

\$5.5B Payment Card Settlement Could Benefit Many Dry Cleaners

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Staff Writer

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BROOKLYN, N.Y. — The claim submission process has started for the largest private antitrust class-action settlement in U.S. history, and millions of business owners nationwide are expected to submit claims to get their portion of the court-approved \$5.54 billion settlement.



(Image licensed by Ingram Image)

The class-action suit includes millions of U.S. businesses that accepted Visa and/or Mastercard credit or debit cards between Jan. 1, 2004, and Jan. 25, 2019, and who did not previously opt-out.

Claim forms started to be mailed out last month to class members by the U.S. Postal Service.

"This is an historic antitrust class-action settlement that provides some relief for U.S. merchants after years of paying allegedly inflated Visa and Mastercard interchange fees," says K. Craig Wildfang, of Robins Kaplan LLP, co-counsel on the litigation alongside Robbins Geller Rudman & Dowd LLP and Berger Montague PC.

"The case has been winding its way through the court system for nearly 20 years. Now we look forward to helping class members with the claims process and getting the benefits of the settlement into their hands," says Alexandra Bernay, partner at Robbins Geller Rudman & Dowd LLP.

On March 15, 2023, the Court of Appeals for the Second Circuit unanimously upheld the district court's order giving final approval to the \$5.54 billion settlement on behalf of U.S. merchants in the *"In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation"* class action lawsuit.

The case relates to claims that merchants allegedly paid excessive fees to accept Visa and Mastercard cards. The suit alleged that Visa and Mastercard and their member banks acted in violation of the antitrust laws.

Full details are available on the settlement website, www.PaymentCardSettlement.com, where class members may also file a claim for their share of the settlement based on their estimated Visa and/or Mastercard interchange fees and other factors during the class period.

Have a question or comment? E-mail our editor Dave Davis at ddavis@atmags.com.

Guest Post: Conflicts Abound When Activist Short-Sellers Publish Reports

K [dandodiary.com/2024/01/articles/securities-litigation/guest-post-conflicts-abound-when-activist-short-sellers-publish-reports](https://www.dandodiary.com/2024/01/articles/securities-litigation/guest-post-conflicts-abound-when-activist-short-sellers-publish-reports)

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The D&O Diary

Guest Post: Conflicts Abound When Activist Short-Sellers Publish Reports



By Kevin LaCroix on January 16, 2024

Posted in Securities Litigation



Nessim Mezrahi



Stephen Sigrist

One of the perennial securities class action litigation issues is the question of how courts should view plaintiff's allegations made in reliance on short seller reports. In the following guest post, Nessim Mezrahi and Stephen Sigrist take a look at the conflicted role that short seller reports play in securities class action litigation. Nessim is co-founder and CEO, and Stephen Sigrist is a senior vice president, at SAR LLC. A version of this article previously was published on Law360. I would like to thank Nessim and Stephen for allowing me to publish their article on this site. I welcome guest post submissions from responsible authors on topics of interest to this blog's readers. Please contact me directly if you would like to submit a guest post. Here is Nessim and Stephen's article.

Activist short-sellers often impugn targeted issuers for their own pecuniary gain. They are remarkably proactive and solely responsible for deciding when to publish and what to disseminate to drive down a target company's stock price.

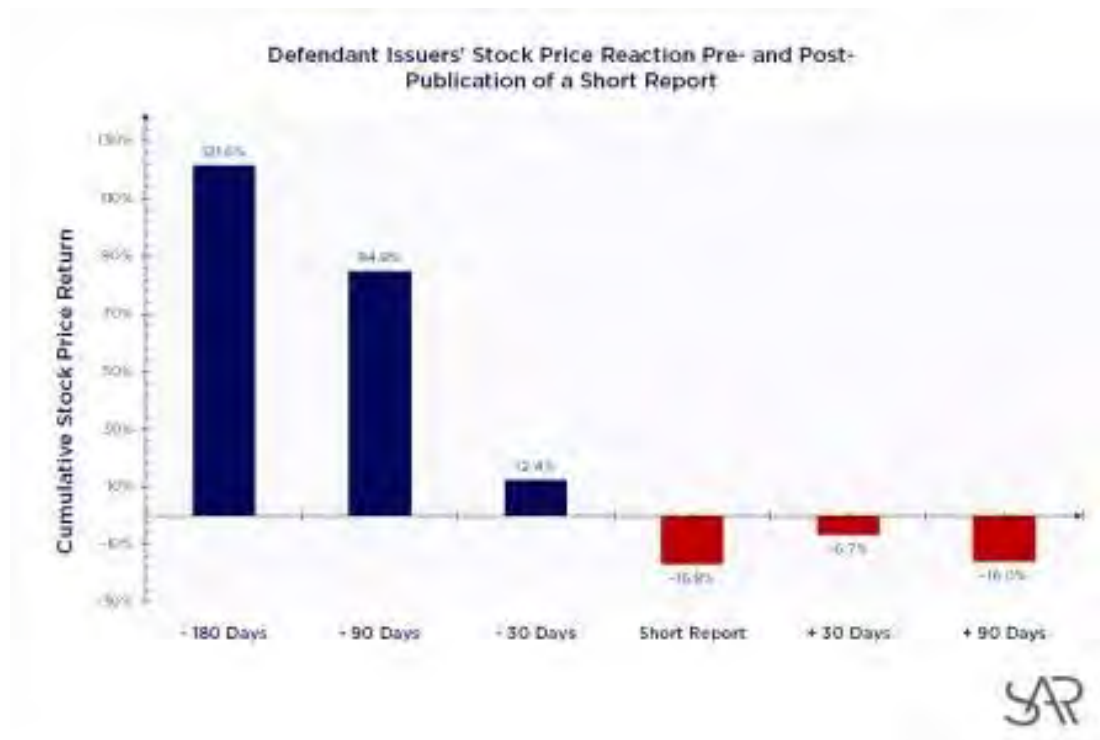
Their intent is clear: to maximize trading profits by publishing negative information to trigger a sell-off in the targeted issuers' common stock.

When these "dark knights of Wall Street," as a recent Law360 Expert Analysis article called them, succeed in driving down a stock price, aggressive securities plaintiff attorneys heed the bat signal and litigate against the affected issuer when they may not have done so otherwise.[1] After all, the defendant company may not have publicly disclosed anything at the time when the activist short-seller decided to launch a faux-fraud campaign to profit from their short position.

But this self-serving relationship between activist short-sellers and entrepreneurial plaintiff officers of the court is conflict-ridden and hinders the fact finder's impartiality when a short report forms the basis for lead plaintiffs' alleged violations of the federal securities laws under

Section 10(b) and 20(a) of the Securities Exchange Act and U.S. Securities and Exchange Commission Rule 10b-5 promulgated thereunder.

First, an activist short-seller's work product is an unreliable source of new information about an issuer because the short-seller has an economic interest in driving down the stock price. During the 180, 90 and 30 days leading up to a short report, defendant issuers in 57 short-seller-driven securities class actions exhibited formidable mean stock price returns of 121.6%, 84.8% and 12.4%, respectively.[2]



Second, short reports have an immediate and substantial impact on an issuer's stock price, coupled with other dispositive lingering effects post-publication. During the close-to-close trading sessions affected by a short report, defendant issuers' stock price declined by 16.8%, on average, and incurred additional declines of 16.0% during the 90-day look-back period of Section 21D(e)(1) of the Private Securities and Litigation Reform Act.[3][4]

Third, Rule 10b-5 private securities fraud lawsuits based primarily on activist short-seller research may not be indicative of actual fraud-on-the-market since the work product does not necessarily reveal information of material fact the issuer is obligated to disclose publicly.

According to the January 2023 opinion and order issued by U.S. District Judge Paul A. Engelmayer in *In re: Draftkings Inc. Securities Litigation* in the U.S. District Court for the Southern District of New York, "[a]s the assembled case law reflects, to the extent that open-

market securities fraud complaints use as the source for adverse factual allegations about a public issuer a report by a short seller — an entity with an economic interest in driving down the company's stock price — these allegations must be considered with caution.”[5]

A short-seller's intent hinders an objective evidentiary assessment of securities fraud allegations.

