Sixth Circuit — the scope of the certified class will not change. This is wrong," the company and a group of its current and former executives said.

In reality, according to the company's brief, FirstEnergy has brought up issues with the Southern District of Ohio's **earlier decisions** to certify two classes and is likely to prevail in getting the class whose claims fall under the Securities and Exchange Act decertified, which would significantly tighten the scope of the litigation since the other claims brought under the Securities Act of 1933 are "substantially narrower."

Letting litigation go on when such a major shift is potentially on the horizon would unfairly harm FirstEnergy and go against the public's interest in a proper application of the law, and therefore the company's **motion to stay** must be granted, the brief states.

The investors, both classes and direct action plaintiffs MFS Value Portfolio and Brighthouse Funds Trust II, opposed FirstEnergy's stay bid on Dec. 19, arguing in part that the appeal will only decide how the class claims should be "characterized" rather than whether their certification was warranted, as certification is practically "inevitable" for their claims.

In a separate opposition brief the investors filed Dec. 19 objecting to a reconsideration bid FirstEnergy filed about a **special master's discovery order**, they accused the energy company of "using one baseless motion after another to multiply these proceedings and overwhelm the special master and court" rather than let the litigation continue. The company has also failed to show why a stay is necessary while the certification appeal is dealt with, according to the investors.

Counsel for the parties did not immediately reply to requests for comment Wednesday.

FirstEnergy and its current and former executives are represented by Jones Day, Warren Terzian LLP, and Sullivan & Cromwell LLP.

The investors are represented by Robbins Geller Rudman & Dowd LLP, Murray Murphy Moul & Basil LLP, Ice Miller LLP, and Lieff Cabraser Heimann & Bernstein LLP.

The case is In re: FirstEnergy Corp. Securities Litigation, case number 2:20-cv-03785, in the U.S. District Court for the Southern District of Ohio.

--Additional reporting by Katryna Perera. Editing by Adam LoBelia.

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6 Firms Vie To Lead SolarEdge Sales Disclosure Suit

By **Sydney Price**

Law360 (January 3, 2024, 9:57 PM EST) -- Pomerantz LLP, The Rosen Law Firm and four other firms have filed competing bids to lead a proposed shareholder class action accusing solar technology company SolarEdge of harming investors by failing to disclose information about sluggish European sales.

According to a motion filed Tuesday by Pomerantz, its clients — which consist of several pension funds and an insurance company — incurred total losses estimated between \$6.1 million and \$8.7 million in connection with the securities suit filed by plaintiff Daphne Shen in November in Manhattan federal court.

The Pomerantz clients, along with Hagens Berman Sobol Shapiro LLP client Dean Clayton, Levi & Korsinsky LLP client Ananda Investments LLC and Glancy Prongay & Murray LLP client Lucid Alternative Fund LP submitted lead plaintiff proposals, and asked the court to consolidate the suit with another class action pending in New York federal court brought by Javier Alcides Cascallar.

Meanwhile, Rosen Law client Jan-Willem ter Meulen and Keller Rohrback LLP clients Isadore Fisher and Ada Fisher also submitted lead plaintiff proposals for the suit brought by Shen.

In her suit, Shen accused SolarEdge, CEO Zvi Lando and CFO Ronen Faier of securities fraud in connection with alleged misrepresentations about its European revenue expectations.

In her proposed class action, Shen cites a comment Lando made on an August 2023 call with analysts discussing SolarEdge's quarterly earnings: that "distribution channels in Europe are experiencing higher than optimal inventory levels, especially as it relates to solar modules."

The next day, Shen said, trading prices for SolarEdge shares fell from nearly \$240 to about \$196, about 18%, on high trading volume.

Shen also pointed to statements from the company's Oct. 19 press release announcing its preliminary financial results for its third quarter, in which the company said it experienced "substantial unexpected cancellations and pushouts of existing backlog from our European distributors." The company said this was the reason its revenue, gross margin and operating income for the quarter would come in either below or at the low end of the range it had earlier offered as its guidance.

The next day, Shen said, trading prices for SolarEdge shares fell from about \$114 to about \$83, a drop of about 27%.

Shen claimed the company had failed to tell investors about the inventory glut affecting its European distribution channels and that its financial guidance to investors was overstated as a result.

SolarEdge makes inverters used to convert energy in solar photovoltaic systems and sells energy storage and monitoring systems, the suit says.

Counsel for the parties did not immediately respond to requests for comment Wednesday.

Mivtachim The Workers Social Insurance Fund Ltd., Keren Hgimlaot Hmerkazit Histadrut Central Pension Fund Ltd., Kerren Makefet Pension and Provident Center Cooperative Society Ltd., The Hadassah Workers Pension Fund Ltd. and Hachshara Insurance Company Ltd. are represented by Jeremy A. Lieberman, J. Alexander Hood II and James M. LoPiano of Pomerantz LLP.

Dean Clayton is represented by Nathaniel A. Tarnor of Hagens Berman Sobol Shapiro LLP.

Jan-Willem ter Meulen is represented by Phillip C. Kim of The Rosen Law Firm.

Ananda Investments LLC is represented by Adam M. Apton of Levi & Korsinsky LLP.

Lucid Alternative Fund LP and Shen are represented by Gregory Bradley Linkh of Glancy Prongay & Murray LLP.

Isadore Fisher and Ada Fisher are represented by Ron Kilgard of Keller Rohrback PLC.

The SolarEdge defendants are represented by Christopher Daniel Belelieu, Bethany Jade Saul and of Gibson Dunn & Crutcher LLP.

The case is Shen v. SolarEdge Technologies Inc. et al., case number 1:23-cv-09748, in the U.S. District Court for the Southern District of New York.

--Editing by Caitlin Wolper.

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Adobe Brass Face Investor Suit Over Tanked \$20B Figma Deal

By **Katryna Perera**

Law360 (January 3, 2024, 6:03 PM EST) -- An Adobe shareholder filed a derivative suit on Wednesday in Delaware federal court against the software company's top brass over the recent failure of a \$20 billion deal to buy out rising competitor Figma Inc.



The complaint comes less than a month after Adobe and Figma announced an agreement to terminate their roughly \$20 billion merger agreement, after U.K. regulators said the merger could harm innovation. (Aaron M. Sprecher via AP)

Hugues Gervat's **complaint** comes less than a month after Adobe and Figma announced an agreement to **terminate** their roughly \$20 billion merger agreement, squashing one of the largest recent software-related M&A deals, after U.K. regulators said in November that the merger could harm innovation.

Wednesday's complaint names as defendants Adobe CEO Shantanu Narayen, the company's chief financial officer Daniel Durn, former CEO John Murphy and several other executives and board members.

Gervat says that from July 2021 through September 2022, the defendants repeatedly downplayed rising competition from companies like Figma, which offers a web application that allows multiple users to view and edit interfaces.

According to the complaint, the defendants misled investors to believe that Adobe's offerings were

adequate to counter any competition and growing market position from companies like Figma.

Gervat also claims the defendants hid the fact that Adobe's own user-interface design app was failing to gain traction with customers.

Despite assurances about Adobe's stable position within the industry, the company announced in September 2022 that it planned to acquire Figma for \$20 billion — a price 50 times more than Figma's revenues, according to the complaint.

Following the announcement, Credit Suisse noted that the deal price represented the highest revenue multiple ever paid for a scaled software-as-a-service company, the complaint states. The suit also quotes published remarks of an analyst who called the deal's price tag "'way above any rational valuation of Figma,'" and a sign that Adobe's leaders "are thinking ahead and they see a strategic threat in the making."

According to the complaint, another veteran analyst claimed that "in the long run Adobe has to operate on Figma's terms, not the other way around; to put it another way, Adobe is not only paying for long-run control of design but also its own independence."

On all of this news, Gervat says Adobe's stock plummeted by 17%, or approximately \$62, in one day from \$371.52 per share on Sept. 14, 2022, to \$309.13 on Sept. 15, 2022 — resulting in a \$28.9 billion decline in market capitalization.

Gervat's complaint also references an August 2023 report published by the United Kingdom's Competition & Markets Authority allegedly confirming that Adobe viewed Figma as a competitive threat throughout the relevant period.

Gervat alleges that throughout the relevant period, the defendants made several false and misleading statements and omissions about the competition Figma posed to Adobe, how Figma was growing its market share, and how Adobe's own offerings were not succeeding in competing with Figma on user experience design.

The complaint further alleges that the defendants breached their fiduciary duties to investors by causing the company to maintain inadequate internal controls and that, as a result of their alleged misconduct, Adobe and its top brass have now become the subject of a securities class action and will have to spend significant amounts of money on litigation.