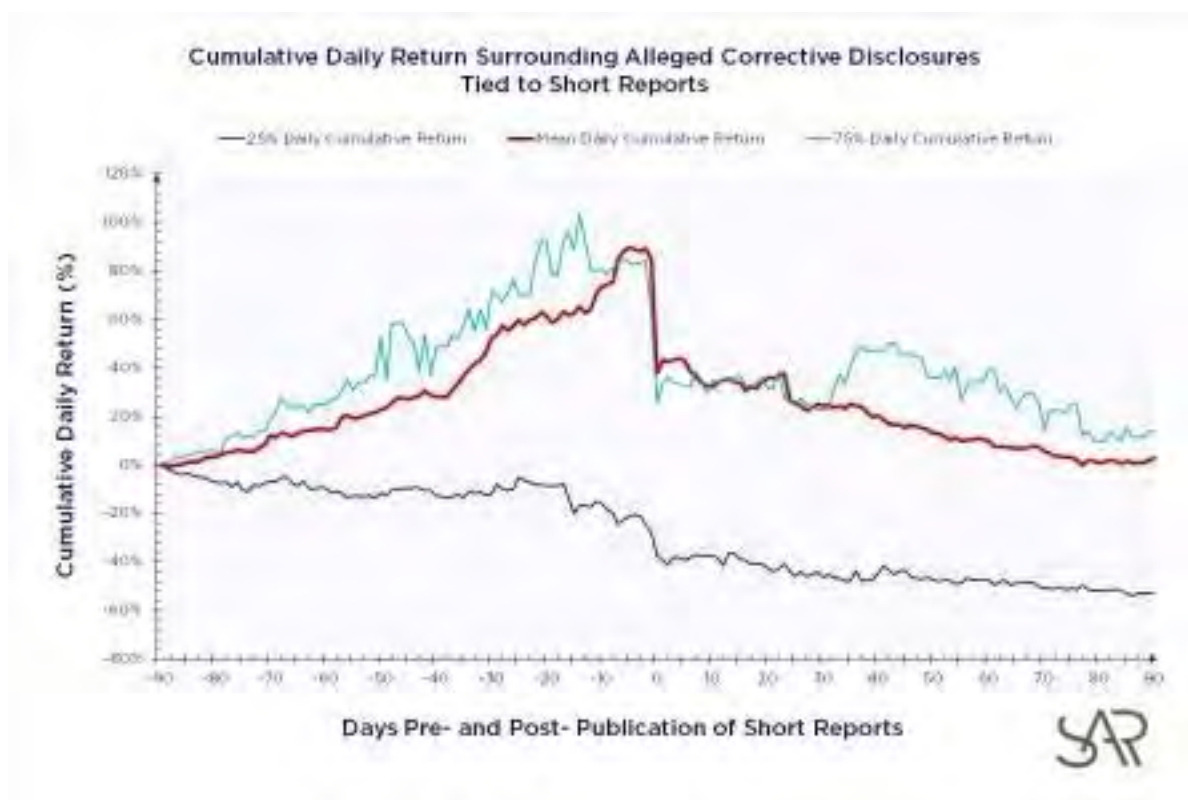
Short reports are ill-suited to support allegations of open-market securities fraud because they are published only when the short-seller decides to pull the trigger on a short attack to ignite a sales frenzy, thereby catalyzing an immediate decline in a targeted issuer's stock price.

According to a story by Shaud Tavakoli of Skadden Arps Slate Meagher & Flom LLP in Westlaw, short-sellers “take matters into their own hands, preparing and publishing purported ‘research’ reports detailing their rationales for expecting a stock price decline in the hopes of triggering or accelerating a market reaction.”[6]

During the last three years, our organization SAR LLC has identified 79 short-seller-driven securities class actions.[7] Our independent event study results on 57 of these lawsuits indicate that activist short-sellers act to drive down the stock price of issuers that are exhibiting notable stock price appreciation prior to the publication of a short report.[8]

Our data and analyses indicate that cumulative stock price returns during the 30, 90 and 180 days prior to the publication date of the corresponding short reports relied on by investor plaintiffs were, on average, 12.4%, 84.8% and 121.6%, respectively.[9]

The graph below illustrates the mean, 25th and 75th percentile returns of defendant issuers during the 90 days prior to and after the publication of the first-referenced short report in the corresponding class action complaint.



Our independent event study results provide objective indicia that potential aggregate damages stemming from short-seller-driven securities class actions are magnified based on the publication time chosen by the activist short-seller.

According to the SEC’s Rule 34-98738, which went into effect on Jan. 2, “[w]hile short selling can serve useful market purposes, such as facilitating price discovery, there are concerns that it could be used to drive down the price of a security, to accelerate a declining market in a security, or to manipulate stock prices.”[10]

Activist short-sellers do not operate as “independent detectives,” as described by plaintiff-side class action litigators in their recent Law360 Expert Analysis article.[11]

Their work product is instead conflict-ridden and unsuitable for evidentiary purposes in Rule 10b-5 private securities fraud litigation. It falls short relative to the independent discoveries made by truth-seeking investigative journalists who do not pursue trading profits, and is subpar to the valiant breakthroughs achieved by whistleblowers who seek to rectify deep-rooted corporate malfeasance.

The economic harm facing issuers from short attacks and follow-on shareholder litigation is growing and becoming increasingly impactful for other investors as well.

Short Reports Have a substantial immediate impact on stock price.

Our data and analyses indicate that short-sellers are directly responsible for \$34 billion in alleged market capitalization losses claimed by investor plaintiffs in 57 private Rule 10b-5 securities fraud lawsuits during the last three years.[12]

Approximately 68% of the alleged corrective disclosures tied directly to short reports exhibited a statistically significant return at the 95% confidence standard after controlling for the effects of the U.S. equity markets and corresponding industry-specific indices.[13]

On average, the stock price decline over the single-day event window affected by a short report for the cohort of defendant issuers is 16.8%.[14]

Our data and analyses also indicate that issuers defending both a short attack and follow-on litigation saw their stock price decline an additional 16% during the 90-day look-back period of the PSLRA.[15] In other words, the stock price of issuers facing short-seller-driven litigation remains depressed during the PSLRA period, effectively mooted the utility of the damages cap, because the issuers' common stock did not exhibit a bounce back in price.

Out of the 57 short-seller-driven securities class actions analyzed independently by SAR since January 2021, 16 have been dismissed, five have settled and 36 remain open. That yields a 28% dismissal rate over the last three years, with mean and median settlements of \$2.83 million and \$2.5 million, respectively.[16]

The market capitalization losses attributable to the cohort of open short-seller-driven securities class actions we have analyzed amount to approximately \$22 billion.[17]

Short-sellers disseminate information that may not be materially factual.

The consequences of well-timed short attacks against issuers experiencing an increasing stock price are notably impactful, particularly when short-sellers disseminate negative information that may not necessarily be of material fact and required to be made public in accordance with the federal securities laws.

In a recent webinar, Susan Muck of WilmerHale said, "The short-seller is writing about something that the company has never addressed publicly. It is a short-seller's analysis of what she or he finds troubling about the company, but isn't the subject of any affirmative disclosure, nor is it the subject of something a company has to disclose." [18]

Given the zero cost to procure short reports, plaintiff class action litigators are incentivized to rely on them as evidence "to recover the losses investors suffer due to [alleged] corporate misconduct," according to the "Activist Short-Sellers Are The Dark Knights Of Wall Street" authors, even if such work product is curated to inflict maximum impact on the stock price. [19]

According to a Bloomberg reporter, “[a]ctivist short sellers such as Nathan Anderson of Hindenburg Research and Carson Block of Muddy Waters Capital are getting more attention, as they increasingly use social media to push well-timed claims of weak fundamentals, improper accounting or outright fraud at publicly traded companies.”[20]

The entrenchment among plaintiff-side litigators and activist short-sellers is strengthening. Our data and analyses indicate that 37 plaintiff law firms heeded the bat signal of 25 activist short-sellers to aggressively litigate alleged open-market securities fraud.[21][22]

The top five plaintiff law firms that have participated during the pleading stages of the sample of short-seller-driven securities class actions we analyzed are Pomerantz LLP (15), Glancy Prongay & Murray LLP (15), Rosen Law Firm PA (9), Block & Leviton LLP (5) and Hozer & Holzer LLP (5). The top three activist short-sellers that were relied upon by investors’ counsel are Hindenburg Research (10), Culper Research (6) and Blue Orca (4).[23]

More recently, leading plaintiff-side firms were also willing to go to bat for a short-seller at the U.S. Court of Appeals for the Tenth Circuit when a scheme to profit from a short attack went awry against Overstock.com.[24]

In 2021, in *In re: Overstock Securities Litigation*, now before the Tenth Circuit, the U.S. District Court for the District of Utah held that the plaintiff “contends that Defendants engaged in a scheme to issue a locked-up dividend they knew would cause a short squeeze, artificially spike Overstock’s stock price, and force short sellers of Overstock stock to cover their positions at inflated prices.”[25]

According to the memorandum decision and order issued by U.S. District Judge Dale A. Kimball granting the defendant’s motion to dismiss, the “[d]efendants could not manipulate the market via truthful statements or via a dividend that everyone immediately knew would impact short sellers.”[26]

Evidently, the securities litigation landscape now displays a growing number plaintiff-side firms following, acting with and defending these “dark knights of Wall Street” in a biased pursuit of justice that relies on ill-suited evidentiary support that does not necessarily reveal anything the company was obligated to disclose.

On Jan. 16, the U.S. Supreme Court will hear arguments in *Macquarie Infrastructure Corp. v. Moab Partners LP*, to evaluate “[w]hether the U.S. Court of Appeals for the 2nd Circuit erred in holding that a failure to make a disclosure required under Item 303 of SEC Regulation S-K can support a private claim under Section 10(b) of the Securities Exchange Act of 1934, even in the absence of an otherwise misleading statement.”[27]

As we previously noted, “focused review of plaintiffs’ scienter allegations by federal judges has helped U.S.-listed corporations ward off a litigation wave of purported irregularities related to Regulation S-K, specifically pertaining to alleged violations of Item 303, or management’s discussion and analysis of financial condition and results of operations.”[28]

Now, on the heels of the Supreme Court’s 2021 landmark ruling in *Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System*, the justices face another complex disclosure issue related to whether an issuer’s “optional disclosure [is] a required one — expanding the bounds of Section 10(b) liability for Item 303 violations even further.”[29]

The Supreme Court’s Goldman framework is effective to nullify short-seller driven litigation.