Gervat's suit seeks damages, disgorgement, attorney fees and a jury trial.

Representatives for the parties did not immediately respond to requests for comment.

Gervat is represented by Phillip Kim and Erica L. Stone of The Rosen Law Firm PA and by Brian E. Farnan and Michael J. Farnan of Farnan LLP.

Counsel information for the defendants was not immediately available.

The case is Gervat v. Narayan et al., case number 1:24-cv-00006, in the U.S. District Court for the District of Delaware.

--Editing by Emily Kokoll.

BioXcel Execs Face Investor Suit Over Alzheimer's Drug Probe

By **Sydney Price**

Law360 (January 3, 2024, 5:47 PM EST) -- Top brass at artificial intelligence-driven biopharmaceutical company BioXcel Therapeutics Inc. have been hit with a shareholder derivative suit alleging they took too long to disclose a U.S. Food and Drug Administration probe of its development of an Alzheimer's treatment and its lead clinical trial investigator's compliance issues.



A shareholder suit alleges executives of BioXcel Therapeutics took too long to reveal an FDA warning about violations of clinical trial rules. (AP Photo/Virginia Mayo)

BioXcel did not publicly report that it received a letter from the FDA warning that it was in violation of multiple clinical trial rules until June 29, 2023, about six months after the company had received the letter in December 2022, according to the complaint filed by Maria Vomvolakis on Tuesday in Connecticut federal court. Instead, BioXcel continued to "perpetuate a ruse" that the clinical trial would be a valuable catalyst to the company, the complaint states.

On June 29, 2023, before the market opened, BioXcel publicly acknowledged the probe for the first time, according to the complaint. On that day, the company also disclosed that its principal investigator for its clinical trial, called Tranquility II, had failed to adhere to certain requirements and did not adequately maintain case histories for certain patients. BioXcel also said the investigator may have lied about submitting certain vendor reports.

In response to the news, BioXcel's share price fell nearly 64% from \$17.67 at the end of day June 28 to close at \$11.28 on June 29, the complaint said.

In addition to nominal defendant BioXcel, the suit names eight individual defendants, including BioXcel cofounder and CEO Vimal Mehta.

The complaint accuses Mehta, BioXcel Chief Financial Officer Richard Steinhart and former director Krishnan Nandabalan of insider trading based on material non-public information in the letter from the FDA before it became available to the public.

During the suit's relevant period, which begins Dec. 15, 2021, and continues through the present, BioXcel's executives purposely misled the public about the clinical trials, according to the complaint. For example, in January 2023, Mehta said during the J.P. Morgan Healthcare Conference that the Tranquility II trial had "progressed" on a "strong foundation," and that the company was "excited" about the data.

The suit says, however, that these statements were false and misleading because Mehta failed to disclose that BioXcel had received a warning from the FDA regarding the trials, and that the trials were not "strong."

"No reasonable person would be 'excited' about the data under those negative circumstances," the suit states.

BioXcel is facing a **related federal securities class action** in Connecticut based on its alleged failure to disclose the FDA probe, according to the complaint.

That suit describes BioXcel as a company that purportedly uses AI to develop its therapeutics, using "big data and proprietary machine learning algorithms" to identify new possible treatments.

"Between BioXcel's wasted capital spent on the clinical trials, lost market cap, fines, penalties, ongoing testing and additional clinical trials, regulatory investigations, the securities action, the insider trading, reputational loss, and loss of goodwill, BioXcel is exposed to millions in damages and its directors are exposed to personal liability," the complaint states.

The suit accuses the defendants of violating the Exchange Act, breaching fiduciary duties, unjust enrichment, wasting corporate assets, abuse of control and gross mismanagement. Vomvolakis seeks an order that would require BioXcel to take action to improve internal controls and board oversight, and the individual defendants to pay restitution to BioXcel and disgorge any ill-gotten gains.

Counsel for Vomvolakis and a representative of BioXcel did not immediately respond to requests for comment Wednesday.

Vomvolakis is represented by Fletcher Moore of Moore Kuehn PLLC and Lee Squitieri of Squitieri & Fearon LLP.

Counsel information for the BioXcel defendants was not immediately available Wednesday.

The case is Vomvolakis v. Mehta et al., case number 3:24-cv-00003, in the U.S. District Court for the District of Connecticut.

--Editing by Michael Watanabe.



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Penske Auto Sued In Del. Over \$1B Stock Buyback

By **Leslie A. Pappas**

Law360 (January 3, 2024, 2:48 PM EST) -- A Penske Automotive Group Inc. shareholder sued the company in Delaware's Court of Chancery Tuesday, alleging that the Michigan truck company's board squandered more than \$1 billion on stock buybacks that vaulted its CEO into a controlling position without any return for the company or minority shareholders.

The proposed class action by Jeffrey Edelman accuses company founder, chairman and CEO Roger S. Penske of using his influence over the board to increase his stake in Penske Automotive Group from 43.5% to more than 51% without paying anything for it.

"Roger has not spent a dime on additional stock to become the company's controller; instead, he exploited his dominance over the board to make the company bear the cost of his becoming its controller," the complaint says. "Neither the company nor the public stockholders received anything in return."

Penske Automotive Group, headquartered in Bloomfield Hills, Michigan, operates truck and automotive dealerships in North America, the United Kingdom, Germany, Italy and Japan, according to its website. It also distributes vehicles in Australia and New Zealand, and owns 28.9% of Penske Transportation Solutions, which manages a fleet of more than 431,000 trucks, tractors and trailers in North America.

Penske Automotive Group is an affiliate of Penske Corp., a holding company that Roger Penske founded in 1969 that is also named as a defendant in the case.

Other defendants named in the complaint include Roger Penske's son Greg Penske, a company director and board vice chair, and a dozen board members.

The four-count complaint raises both direct and derivative claims of breaches of fiduciary duty against the company's directors and controlling stockholders.

The complaint alleges that Roger Penske "stacked the board" with his associates and was able to keep a "tight grip" on the company even before he secured his controlling stake.

Beginning in July 2021, the board began to authorize stock repurchase programs that were "significantly larger" than in previous years, the complaint alleges.

The board approved \$250 million worth of repurchases in both July 2021 and December 2021, and bought back \$233 million worth of company stock that year, the complaint says.

The board approved another \$250 million in each of May, July and October 2022 and spent \$869.3 million that year to repurchase 8,065,707 shares of its common stock, according to the complaint.

In 2023, the board approved another \$500 million and spent \$341.1 million on share repurchases, giving Roger Penske more than 51% of the company.

The buybacks were much higher than in earlier years, the complaint says. From September 2019 to July 2021, the company only spent \$57.5 million on buybacks.

"We have laid out compelling facts which we believe plead a strong claim for breach of fiduciary duty and show why a litigation demand would be futile," Edelman's attorney, Daniel Tepper of Levi &

Korsinsky LLP, told Law360. "It cannot be the case that you become the sole majority stockholder at the Company's expense."

A representative for Penske Automotive Group said the company does not comment on open litigation.

Jeffrey Edelman is represented by Gregory M. Nespole, Daniel Tepper, Correy K. Suk, and Cinar Oney of Levi & Korsinsky LLP and Stephen E. Jenkins and Tiffany Geyer Lydon of Ashby & Geddes PA.

Counsel information for the defendants was not immediately available.

The case is Jeffrey Edelman v. Roger S. Penske, et al., case number 2023-1291, in the Court of Chancery of the State of Delaware.

--Editing by Alex Hubbard.

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Cannabis Co. Says Investor Should Not Get Fresh Shot At Suit

By Jonathan Capriel

Law360 (January 3, 2024, 9:09 PM EST) -- Cannabis company Cronos Group Inc. has urged a New York federal court not to resurrect a dismissed investor-led securities fraud lawsuit, saying the plaintiff had numerous chances to amend his suit to include alleged misconduct by one of its executives but repeatedly chose not to.

There is nothing new in Keith Norman's Dec. 1 motion for reconsideration that the court hasn't already seen, the company said Friday in a memorandum of opposition. Rather, the Friday filing argues, the Second Circuit opinion that Norman's motion calls "overlooked" and leans on to support his bid for reversal was already submitted to the court in a briefing.

"Given that the alleged overlooked authority was, in fact, cited in the briefing and moved the needle not at all, this is not a proper ground for reconsideration," Cronos' memorandum argues. It later adds, "In short, the purportedly overlooked material was fully presented but entirely irrelevant to the well-reasoned order of this court. Accordingly, plaintiff's motion should be denied."