With over \$21 billion in market capitalization losses alleged by investor plaintiffs in the cohort of active short-seller-driven securities class actions that we analyzed, the Supreme Court’s ruling in *Goldman Sachs* provides the trier of fact an essential data-driven framework to disqualify ill-suited evidentiary support in fraud-on-the-market lawsuits.[30]

As Muck stated, “I think Goldman can also give us tools to try to argue forcefully at the motion to dismiss stage, as well as at class cert, that there’s a complete and utter mismatch and the Courts should not allow plaintiffs to take advantage of the fact that a short-seller, a self-interested investor, was able to get into the market and throw around a lot of allegations — but, completely untied to anything the company has said publicly.”[31]

The timing chosen by activist short-sellers to publish short reports to not only limit a targeted issuer’s appreciating stock price, but to also drive it down and maximize trading profits, impairs the independence of the work product and hinders its evidentiary utility to validate investor plaintiffs’ alleged falsity and loss causation in open-market securities fraud litigation.

Nessim Mezrahi is co-founder and CEO, and Stephen Sigrist is a senior vice president at SAR LLC.

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[1] “Activist Short-Sellers Are The Dark Knights of Wall Street,” Francis McConville, William Schervish, and Connor Boehme, Law360, December 4, 2023.

[2] SAR Securities Class Action (“SCA”) Database, as of December 31, 2023.

[3] Id.

[4] For this analysis, the 90-day look-back period of Section 21D(e)(1) of the PSLRA is applied beginning on the date of the alleged corrective disclosure tied to a short report.

[5] Opinion & Order, In re: DraftKings Inc. Securities Litigation, No. 21-cv-5739 (PAE), (S.D.N.Y. Jan. 10, 2023).

[6] “Securities fraud plaintiffs rely on short seller reports at their peril,” Shaud G. Tavakoli, Esq., Westlaw Today, Thomson Reuters, February 8, 2023.

[7] SAR SCA Database, as of December 31, 2023. The 3-year tally excludes 1 short-seller SCA claim that only alleges violations of Section 11, not Rule 10b-5.

[8] 21 defendant issuers exhibited insufficient trading history for SAR to derive robust statistical results of stock price reaction.

[9] SAR SCA Database, as of December 31, 2023.

[10] SEC 17 CFR Parts 240 and 249; Final Rule: Short Position and Short Activity Reporting by Institutional Investment Managers, Effective Date, January 2, 2024.

[11] “Activist Short-Sellers Are The Dark Knights of Wall Street,” Francis McConville, William Schervish, and Connor Boehme, Law360, December 4, 2023.

[12] SAR SCA Database, as of December 31, 2023.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Id.

[18] Professional Liability Underwriting Society (PLUS) Webinar: “Goldman Sachs: Common Sense Prevailed in the 2nd Circuit,” Gregory Larsson, Nessim Mezrahi, Susan Muck, Walker Newell, November 8, 2023.

[19] “Activist Short-Sellers Are The Dark Knights of Wall Street,” Francis McConville, William Schervish, and Connor Boehme, Law360, December 4, 2023.

[20] “Why Activist Short Sellers Get Everyone So Worked Up,” Lisa Pham, Bloomberg, May 19, 2023.

[21] “Activist Short-Sellers Are The Dark Knights of Wall Street,” Francis McConville, William Schervish, and Connor Boehme, Law360, December 4, 2023.

[22] SAR SCA Database, as of December 31, 2023.

[23] Id.

[24] In re: Overstock Securities Litigation, Case No.: 21-4126.

[25] In re: Overstock Securities Litigation, Case No.: 2:19-cv-709-DAK-DAO.

[26] Id., Memorandum Decision and Order.

[27] SCOTUSblog.com: Macquarie Infrastructure Corp. et al., v. Moab Partners, L.P. et al., Case No. 21-2524.

[28] “3 Reasons Securities Fraud Litigation Exposure Fell in Q1,” Nessim Mezrahi and Stephen Sigrist, Law360, April 9, 2021.

[29] Petition for a Writ of Certiorari in Macquarie Infrastructure Corp. et al., v. Moab Partners, L.P. et al., Pg. 27, Case No. 21-2524, May 30, 2023.

[30] “Q2 Stock Drop Stats Buoy High Court’s Goldman Ruling,” Nessim Mezrahi and Stephen Sigrist, Law360, July 9, 2021.

[31] Professional Liability Underwriting Society (PLUS) Webinar: “Goldman Sachs: Common Sense Prevailed in the 2nd Circuit,” Gregory Larsson, Nessim Mezrahi, Susan Muck, Walker Newell, November 8, 2023.

When Do Omissions Create Private Liability? The Supreme Court Ponders

[law.com/newyorklawjournal/2024/01/17/when-do-omissions-create-private-liability-the-supreme-court-ponders](https://www.law.com/newyorklawjournal/2024/01/17/when-do-omissions-create-private-liability-the-supreme-court-ponders)

By ALM Staff



John C. Coffee Jr.

ANALYSIS

On Jan. 16, 2024, the Supreme Court heard 'MacQuarie Infrastructure Corp. v. Moab Partners L.P.', which will presumably resolve a circuit split. The question before the court is whether the Second Circuit erred in holding “that a failure to make a disclosure required under Item 303 of SEC Regulation S-K can support a private claim under §10(b) of the Exchange Act, even in the absence of an otherwise misleading statement.”

January 17, 2024 at 09:48 AM

By John Coffee | January 17, 2024 at 09:48 AM

On Jan. 16, 2024, the Supreme Court heard *MacQuarie Infrastructure Corp. v. Moab Partners, L.P.*, 2023 WL 7928297 (Nov. 13, 2023), and in due course it will presumably resolve the split that now divides the Second Circuit, on one side, and the Third, Ninth and Eleventh Circuits, on the other. The question before the court is whether the Second Circuit erred in holding “that a failure to make a disclosure required under Item 303 of SEC Regulation S-K can support a private claim under §10(b) of the Exchange Act, even in the absence of an otherwise misleading statement.”

That sounds technical (and it is), but if the court does reverse the Second Circuit's long-held position, much more than Item 303's complex standard for materiality will be overturned. Once onto the slippery slope that results from reversing the Second Circuit's position, the likely stopping point may be to read Section 10(b) and Rule 10b-5 to apply, in the case of omissions, only when the issuer has made a prior statement that was or has

become materially misleading and needs to be corrected “in order to make the statements made in light of the circumstances under which they were made, not misleading.” See 17 C.F.R. §240.10b-5(b). As defendant MacQuarie argues in a heading in its brief to the court:

The statutory and regulatory text shows that there is no Rule 10b-5 liability for an omission absent a misleading statement.

Although the language of Rule 10b-5(b) invites this argument that there must be a prior statement that was or has become false, the factor that gives this argument its greatest strength is the contrast in language between Section 11 of the Securities Act and Rule 10b-5. Section 11(a) mandates that, in the case of omissions, that the issuer is liable if it “omitted to state a material fact *required to be stated therein* (emphasis added) or necessary to make the statements therein not misleading.” This test is framed in the alternative: is the information “required” to be disclosed or “necessary” to make other statements not misleading. Thus, if MacQuarie could have been sued under Section 11, it would face fairly clear liability because Item 303 “required” disclosure of the omitted information. The absence of any corresponding “required to be stated” language in Rule 10b-5 can be read (but need not be read) to limit the reach of Rule 10b-5.

So how does the Second Circuit justify its position? In a famous footnote, in *Basic Inc. v. Levinson*, 485 U.S. 224 at n. 17 (1988), the court wrote:

Silence, absent a duty to disclose, is not misleading under Rule 10b-5.

But when does a “duty to disclose” arise? The Second Circuit’s answer has long been that if federal law or SEC rules mandate a specific disclosure, then there is a “duty” to disclose it, and silence can become misleading. Hence, if Item 303 requires the disclosure of certain “trends and uncertainties” (as it does), then a duty to disclose that information under Rule 10b-5 automatically arises, at least if the information is material and the nondisclosure would be accompanied by scienter. Rejection of this position invites chaos and radically reduces the transparency that Rule 10b-5 can enforce, as will be illustrated in a moment.

In any event, plaintiffs have a second theory known as “scheme liability.” Most discussion and analysis of Rule 10b-5 focuses on its second clause, but its other two clauses use considerably different language. In *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019), the court held in a case where the defendant could not be sued under Rule 10b-5(b) that it could be sued under clauses (a) and (c) of Rule 10b-5. There, the defendant was exempt from liability under Rule 10b-5(b) because it was not the “maker” of the statement (as required under *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011)). But even if so, the defendant (in *Janus*) had knowingly passed on materially false and misleading disclosures to clients that caused them to trade. Accordingly, the court ruled that, even if the defendant could not be sued under Rule 10b-5(b), he could still be sued under Rule 10b-5(c), which makes it unlawful.

To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Similarly, Rule 10b-5(a) makes it unlawful to employ any “scheme” to defraud.

Although *Lorenzo* shows that using materially false disclosures can violate Rule 10b-5(c), it is unlikely that the court wants these two provisions (i.e. clauses (b) and (c) of Rule 10b-5) to be identical in their reach. The likelihood is that the court will want to require a showing of greater fraudulent conduct in a case brought under Rule 10b-5(c) than under Rule 10b-5(b). Nonetheless, Rule 10b-5(c) worked in *Lorenzo* when the defendant knowingly distributed fraudulent financial disclosures (prepared by others) to his clients.

Against this backdrop consider now two polar cases. The first would be much like *MacQuarie* in that the defendant does not disclose information that was required by Item 303, but no other conduct is involved. The second case involves a truly fraudulent scheme with more conduct: the defendants run a privately held firm that is planning an eventual IPO, but it needs first to complete a major private placement. To its surprise, the firm finds that the U.S. Attorney for the Southern District of New York is planning to indict the firm (for money laundering and related offenses). This firm has never discussed its potential liability for criminal violations in any prior communication or disclosure to its investors (after all, it was privately held). It also knows if the U.S. Attorney indicts it, its stock price will fall dramatically (maybe 40% or more). Nonetheless, it realizes that if it cannot complete the private placement quickly and at the contemplated price, it faces bankruptcy in weeks.

To protect itself, it engages a securities law firm to give it an opinion (based on the court overturning *MacQuarie*) that it was entitled not to disclose the pending criminal prosecution because this was a pure omissions case in which no prior statement on this topic had been made. Its desperate hope is that it can avoid rescission of its private placement (and thereby avoid bankruptcy), even though its stock price will fall dramatically once the prosecution is announced. The court could easily draw a line that allows “scheme” liability to be used only in this second example and not the first.

These two hypotheticals illustrate the wide range of legal consequences that could follow if *MacQuarie* is reversed. Much depends on how the court articulates its ruling. To be sure, the court would agree with the Second Circuit’s theory that a mandatory disclosure requirement in Regulation S-K creates a “duty” to disclose under Rule 10b-5. But it is difficult to believe that the court’s conservative justices will rule this way (particularly where Justice Alito has already authored the opinion for the Third Circuit disagreeing with the Second Circuit—see *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000)).

Conceivably, the court could write narrowly and limit its decision to Item 303, which uses a very different and hard-to-apply test for materiality that differs significantly from the usual standard under Rule 10b-5. *Basic v. Levinson* mandated a magnitude/probability balancing

test for materiality, while Item 303 use a more complicated two-part test.

If this were the outcome, the damage to our disclosure system would only be modest. Recognizing this narrower option, the defendants offer it to the court, and the final argument in their brief begins with the caption:

| Item 303 is particularly ill-suited to enforcement through private litigation.

That claim may overstate, but its adoption would not create chaos.

In contrast, MacQuarie's brief makes far more sweeping arguments. For example, one heading in their brief boldly states:

| The enforcement structure of the Exchange Act confirms that § 10(b) cannot be understood to allow private lawsuits to enforce disclosure regulations.

This is an attack on private enforcement, itself, and, if accepted, it could overrule cases going back to *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). Much then is at stake.

To have any chance at success, plaintiffs must be able to explain the curious discrepancy between Section 11 with its "required to be stated" clause and Section 10(b) which says nothing of the kind. The short answer here should be that the two sections were not intended to be matching or parallel provisions. Section 11 was intended to authorize a private cause of action for investors, but Section 10(b) was intended to frame a broad, catch-all clause that covered any form of fraud that had not been otherwise covered. As Tommy "the Cork" Corcoran, one of the draftsmen of the 1934 Act, told a Congressional hearing at the time of the statute's enactment: The goal of Section 10(b) was to say:

| Thou shall not use any other cunning devices.

In light of this "fill-in-the gaps" purpose, there was little reason for Section 10(b) to address what had to be disclosed; it needed only to make clear that its coverage was intended to sweep broadly and cover any "manipulative or deceptive device or contrivance." In short, its intent was to ensure that nothing fell through the cracks. Given the extremely broad net that it cast, it makes little sense today to limit its reach because it does not contain the same language as Section 11 of the 1933 Act. Not only did Section 11 focus only on public offerings, but it created strict liability for the issuer. Thus, given its use of strict liability, it was appropriately narrower and more careful in its reach. But Section 10(b) intended to cover the waterfront.

Nonetheless, suppose the court does rule that omissions are not actionable under Rule 10b-5, unless they leave uncorrected a prior statement that was or became materially false. Are corporate counsel able to ignore Regulation S-K at this point? The answer has to be no for two reasons.

First, the SEC can sue for the violation of Regulation S-K. Indeed, repeated failures could even result in the issuer facing a suspension of trading. This may not be as frightening as a billion dollar securities class action (mainly because the SEC does not have the resources to enforce all, or even most, violations).

Second and more importantly, in an extreme case – such as my impending indictment example—the likelihood grows that a court could strain to find some prior statement (possibly even made years earlier) which was now materially misleading and required a correction. Unless it discloses that it was likely to be indicted, the issuer in my earlier fact pattern is highly vulnerable, including under the court’s decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund.*, 575 U.S. 175 (2015), which finds that there can be “embedded” factual statements in expressions of opinion.

Still, even if these traps for the unwary defendant would remain, one has to acknowledge that, just in this Term, the court seems about to change the law to an extraordinary degree by (1) prohibiting the use by administrative agencies of administrative law judges in actions for damages, (2) effectively eliminating the ability of Rule 10b-5 to reach omissions in private actions, and (3) overturning *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). That is an amazing aboutface in a single term. Make no mistake about it, the Administrative State is under severe attack.

Professor John Coffee is the Adolf A. Berle Professor of Law at Columbia University Law School and director of its Center on Corporate Governance.

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Supreme Court Signals Narrow Ruling on Securities Liability (1)

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- Case test limits of private securities class actions
- Parties now appear to agree on underlying issue

US Supreme Court justices once again found themselves debating a question on which the parties now seem to agree, this time in a much-anticipated securities case.

It's the latest example of when the justices don't discover until after they've granted a case that there's actually broad agreement on the issue. But the parties do differ widely on the effects the court's answer could have.

The precise question the justices agreed to decide is whether a "pure omission" in an SEC filing can give rise to a securities class action under the oft-criticized Rule 10b-5, or whether there must be some statement that plaintiffs can point to that's misleading.

All parties appeared to agree during oral argument Tuesday there must be some statement in order for a class action to move forward.

Based "on the argument this morning and your briefs, I don't really see a disagreement" on the "narrow question that the Court agreed to take," Justice Samuel Alito told the parties.

Justice Elena Kagan said the argument now focused on something else. What "everybody is arguing about is just sort of how narrow or how capacious we should understand the requirement that there needs to be another statement," Kagan said.

Several justices suggested answering just the question granted, and sending the case back to the lower courts to consider whether Macquarie Infrastructure Corp.'s failure to disclose that a new rule would decimate nearly half of its business made other statements about general risks to the business misleading.

Kellogg Hansen's David Frederick, arguing on behalf of one of MIC's shareholders Moab Partners, said that kind of ruling wouldn't provide a lot of clarity for the securities bar. He urged the justices to provide guidance on the question of how specific the alleged misleading statement must be before private shareholders can sue.

That's in part because both sides argue that the stakes are high. Frederick said requiring too much specificity would "create a roadmap for fraud." He noted that MIC's stock price fell 40% in one day after the new rule at the heart of the case was made known.

But MIC's attorney, Linda Coberly of Winston & Strawn, argued that a broad rule, allowing very general statements to give rise to liability, would force companies to keep silent on potential risks—or say so much that the information is essentially useless.

Coberly noted that the case comes to the court in the backdrop of Rule 10b-5, which the court has said "implies" a right for private plaintiffs to sue, even if that's not explicit in the statutory text. The court has been "loath to expand" that right, she said.

The court has said that it doesn't "want to get any further into the business of implying private rights of action," Chief Justice John Roberts said. That's "something that should cause us to be reluctant" here, Roberts said.

Seeking Limits

Roberts was referring to the expansion of liability to Item 303 of the SEC's Regulation S-K, also known as Management's Discussion and Analysis or "MD&A." That regulation requires management provide investors with an understanding of trends or events that could affect the business's financial condition.

Moab argues the failure to disclose certain events can be the subject of a securities class action, because it makes the statements the business did make misleading.

It's a "classic" half-truth, Frederick said.

Justice Clarence Thomas wondered if that would make potentially every omission actionable. "It seems as though you're saying the mere fact that it is an omission makes it misleading," Thomas told Frederick. "Is there a limit to that?"

Frederick said there were limits, namely that the omission must be important to understanding the health of the business.

"We're not going to flyspeck every sentence and the placement of every comma," Frederick said. But this "company didn't disclose what was going to happen to 40 percent of their business."

But Coberly urged a narrower rule that would require plaintiffs to identify "a specific misleading statement" in order to sue.

Coberly agreed with Kagan's hypothetical that plaintiffs could sue if "the company says there are three trends that" the investor should know about but "doesn't list a fourth that's actually much more consequential than those three and cuts in the opposite direction."