Moreover, the memorandum says, Norman intentionally decided not to amend his complaint to include a settlement the company made with the U.S. Securities and Exchange Commission on accounting fraud charges. This was a poor strategy that Cronos warned Norman against, but he chose to do it, anyway, Cronos argued.

"Poor strategic choices in litigation are not a proper basis for reconsideration," the memorandum says.

In November, U.S. District Judge Eric N. Vitaliano **dismissed with prejudice** Norman's lawsuit accusing Cronos of cooking the books to make the company appear to be reaching certain financial benchmarks only to amend its revenue report and cause stock prices to tumble.

In December, Norman **asked the court** to reverse its decision and allow him to amend his complaint to include references to a settlement the SEC made with the company ending fraud charges. That deal accused William Hilson, Cronos' former chief commercial officer and chief financial officer, of inflating the company's revenue numbers in public filings with the SEC, according to a press release issued by the commission. When those filings were amended with the correct numbers, it caused the stock price to fall, according to the lawsuit.

Cronos' Friday memorandum argues that Norman should have asked for leave to amend his complaint while Judge Vitaliano was considering the motion to dismiss. Since October 2022, Norman has known about the settlement and submitted only a supplemental authority letter notifying the court of the deal, but he decided not to ask the court to update his complaint with these facts, the memorandum says.

Norman's motion for reconsideration argued that his failure to ask to amend the complaint shouldn't preclude him from being allowed to amend it now. He leaned on the Second Circuit's 2015 opinion in **Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities LLC**, saying it set a precedent that forbids trial courts from closing off such an option to amend.

But Cronos called that a misreading of Loreley, a case in which — its memorandum asserts — much less opportunity to amend was offered.

The judge in Loreley asked the plaintiff only once during a pre-motion conference if he would like to amend his complaint, and the judge in that case later dismissed the case with prejudice, according to Cronos' memorandum. Therefore, Cronos argued, what the Second Circuit's opinion explicitly prohibits is narrowing the window for considering amending a complaint to one conference.

In contrast, the company argued, Norman had more than a year to add reference to the SEC settlement into his lawsuit.

"Plaintiff has no ground to seek a do-over now," Cronos memorandum says.

Cronos separately argues that even if the evidence of the settlement had been added to the complaint, it would not have saved his suit for two reasons. First, the company said, regulatory settlements like that one aren't "adjudications" and can't be used as evidence. Next, the company claimed, Hilson acted alone. The memorandum points to the SEC charges which say that he "hid his actions" from the rest of the company.

The parties did not immediately respond to a request for comment.

Norman is represented by Carol Villegas, Christine M. Fox and Jake Bissell-Linsk of Labaton Sucharow LLP, and Brian Schall and Rina Restaino of the Schall Law Firm.

Cronos Group is represented by David Rein of Sullivan & Cromwell LLP.

The case is In re: Cronos Group Inc. Securities Litigation, case number 2:20-cv-01310, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Collin Krabbe and Mike Curley. Editing by Amy French.

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Wells Fargo Says Investors' Sham Diverse Hiring Claims Fail

By **Emilie Ruscoe**

Law360 (January 3, 2024, 7:26 PM EST) -- Wells Fargo investors still cannot show the bank had a widespread practice of holding sham interviews in an initiative aimed at promoting diversity, even after they were given another shot at bringing their previously dismissed case, the bank told a California federal judge.

In a **Tuesday brief** in San Francisco federal court, Wells Fargo and three of its executives told U.S. District Judge Trina L. Thompson that the latest version of the proposed investor class action rests on a few "vague or speculative anecdotes" about alleged hiring practices that fail to support the claim that there was a proverbial playbook guiding allegedly improper hiring practices.

"After a year of investigating, plaintiffs have been unable to find facts to support [their] sweeping claims," launched in the wake of a media report detailing the alleged practices, Wells Fargo said.

Wells Fargo added that in that same period, the U.S. Department of Justice had opened and closed its own probe into the matter.

Khosrow Ardalan, a Wells Fargo investor, **launched the suit** in June 2022, drawing heavily from claims in a media report with his contention that the bank knew or should have known its managers were interviewing candidates from underrepresented demographics despite knowing they wouldn't be hired, in service of the bank's "diverse slate" recruitment policy.

At the time of the suit's filing, federal lawmakers were also taking aim at the company over the report's alleged misconduct, asking regulators to crack down on the bank.

Judge Thompson **dismissed the suit** in August 2023, finding the investors failed to provide evidence of the allegedly pervasive practices. However, the judge allowed the appointed plaintiffs to amend their claims.