Justice Brett Kavanaugh noted even if investors couldn't sue the company, the Securities and Exchange Commission could still pursue inadequate MD&As.

The "SEC has ample authority to pursue and penalize failures to comply," Coberly said.

But the federal government, which is siding with the investors here, said its resources were "limited."

"The SEC has a few hundred employees that are tasked with reviewing tens of thousands of forms from registered companies each year, said Justice Department attorney Ephraim McDowell. It's "simply not realistic to think that those employees will be able to routinely detect, investigate, and penalize the many disclosure violations that are taking place."

The case is Macquarie Infrastructure Corp. v. Moab Partners, U.S., No. 22-1165, argued 1/16/24 .

—With assistance from Martina Barash.

(Updates with details, quotes from the argument starting in paragraph two.)

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A customer uses an automatic teller machine inside a Bank of America Corp. branch in New York.

Bank of America Corp. board members are free of a shareholder suit alleging they didn't act to stop employees' use of unapproved electronic platforms and devices.

Investors Robert Weiss and Michael Miliote told the US District Court for the District of New Jersey Jan. 12 that they're voluntarily dismissing their derivative suit on behalf of the company.

- Allowing the messaging and lacking records of the communications when regulators asked for them led to a \$225 million fine, the investors said
- BofA is among numerous financial sector companies caught up in regulatory scrutiny of employee messaging
- Attorneys for Weiss and Miliote didn't immediately respond to an email requesting comment on the decision to drop the case

The Brown Law Firm PC; Weiss Law; and Vik Pawar, who practices in New York, represented the investors. Bressler, Amery & Ross PC represented the individual defendants. Archer & Greiner PC represented BofA.

The case is In re Bank of Am. Corp. Derivative Litig. , D.N.J., No. 3:23-cv-03851, notice of voluntary dismissal 1/12/24 .

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- **Court:** C.D. Cal.
- **Track Docket:** No. 2:24-cv-369

On behalf of the proposed class, Baker is seeking class certification, damages, and attorneys' fees and costs.

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

The Rosen Law Firm PA represented Baker.

This case is Baker v. Cummins Inc. , C.D. Cal., No. 2:24-cv-369, complaint filed 1/15/24 .

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Jan. 17, 2024, 9:50 AM PST
Mobileye, Execs Allegedly Hid Inventory Issues From Investors
By [Ben Miller](#)
Documents

-  [Complaint](#)
-  [Docket](#)

- COURT:** S.D.N.Y.
- TRACK DOCKET:** 1:24-cv-00310

Bloomberg Law News 2024-01-17T13:38:44763039733-05:00
Mobileye, Execs Allegedly Hid Inventory Issues From Investors

By Ben Miller 2024-01-17T12:50:26000-05:00
COURT: S.D.N.Y.
TRACK DOCKET: 1:24-cv-00310

Mobileye Global Inc. and its top executives allegedly failed to disclose that the company had purchased excess inventory to avoid supply chain shortages, which in turn negatively impacted the company's financial results, a shareholder class action complaint says.

The automated driving technology company hid the fact that it had purchased inventory that exceeded demand during fiscal year 2023, including up to 7 million units of the EyeQ System-on-Chip used for driver-assistance and partial autonomous driving, according to the complaint filed Tuesday in US District Court for the Southern District of New York.

Mobileye allegedly misrepresented the inventory and supply chain dynamics to its shareholders for nearly a year, until Jan. 4, 2024, when the company issued a press release acknowledging a build-up of excess inventory. The press release cited supply chain constraints in 2021 and 2021, as well as a desire to avoid part shortages and lower than expected production among equipment manufacturers in 2023, telling investors it expected first quarter revenue to decline 50% compared to the same quarter last year.

Mobileye's stock price fell nearly 25% that day to close at \$29.97 on Jan. 4, according to the complaint. That was the stock's biggest ever decline since its October 2022 market debut, according to data compiled by Bloomberg.

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The misleading statements allegedly began in January 2023, when the company issued a press release announcing its fourth quarter results for the prior year, touting strong revenue growth. Then in March, Mobileye told investors in its annual report that it was attempting to mitigate supply chain constraints by monitoring inventory levels on an ongoing basis, noting that they didn't expect those constraints to adversely affect the business.

The alleged revelation that the company had purchased excess inventory came after several more months of disclosures highlighting growth in EyeQ chip revenue and demand, the complaint says.

Shareholder John McAuliffe seeks to recover damages for a class of investors who acquired Mobileye stock between Jan. 26, 2023 and Jan. 3, 2024, alleging that the company and its top executives violated the Securities Exchange Act. He also seeks legal fees, the complaint says.

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

Glancy Prongay & Murray LLP and Frank Cruz, who practices in Century City, Cal., represent the plaintiff and the proposed class.

The case is McAuliffe v. Mobileye Global Inc., S.D.N.Y., No. 1:24-cv-00310, 1/16/24.

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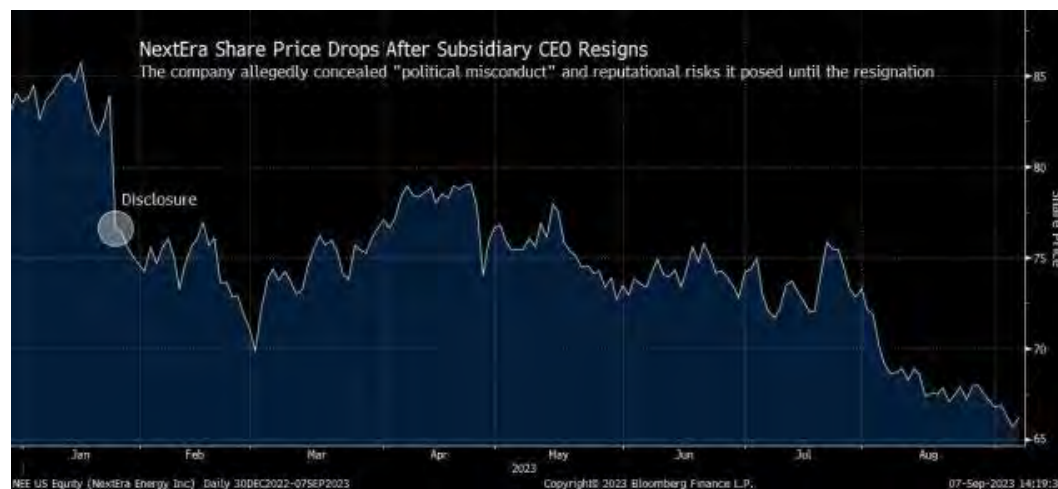
Documents

 Docket

- NEE subsidiary Florida Power and Light Co. allegedly worked with political consulting firm Matrix LLC to steer funding to “ghost candidates” and derail campaign efforts of Florida legislators seeking reelection in 2020, the shareholders said in their complaint. The company also allegedly spied on journalists who had published unsupportive news about FPL, courted public officials with job offers, and placed bids to privatize certain public utilities, according to the complaint.

FPL denied the alleged misconduct at the time it was reported in local Florida newspapers, but acknowledged the legal and reputational risks to the company in a regulatory filing in January 2023 after then-president and CEO Eric Silagy resigned from his role at the subsidiary.

Plaintiffs allege that those revelations and the leadership change at FPL prompted a nearly 9% stock drop for NextEra on Jan. 25, according to the complaint. That was the stock's biggest drop since April 2020, according to data prepared by Bloomberg.



NexEra's stock continued to fall due to the alleged misstatements about FPL's political conduct and associated risks, trading below \$80 per share between January and May 2023, the complaint said.

The plaintiffs didn't show the statements in question were false or intended to mislead investors, and their complaint failed to plead loss causation stemming from the alleged misrepresentations, NextEra said in the motion to dismiss filed Jan. 12. They have 28 days to file their response to the motion, Judge Aileen Cannon said in an order last month granting an extended period for the filing of the initial motion.

A shareholder derivative suit filed against the NextEra's directors and executives in the same federal court in September was voluntarily dismissed the following month. The plaintiff in that case didn't receive any compensation in exchange for dismissal of the action, according to the Oct. 17 filing.

Another derivative suit by a different shareholder was filed in November with similar allegations against the company's directors and executives, which is currently pending in the same Southern Florida district court.

Block & Leviton LLP and Edelsburg Law PA represent the plaintiffs and the proposed class and didn't immediately respond to a request for comment.

Paul, Weiss, Rifkind, Wharton & Garrison LLP and Martinez-Cid Law represent the defendants.

The case is *Jastram v. NextEra Energy*, S.D. Fla., No. 9:23-cv-80833.

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Halliburton Board Bylaws 'Would Choke a Horse,' Lawsuit Says

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- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0035

An investor is suing Halliburton Co. over claims that its board nomination bylaws are both too vague to comply with and so restrictive they “would choke a horse.”

The lawsuit, docketed Tuesday, targets bylaw provisions the fracking and oil services giant adopted late last year that cover the advance-notice disclosures required of stockholders seeking to nominate corporate directors. The complaint in Delaware’s Chancery Court also names Halliburton board members as defendants.

The proposed class action is the latest in a wave of similar cases taking aim at advance-notice bylaws and the ways they’re enforced by boards allegedly seeking to kneecap activist investors who propose dissident director slates. Judges hearing those claims have mostly upheld the bylaws.

Read More: Driver, Left Off AmeriServ Board Ballot, Comes Up Short in Court

The suit against Halliburton says its bylaws are “more akin to a tripwire”—a phrase used in a recent court ruling—than a legitimate tool for gathering information about conflicts of interest. They also amount to an end run around a statute specifying that only investors, not other board members, have the authority to remove directors, according to the complaint.

That mechanism “is inequitable, even if hypertechnically legal (which it is not),” the lawsuit says.

Halliburton didn’t immediately respond to a request for comment Tuesday.

According to the court complaint, the Halliburton bylaws enacted in December are more egregious than others that judges have sided with in recent years. The suit assails a section requiring director nominees, as a condition of eligibility, to submit contingent resignations that become effective if a majority of independent board members later determine they “recklessly” breached their fiduciary duties.

The provision is “contrary to Delaware law and bedrock principles of stockholder democracy,” the lawsuit says. “The board has made itself the arbiter of whether a fellow director elected by stockholders can remain a director.”

The complaint also challenges “vague and far-reaching disclosure requirements” contained in the bylaws, saying they “set up a minefield of potential subjective judgments by the board,” which would allegedly have the power to reject nominations on a pretext.

The investor leading the case, Eric Gilbert, is represented by Christensen & Dougherty LLP, Abbott Cooper PLLC, and Kaskela Law LLC.

The case is Gilbert v. Albrecht , Del. Ch., No. 2024-0035, complaint filed 1/16/24 .

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Chinese Online Insurer Waterdrop's Win in Investor Suit Upheld

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- Suit alleged Waterdrop downplayed regulatory risks in China
- 2nd Cir. affirms lower court's dismissal of shareholder suit

A federal appeals court upheld the dismissal of a shareholder lawsuit accusing Chinese online insurance company Waterdrop Inc. of misleading investors ahead of its initial public offering.

Waterdrop's registration statement went into detail about the regulatory environment in China and the risks it presented to the fintech startup, the US Court of Appeals for the Second Circuit said Tuesday.

The ruling is a loss for investors who said the company provided an incomplete picture as regulators in China increased supervision over the online insurance industry and tightened the rules.

"The registration statement put investors on notice that Waterdrop operates in a highly regulated industry and is subject to considerable regulatory risk," the appeals court said in an order.

The Second Circuit also rejected arguments that Waterdrop misled investors about its financial results in the first quarter of 2021. While the registration statement said expenses had increased, the lawsuit argued it was misleading because it didn't disclose the rate of increase.

The appeals court said the registration statement, as a whole, "described a risky and speculative investment in an upstart growth company that had never been, and might never be, profitable."

"The reference to Q1:21 growth, and the omission of the precise figure for aggregate expenses, did not affect the overall picture of Waterdrop that the registration statement presented," the court said.

The lawsuit, a proposed class action, was filed in September 2021, weeks after news reports that China's banking and insurance watchdog was stepping up scrutiny of insurance technology platforms. It sought to represent all investors in Waterdrop's IPO.

Kahn Swick & Foti LLC represents the investor. Quinn Emanuel Urquhart & Sullivan LLP represents Waterdrop. O'Melveny & Myers LLP represents underwriters.

The case is Mi v. Waterdrop Inc. , 2d Cir., No. 23-00301, 1/16/24 .

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Verrica Pharma Trims Claims in Securities Suit Over FDA Denial

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Verrica Pharmaceuticals Inc. convinced a federal judge to dismiss some claims in an investor's proposed class action alleging the company committed securities fraud by making misleading statements about regulatory approval for its core drug.

The US District Court for the Eastern District of Pennsylvania granted Verrica's motion to dismiss related to statements made in the second half of 2021 and Spring 2022 due to failure to raise a strong inference of intent. The claims were dismissed without prejudice and can be repleaded within two weeks of the order, which was signed Jan. 11 and entered Jan. 12.

Claims related to statements made by CEO Ted White in Spring 2021 survived since the facts pleaded suggest White was aware of potential approval obstacles and used allegedly evasive phrasing when speaking about those issues with investors.

In 2021, Verrica was preparing to market a new drug-device product used to treat molluscum, a skin disease, but its viability was dependent on approval from the Food and Drug Administration. Since Verrica planned to use a contract manufacturer called Sterling Pharmaceutical Services LLC, the FDA had to review the facility for compliance with regulations called current good manufacturing practices as part of the new drug application.

The FDA noted four noncompliance observations after a May 2021 inspection. The investors say Verrica and White knew the inspection had happened and that its results would delay the product's launch. Five days after the inspection concluded, White told institutional investors that the company anticipated it would "have our inspections take place according to plan." In September, the company announced the agency had denied the product's NDA in its present form. Following the September announcement, Verrica's stock price fell 8.3%.

After a second inspection in February 2022, the FDA gave the facility its most severe classification and denied the NDA for the second time as a result. Verrica's stock price dropped from \$5.56 on May 24, 2022, the day the company announced the denial, to \$2.01 by close of trading the next day. The investors say they were defrauded into believing quality issues at Sterling wouldn't impede the product's approval which caused the price to be artificially high until misstatements were corrected.

White's statement that FDA inspections would move forward as planned after the May 2021 inspection had concluded "could be read to suggest that White misleadingly concealed that the inspection had already occurred and would prevent the timely approval" of the product, Judge Mitchell S. Goldberg said.

He noted that “White’s statement that the FDA’s inspections would go forward in a timely manner could be misleading by concealing that one inspection had occurred and this fact would frustrate rather than advance the goal of timely approval.

The investors succeeded in showing scienter for White’s May 2021 statement since his phrasing that inspections would “take place according to plan” could be viewed as “dodging the question,” Goldberg said.

Goldberg dismissed claims for direct liability against defendants other than Verrica and White.

The investors are represented by Glancy Prongay & Murray LLP.

Verrica and White are represented by Cooley LLP and Morgan Lewis & Bockius LLP.

The case is Gorlamari v. Verrica Pharms., Inc. , E.D. Pa., No. 2:22-cv-02226, entered 1/12/24 .

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Six Flags Board Sheds Derivative Suit Over Expansion to China

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Plaintiff didn't show law firm had conflict, court says

Complaint alleged defendants knew parks couldn't open on time

Board members and officers of Six Flags Entertainment Corp. won dismissal of claims that the board wrongfully refused to pursue a derivative action against former officers and directors over allegedly misleading statements about the progress of theme park projects in China.

The plaintiff, shareholder Antonio Dela Cruz, failed to show that the board acted in bad faith or that its investigation was unreasonable, Judge Mark T. Pittman of the US District Court for the Northern District of Texas said.

The complaint alleged that the individual defendants made "materially false and misleading statements and omissions concerning the development of several multibillion-dollar Six Flags-branded parks in China," which they "represented to stockholders were scheduled to begin opening in 2019."

"In reality, construction was at a standstill and the Individual Defendants knew the Six Flags China parks could not possibly open on time. As stockholders gradually learned the extent to which the Individual Defendants misled them and the public, the price of Six Flags' common stock plummeted and billions of dollars' worth of stockholder value was lost," the complaint alleged.

Dela Cruz argued that the board acted unreasonably and in bad faith in declining to pursue the action because it was advised by conflicted counsel in considering the litigation demand.

Specifically, Dela Cruz alleged, Skadden Arps Slate Meagher & Flom LLP represented Six Flags, then-CEO James Reid-Anderson, and then-Chief Financial Officer W. Marshall Barber in a securities action based on the same underlying allegations.

The argument fails because Dela Cruz didn't show Skadden had a conflict of interest or that the firm dominated the investigation and consideration of the litigation demand, Pittman said.

Skadden didn't lead an investigation into the merits of the allegation, but assumed they "were meritorious," Pittman said. The firm advised the board on other considerations, including whether pursuing the claims would force the company to take a position that was inconsistent with its position in the securities action, he said.

In addition, Pittman said, the interests of Six Flags, Barber, and Reid-Anderson "were aligned in the Securities Action that supposedly created the conflict," he said.

Finally, Pittman said, Skadden isn't representing "any of the alleged wrongdoers in criminal proceedings—which would more easily give rise to potential conflict of interest."

Shuman, Glenn & Stecker PA, Pomerantz LLP, and Federman & Sherwood represent Dela Cruz. Cantey Hanger LLP and Skadden Arps represent nominal defendant Six Flags, former CEO James Reid-Anderson, and former Chief Financial Officer W. Marshall Barber. Wick Phillips Gould & Martin LLP represents the former board members. Moses, Palmer & Howell LLP and Morvillo Abramowitz Grand Iason & Anello PC represent former officers.

The case is Dela Cruz v. Reid-Anderson , 2024 BL 12831, N.D. Tex., No. 23-cv-0457, 1/12/24 .

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Express Scripts Fueled Opioid Epidemic, Boston Lawsuit Claims

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Litigation

Express Scripts Inc.'s headquarters stands in St. Louis, Mo., on July 21, 2011.

Whitney Curtis/Bloomberg via Getty Images

- Suit scrutinizes pharmacy benefit managers' role in crisis
- Boston claims PBMs colluded with Purdue Pharma to market drugs

Express Scripts Inc. and OptumRX Inc. sought profits over human lives by deceptively marketing **opioids** and failing to report illegitimate prescriptions, according to a lawsuit brought Friday by the city of Boston.