In the latest version of the suit, filed in September, lead plaintiff SEB Investment Management AB and plaintiff West Palm Beach Firefighters' Pension Fund assert Wells Fargo knew or should have known it had a practice of interviewing diverse candidates for open jobs "despite the diverse candidates not having a legitimate and fair shot at obtaining the job or another candidate already previously being selected for the job."

Wells Fargo launched its latest dismissal bid in October, contending that the revised suit showed the investors didn't have a case and that it should be dismissed with prejudice.

The bank argued nine new confidential witnesses added to the action did not help the investors because none of the new witnesses offered any testimony specific enough to support the investors' claims.

The investors fought back in December, arguing the matter should proceed to discovery, partly because they cited internal documents from Wells Fargo's files produced in separate litigation, which according to the investors show the bank's interview practices were "pervasive and persistent."

"At Wells Fargo, we are deeply dedicated to diversity, equity and inclusion," a spokesperson for the bank told Law360 via email on Wednesday. "Wells Fargo disagrees with the claims, and we will

continue to defend ourselves against them."

Representatives for the investors did not immediately respond to requests for comment Wednesday.

The investors are represented by Sharan Nirmul, Gregory M. Castaldo, Evan Hoey, Jennifer L. Joost and Stacey M. Kaplan of Kessler Topaz Meltzer & Check LLP, Lester R. Hooker and Dianne M. Pitre of Saxena White PA, and Robert D. Klausner and Bonni S. Jensen of Klausner Kaufman Jensen & Levinson PA.

Wells Fargo and the individual defendants are represented by Brendan P. Cullen, Sverker K. Högberg, Christopher M. Viapiano and Leonid Traps of Sullivan & Cromwell LLP.

The case is SEB Investment Management AB et al. v. Wells Fargo & Co. et al., case number 3:22-cv-03811, in the U.S. District Court for the Northern District of California.

--Additional reporting by Katryna Perera, Jessica Corso, Bonnie Eslinger and Jon Hill. Editing by Drashti Mehta.

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Las Vegas Sands Securities Class Action Thrown Out

By **Joyce Hanson**

Law360 (January 3, 2024, 10:00 PM EST) -- A Nevada federal judge has tossed for now a securities fraud class action against Las Vegas Sands Corp. and the estate of the casino giant's billionaire founder, Sheldon Adelson, saying another judge's ruling in the case correctly found that the shareholders suing the company failed to plead it made false statements about its transfer of funds between player accounts.

U.S. District Judge Cristina D. Silva on Tuesday granted Sands' motion to dismiss the shareholders' second amended complaint but gave the proposed class led by The Daniels Family 2001 Revocable Trust one final opportunity to amend its pleading by Jan. 18.

Judge Silva's ruling followed U.S. District Judge Gloria M. Navarro's March 2022 dismissal of the shareholders' first amended complaint in its entirety. Judge Navarro found that the plaintiffs failed to meet the heightened pleading requirement under Section 10(b) of the Securities Exchange Act of 1934.

The stockholders claim Las Vegas Sands' annual reports and proxy statements filed with the Securities and Exchange Commission from 2015 to 2020 materially misrepresented how the Marina Bay Sands casino in Singapore falsely qualified its "subprime clientele" as premium players and promoted the wrong impression that the casino was earning record-breaking revenue.

Judge Silva on Tuesday did find that the shareholders plausibly showed that Marina Bay Sands engaged in an unauthorized transfer scheme that moved funds between player accounts to counter falling revenues and create an appearance that the casino still had plenty of "high rollers" playing at its tables.

However, the judge said the suit does not provide sufficient information between the years 2016 and 2018 to show "precisely when or which defendants learned about the scheme to render statements false and misleading."

"But," Judge Silva wrote, "the allegations pertaining to 2019 and 2020 are different. The SAC alleges that by then, defendants, in fact, knew about the scheme; their knowledge is evidenced by their own internal investigation and subsequent report and the Xi lawsuit. By 2019, LVS was aware of the Xi lawsuit and its disclosure accompanied a decline in LVS's stock price."

The Xi lawsuit mentioned by the judge refers to a 2019 claim in the High Court of Singapore against Marina Bay Sands by Chinese national and VIP gambler Wang Xi, who alleges that the casino misappropriated millions of dollars from his account.