The lawsuit claims the companies violated state and federal controlled substance laws. They allegedly gave **opioids** better placement on the national registry of drugs in exchange for profitable rebates, failed to limit their excessive distribution into communities, dispensed **opioids** through mail order pharmacies without effectively controlling diversion, and colluded with Purdue Pharma in marketing **opioids** to increase their sales.

Express Scripts and OptumRX are two of the largest pharmacy benefit managers in the nation, but their role in the **opioid** epidemic has until now been “largely concealed from the public view,” the Massachusetts Superior Court suit claims. The city of Boston alleges that the PBMs have played “a key role in facilitating the oversupply of **opioids** through intentional conduct that ignored needed safeguards in order to increase the prescribing, dispensing, and sales of prescription **opioids**.”

Boston seeks to block the PBMs from continuing their practices by demonstrating that their conduct created a public nuisance.

The challenge follows successful lawsuits holding manufacturers like Purdue Pharma, Teva Pharmaceuticals, Allergan, and Johnson & Johnson accountable for the crisis.

Massachusetts and other states will bring in hundreds of millions of dollars from settlements with these companies.

The case is City of Boston vs. Express Scripts Inc , Mass. Super. Ct., No. 2484CV00107, complaint 1/12/24 .

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Verizon's \$100 million fee settlement is setback for mass arbitration critics

 [reuters.com/legal/litigation/column-verizons-100-million-fee-settlement-is-setback-mass-arbitration-critics-2024-01-16](https://www.reuters.com/legal/litigation/column-verizons-100-million-fee-settlement-is-setback-mass-arbitration-critics-2024-01-16)

Alison Frankel

Signage is seen at a Verizon store in Manhattan, New York City, U.S., November 22, 2021. REUTERS/Andrew Kelly Acquire Licensing Rights , opens new tab

Jan 16 (Reuters) - Verizon had two chances at the end of 2023 to defend a controversial corporate tactic to avoid paying millions of dollars in arbitration fees when companies are socked with thousands of consumer claims.

The telecom was poised to argue at both the New Jersey Supreme Court and the 9th U.S. Circuit Court of Appeals that its bellwether arbitration process — in which customers whose lawyers have filed more than 25 similar claims must arbitrate their cases in batches of 10, with settlement talks following the resolution of each batch of bellwether cases — is fair to consumers.

The repercussions of the Verizon (VZ.N) , opens new tab appeals would have been huge. As you surely recall, most arbitration forums require companies to put up hundreds or thousands of dollars in upfront fees when a consumer files an arbitration demand. When plaintiffs' lawyers amass hundreds or thousands of clients to file individual arbitration claims, those upfront fees quickly escalate into millions of dollars — and that's before any determination on the merits of the consumers' cases.

Companies have complained for years that plaintiffs' firms abuse the leverage of these initiation fees to force them into unwarranted settlements. Spurred by the U.S. Chamber, some big corporations — including Microsoft (MSFT.O) , opens new tab, Live Nation Entertainment (LYV.N) , opens new tab and Altice USA (ATUS.N) , opens new tab — have recently revised their consumer contracts to mitigate that leverage by requiring consumers to consent to arbitrate only a few cases at a time. That way, companies must only pay initiation fees for those few cases.

Verizon and other proponents of batch or bellwether arbitration contend that it's a fair way to figure out the legitimacy of consumers' claims. If consumers prevail in the first batch or two of cases, proponents argue, companies are likely to offer global settlements. Consumers with legitimate claims therefore end up better off, companies insist, because they receive settlement money that defendants would otherwise have to spend on arbitration fees.

But instead of making that pitch to the 9th Circuit or the New Jersey Supreme Court, Verizon quietly reached a \$100 million settlement , opens new tab last month to resolve consumer claims that it deceptively tacked on administrative fees to customers' monthly wireless bills.

Verizon, which continues to deny that its bills were deceptive or improper, resolved the dispute via a New Jersey state-court class action that mirrored similar class actions filed by the same plaintiffs' firms in federal courts in San Francisco and in Trenton, New Jersey.

The state-court settlement, which received preliminary approval on Dec. 15, is on behalf of a nationwide class and will resolve all of the litigation against the company. (Full disclosure: My husband is a class member and filed a claim after he was sent notice of the deal.)

The deal received little attention at the time, perhaps because of a clause in the settlement agreement that barred class counsel from DeNittis, Osefchen, Prince and Hattis & Lukacs from issuing a press release or otherwise announcing the agreement to news organizations. Several news outlets reported [here](#), opens new tab on the settlement after claims notices were sent out earlier this year.

Neither Verizon spokespeople nor Verizon's outside counsel from Quinn Emanuel Urquhart & Sullivan and Faegre Drinker Biddle & Reath responded to my query.

But I don't see how the settlement can be regarded as anything but an acknowledgement that bellwether arbitration, at least as Verizon designed its program, is not an easy out for companies facing mass arbitration.

Because Verizon dropped its appeals as part of the agreement, three rulings remain the last word in its case. They're all bad for bellwether arbitration proponents. In 2022, U.S. District Judge Edward Chen of San Francisco found [here](#), opens new tab Verizon's arbitration contract to be unenforceable, in part because the batch process would require more than 100 years to complete for all of the 2,700 Verizon customers represented by DeNittis, Osefchen, Prince and Hattis & Lukacs to reach arbitration. A New Jersey intermediate appellate court reached [here](#), opens new tab the same conclusion in May 2023.

And, perhaps most consequentially for other companies that have adopted bellwether arbitration provisions, an American Arbitration Association arbitrator held [here](#), opens new tab in February 2023, after DeNittis, Osefchen, Prince and Hattis & Lukacs filed demands on behalf of about 2,700 clients, that Verizon's bellwether process does not comply with AAA's consumer protocols.

The arbitrator concluded that Verizon's process unreasonably delays claimants' cases, in contravention of the principle that AAA consumer arbitration is supposed to resolve disputes quickly. The arbitrator credited Verizon's good faith in arguing that the bellwether process is intended to inform global settlement talks. But he said Verizon's promises did not supersede the language of its consumer contract, which, "by its unambiguous language would result in extraordinary delays in the resolution of mass claims brought against Verizon," the arbitrator wrote.

After the arbitrator's decision, Verizon told [here](#), opens new tab AAA that it would waive its batching and bellwether requirements for the claims already filed by the DeNittis and Hattis

firms. That was likely a strategic concession, since Verizon was at the time litigating to compel arbitration in the New Jersey class action, where U.S. District Judge Zahid Quraishi had put off a determination of the arbitration agreement's enforceability. But Verizon's willingness to ditch the bellwether procedure when AAA expressed doubts about it is not exactly a ringing endorsement of batch arbitration.

Class counsel DeNittis was in court and unavailable for comment. Verizon's settlement agreement said that plaintiffs' lawyers will request \$33 million in fees, which must be approved by the court.

It's a bit ironic that Verizon ended up resolving consumers' fee claims through a class action. Remember: Mandatory arbitration clauses in consumer contracts originated as a way for companies to avert class actions. It's been about five years since plaintiffs' lawyers turned the tables and began filing mass arbitration demands. Judges, for the most part, have been notably unsympathetic when companies argue that mass arbitration is an abuse of the process they forced upon consumers.

Maybe class actions weren't so bad after all.

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Alison Frankel

Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

Plaintiffs' Lawyers Concerned Over Proposed MDL Management Rule

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Members of the plaintiffs' bar are raising concerns about a proposed rule that would govern initial steps in multidistrict litigation, saying it could lead to certain attorneys repeatedly getting leadership positions in the handling of those cases.

The Advisory Committee on Civil Rules — which proposes changes to the Federal Rules of Civil Procedure — is weighing whether to add a rule on initial case management conferences for MDLs, as no such rule exists. Part of the proposed rule says the judge presiding over the MDL may appoint a coordinating counsel to deal with the logistics in managing the case.

Plaintiffs' attorneys critiqued the current phrasing of the proposed rule during a meeting on Tuesday. They said that it could result in judges appointing lawyers they are familiar with or attorneys who have repeatedly worked on MDLs, as the "coordinating counsel." The lawyers said that coordinating counsel could get a leg up in being appointed to a case's leadership team, and adds another layer of bureaucracy that's not necessarily needed in the process.

The coordinating counsel may be "one more position that will take away from any recovery by claimants at the end of the day," said Jennifer Hoekstra, partner with the Florida-based firm of Aylstock, Witkin, Kreis, & Overholtz.

MDLs can be transferred to a court where none of the participating lawyers have practiced before, meaning the presiding judge isn't familiar with the involved attorneys.

Some lawyers said the proposed rule's phrasing could lead to the judge appointing an attorney who has had zero involvement in the case. While some said it could bring advantages like having no bias toward any one party or argument, others said it would be a detriment.

"It seems to me that the person who's appointed should be vetted for the purposes of determining that person doesn't have a big learning curve" when it comes to the facts of the case or the other lawyers involved, said Alyson Oliver, a Michigan attorney who has worked on several MDLs.