According to the stockholders' Nevada suit, the alleged unauthorized transfers set off investigations in both Singapore and the United States. The suit said Xi's claims caused a \$1.20 per share decline in the company's common stock price.

In addition to naming Las Vegas Sands Corp., the Nevada suit names Miriam Adelson as a defendant in her capacity as administrator of her late father Sheldon's estate. The former CEO and chairman of the company died at age 87 in January 2021. The suit also lists President and COO Patrick Dumont and current CEO Robert G. Goldstein as defendants.

Judge Silva also found that the second amended complaint established scienter for the years 2019 and 2020.

"In a securities-fraud case, scienter can be established if a defendant had a mental state embracing intent to deceive, manipulate or defraud," the judge wrote. "The Ninth Circuit has held that 'recklessness' is sufficient to satisfy the scienter requirement."

Looking at Judge Navarro's March 2022 dismissal of the shareholders' first amended complaint in its entirety, Judge Silva said she had found the plaintiffs failed to meet the heightened pleading requirement under Section 10(b) of the Securities Exchange Act of 1934 because they failed to plausibly allege false and misleading statements by omission.

In addition, Judge Navarro found that the plaintiffs had failed to state a claim for a Section 20(a) violation of the Exchange Act by any control person, according to Judge Silva, who took over the case in April 2022 when the stockholders filed their second amended complaint.

Judge Silva noted that Las Vegas Sands moved to dismiss that complaint, the stockholders opposed the motion, and both parties also moved for leave to file supplemental authority.

"Because the supplemental authorities provided by both parties discuss relevant case law, and considering that the motion to dismiss has been pending for more than a year, I grant both motions and consider the case law in resolving the motion to dismiss," Judge Silva wrote. "Because amendment would not be futile, I also grant plaintiffs leave to amend."

Representatives for the parties did not immediately respond to requests for comment on Wednesday.

The stockholders are represented by John P. Aldrich of Aldrich Law Firm Ltd. and Shannon L. Hopkins of Levi & Korsinsky LLP.

Las Vegas Sands and its officers are represented by Patrick G. Byrne and Morgan Petrelli of Snell & Wilmer LLP and Walter C. Carlson, Lawrence P. Fogel and Caroline A. Wong of Sidley Austin LLP.

The case is The Daniels Family 2001 Revocable Trust v. Las Vegas Sands Corp. et al., case number 2:20-cv-01958, in the U.S. District Court for the District of Nevada.

--Editing by Vaqas Asghar.



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Chancery Mulls Call To Block \$1B SomaLogic Merger

By **Jeff Montgomery**

Law360 (January 3, 2024, 8:26 PM EST) -- A Delaware vice chancellor reported plans to rule Thursday morning on a preliminary injunction bid from a proposed class of stockholders targeting the merger of SomaLogic Inc. and Standard BioTools Inc., hours before a noon Eastern time stockholder meeting on the hotly contested biopharmaceutical industry tie-up.

Vice Chancellor Sam Glasscock III said he would rule on the issue in a 9 a.m. teleconference, after hearing arguments Wednesday afternoon following a flurry of holiday-week filings by both sides of the merger plan.

The deal, which would create a \$1 billion company, has been tangled for months in a bitter dispute tightly focused on alleged conflicts involving SomaLogic's controller Eli Casdin, his allies and his hedge fund, Casdin Capital.

"The key allegation in our complaint is, during the penultimate effort to pursue a SomaLogic merger in the summer of 2022," resistance and rejection allegedly led to a "board reset to install new directors loyal to, beholden to and willing to act in the interests of Casdin," said Peter L. Welsh of Ropes & Gray LLP, counsel to SomaLogic founder Larry Gold and company chief technology officer Jason Cleveland, who opposed and sued to block the deal.

Welsh told Vice Chancellor Glasscock that former SomaLogic CEO Roy Smythe asserted that Casdin "did not willingly recuse himself from any board or transaction committee meeting involving a potential transaction" in 2022 and began recusals only in mid-2023 at the insistence of the company's general counsel. More recent witness testimony, Welsh said, remains unrebutted by SomaLogic.

SomaLogic board member Troy Cox, who served on the board of Casdin's SPAC, pressed for Smythe's resignation after the 2022 merger stall, Welsh said. Smythe ultimately resigned along with another director "because of their unwillingness to serve Casdin's relentless advocacy and pressure for the merger."

Smythe's claims contradicted details in the proxy, Welsh said. He noted that after the resistance, Casdin led a successful push to install new directors "beholden to and willing to act in the interests of Casdin," leading to the stock-for-stock merger plan up for a vote on Thursday.

T. Brad Davey of Potter Anderson & Corroon LLP, counsel to SomaLogic and several board members, told the vice chancellor that the argument on Wednesday was no longer a narrow proceeding "on the knife edge" of plausibility involving Casdin's business relations.

"We're dealing with discovery and new theories that are far afield from that," Davey said, describing the arguments as "revisionist history."

Davey added later: "I do think we're suffering in this situation from the evolving 'Pizza Principle.' It takes more time to clean it off the wall than it does to throw it out there" while opponents gather opposition votes.

"We've just been trying to clean the claims off the wall the best we can, but the claims have been consistently changing," Davey said.

Vice Chancellor Glasscock asked Davey if his view was that "even if the disclosures in the proxy are

untrue concerning Mr. Casdin's recusal from 2022" proceedings, "it is not material because that process did not lead to a merger."

Davey said the disclosures regarding the never-consummated 2022 deal are "not material because that process did not lead to a merger." He added later: "The stockholders are not missing any information. There's not another deal out there. The directors think this is the best deal. Time is the enemy of all."

In an exchange with Welsh, Vice Chancellor Glasscock observed that, while some of the opposition's findings have been shared with stockholders, "what's not been disclosed is your theory, that is supported by the affidavits, admittedly, that there is a relationship" between some SomaLogic director "rejections of a transaction in 2022 and their resignation from the board."

Casdin's interests gained control of SomaLogic in a September 2021 merger with a Casdin-controlled special-purpose acquisition company, CM Life Sciences II, that raised \$630 million and valued the newly public business at \$1.2 billion.

In October, Standard BioTools and SomaLogic entered into a definitive agreement to combine in an all-stock merger. SomaLogic shareholders would receive 1.11 shares of Standard BioTools common stock for each share of SomaLogic common stock owned.

After "brief and anemic" negotiations and a single exchange of offers during the summer, SomaLogic "then accepted (without any explanation) a large drop in the merger consideration initially offered by Standard, a drop well below Standard's offer and at a level that is unfair to SomaLogic stockholders," the suit said.

Books and records regarding the company and deal, obtained by Gold and Cleveland, "make clear that the newly installed SomaLogic board, aided and abetted by Casdin Capital and Standard, did Casdin's bidding and simply rubber-stamped" the merger, the suit said.

The transaction's main purpose, the suit said, "is to use the \$450 million of liquidity on SomaLogic's balance sheet to prop up Standard, which continues to bum cash at a high rate."

The deal has already drawn opposition from other quarters, with a proxy contest led by Madryn Asset Management disclosed in U.S. Securities and Exchange Commission filings and Madryn branding the deal as "conflict-plagued and excessively dilutive."

Madryn's preliminary proxy statement opposing the merger made similar arguments to the Chancery suit, citing an under-valuation after a flawed and incompletely documented process. SomaLogic shareholder equity would be subordinated to "several layers of debt and preferred equity," Madryn added, while better alternatives are available.

SomaLogic describes itself as a global leader in proteomics technology, or technology used to probe the function, composition and structures of proteins and their activities in cells. Its work was described as "catalyzing drug research and development and biomarker identification, capable of running, with a tiny sample, 11,000 measurements covering more than a third of the roughly 20,000 proteins in the human body."

Larry Gold, Jason Cleveland and the proposed class are represented by A. Thompson Bayliss, E. Wade Houston and Christopher Fitzpatrick Cannataro of Abrams & Bayliss LLP and Peter L. Welsh of Ropes & Gray LLP.

SomaLogic Inc. is represented by Troy Cox, Kathy Hibbs, Thomas Carey, Tycho Peterson, Jason Ryan, Richard Post, Anne Margulies, Megan R. Thomas and Robert Barchi of Potter Anderson & Corroon LLP.

Eli Casdin and Casdin Capital LLC are represented by Raymond J. DiCamillo, Sandy Xu and Noah H. Brown of Richards Layton & Finger.

Standard BioTools Inc. is represented by D. McKinley Measley and Phillip Reytan of Morris Nichols Arsht & Tunnell LLP.

The case is Dr. Larry Gold, et al. v. SomaLogic Inc. et al., case number 2023-1249, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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