Some attorneys also said that the proposed rule's list of topics that can be covered at an initial management conference included too many issues to tackle that early in the case. "You can't eat an elephant at once. You have to eat it in bites," said Fred Longer, an attorney with the Philadelphia-based law firm of Levin Sedran & Berman.

Members of the committee pushed back against those critiques, noting that the drafted rule doesn't say all of those issues have to be addressed at one hearing. But the plaintiffs' lawyers said lawyers or judges who haven't worked on MDLs before still might get that impression.

Lawyers also said coordinating counsel should have diverse backgrounds and experiences. Jose Rojas, co-lead counsel in a MDL over baby formula, said he was "lucky" to get the appointment despite not having any experience in MDLs. He said there is now an opportunity to draft the rule to make sure others can get similar opportunities.

Richard Marcus, a professor at UC Law San Francisco and a reporter for the advisory committee, asked Rojas whether it was important that the word diversity be used in the rule, as it might be a term "that some are not entirely comfortable with."

Rojas said that de-emphasizing prior MDL experience will help create diversity, as many of the people affected in cases like product liability MDLs are people of color. He said that by including lawyers and firms who originated litigation will help bring racial diversity, but that the word itself shouldn't be avoided.

Diandra Debrosse Zimmermann, a partner at the firm DiCello Levitt, said she was the first Black woman to be appointed as co-lead counsel in a MDL on the plaintiffs' side. "That was a challenging path, in order to be seen and to come forward and get those positions," she said of that role and other leadership appointments.

Debrosse Zimmermann said that diversity "in a real way impacts the manner in which we organize the case, strategize the case, and litigate the case. It's a really big deal for our clients in complex cases that impact so many people."

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AI Adoption Likely to Spark Surge in Corporate Litigation of All Stripes in 2024

 [law.com/corpcounsel/2024/01/17/ai-adoption-likely-to-spark-surge-in-corporate-litigation-of-all-stripes-in-2024](https://www.law.com/corpcounsel/2024/01/17/ai-adoption-likely-to-spark-surge-in-corporate-litigation-of-all-stripes-in-2024)

ANALYSIS

Companies might face antitrust allegations if they use AI to help set prices, for instance, or they might face allegations of discrimination if they use AI to winnow down candidates for job openings.

January 17, 2024 at 11:40 AM

Risk and Compliance

Maria Dinzeo

Corporate legal departments are bracing for a surge of litigation and regulatory enforcement in 2024 as more companies try to take advantage of advances in artificial intelligence.

Litigation trend reports from law firms Norton Rose Fulbright and Crowell & Moring show that AI will drive litigation and regulatory risk this year across the board, from cybersecurity and data privacy to antitrust, intellectual property and employment.

“Alongside more perennial dispute risks such as class actions and regulatory investigations, 2023 brought rapid-fire developments in artificial intelligence. In-house counsel are eager both to respond to new uncertainties around generative AI and to take advantage of the efficiencies it promises. This tension informs many of the trends we highlight for 2024, including cyber risk, IP and expectations for outside counsel,” said Steve Jansma, Norton Rose Fulbright’s San Antonio-based U.S. head of litigation and disputes.

The firm surveyed more than 400 general counsel, deputy general counsel and other in-house leaders for its 20th annual litigation trends report. Cybersecurity and data privacy continue to plague these in-house leaders as the No. 1 risk heading into 2024. The number of in-house counsel who said they’re anticipating more cybersecurity and data protection litigation risk rose to 44% this year, up from last year’s 40%.

The report attributes the rise in risk to the growing volume of data companies are struggling to manage and keep safe, as threat actors turn to generative AI tools like ChatGPT to supercharge their attacks.

“Data security remains the No. 1 risk,” one deputy general counsel at an insurance company told interviewers with Norton Rose Fulbright. “If companies with profiles like ours are going to end up in the papers, it’s going to be because of a cyber leak.”

AI is also driving litigation exposure in employment law, which the Norton Rose survey called another key dispute area.

“Twenty-eight percent of respondents expect that vulnerability to increase in 2024, as the U.S. Equal Employment Opportunity Commission continues to take a more active role in pursuing workplace litigation,” the Norton Rose Fulbright report states. Labor and employment also topped the list of class action concerns, with 48% of survey respondents saying they were most worried about this area.

This follows on the heels of two important employment lawsuits over AI-based recruiting and hiring, Crowell & Moring notes. In September, iTutorGroup agreed to pay \$365,000 to settle EEOC charges it used AI to filter out and reject more than 200 older applicants from its job listings for online English tutor, and since February Workday has been seeking to beat back a class action lawsuit alleging it instilled “unconscious bias” in the AI-based screening tool it sells to hundreds of companies.

Crowell & Moring expects more pattern-or-practice-discrimination lawsuits to come as AI screening and recruiting tools grow in popularity. Trina Fairley Barlow, Crowell & Moring partner and co-chair of the firm’s labor and employment group, said employment law simply isn’t keeping up with advancements in AI technology, “and that is creating enhanced employment-law risks for companies.”

Crowell & Moring also forecasts an uptick in employment disputes related to diversity, equity and inclusion efforts following the Supreme Court’s 2023 decision in *Students for Fair Admissions v. Harvard*, which ended race-based affirmative action in college admissions.

“While the Harvard decision did not apply directly to employment decision-making, we have already seen, and expect to continue seeing, litigants argue for expansion of Harvard’s holding and rationale to employment-related decisions,” Barlow said.

Norton Rose Fulbright also predicts a complicated landscape for diversity policies this year. It quotes a health care industry general counsel stating, “It’s going to be interesting to see how employment law evolves in the wake of the Supreme Court’s decision on affirmative action.”

Crowell & Moring expects more upheaval in intellectual property law as a host of lawsuits accusing AI platforms of training their models on copyrighted works head to trial. The first test case will go to trial in Delaware this year, with Westlaw owner Thomson Reuters

accusing AI startup Ross Intelligence of feeding Westlaw's case summary material into its language model to improve its legal research product.

Norton Rose Fulbright said 46% of respondents anticipate that their IP exposure will be heightened by the increased use of AI technology this year, "making it the leading contributor—though concerns may be reflecting the lack of certainty around AI's role in patent inventorship, copyright ownership and fair use cases."

Companies may also be on the hook for antitrust violations if they use generative AI software to help set prices, Crowell & Moring warns, as both regulators and the antitrust bar will be on the lookout for signs of price fixing and collusion as businesses look to AI to help give them a competitive edge.

Regulatory investigations and proceedings are expected to rise, especially in the technology, energy and consumer markets sectors. Sixty-one percent of respondents said they were involved in at least one regulatory proceeding in 2023, up from 50% the year before that, and 43% of respondents say they expect to see an increase in this area in 2024. More than half of tech industry corporate counsel say they think the number of regulatory proceedings against their organization will grow this year.

While 42% of survey respondents said they expect the volume of lawsuits to rise this year, only 29% of corporate counsel surveyed said they felt very prepared to face this year's litigation landscape compared with last year's 43%.

A slight majority, 51%, felt somewhat prepared, a gain over last year's 40%. Most attributed their lack of confidence to outside counsel fees that limit their engagement with their firms. Economic uncertainty and staff shortages in their legal departments were also factors.

Fifty-two percent of corporate legal departments expected to hire more in-house lawyers to handle the higher litigation workload, a sharp increase from last year's 36%. Thirty percent said they're expanding their in-house teams because they expect to spend less on outside counsel.

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ANALYSIS

What's the Best Gen AI Model for Legal Professionals?

While experts see a difference in the performance of some generative AI models over others with certain legal tasks, the "right" model for a legal team will come down to a variety of factors.

January 16, 2024 at 05:32 PM

Artificial Intelligence



Rhys Dipshan



The original version of this story was published on [Legaltech News](#)

This article is accompanied by [an infographic](#) that highlights key generative AI models legal professionals should know, including their varying characteristics and current use cases in the legal industry.

While generative AI exploded into the mainstream in late 2022, generative AI models are certainly not new—AI developer OpenAI, for instance, released a number of versions of its GPT model series years before announcing GPT-3.5, which powers the free version of ChatGPT, in November 2022.

What has changed over the past year, however, is the speed at which new models are entering the market and updated versions are coming online. For legal professionals, it can be difficult to know which models can best bring efficiencies to their day-to-day jobs, specific legal tasks and the overall delivery of legal services.

Fortunately, some are hard at work testing these generative AI models on a range of legal tasks. While there are obvious differences in each model's performance with legal work overall, it's becoming evident that comparing them isn't a clear-cut endeavor. After all, the requirements for specific legal tasks vary widely, as do the criteria that law firms and legal departments use to determine which model is right for the job.

For some users, the go-to model for a certain legal task might not be the one that performs best, but the one that is best-suited to the task—which are not always the same thing. Instead of gravitating toward a few "winning" generative AI models, it's likely that the market will turn to a variety of them, including fine-tuned models fit for specific legal purposes.

The Performance Difference

When it comes to sheer performance—how "smart" or "capable" a generative AI model is at a certain legal task—some experts in the field see clear differences.

For Michael Bommarito, CEO of legal tech and AI consultancy 273 Ventures and an adjunct professor at Michigan State University College of Law, "from a drafting perspective, there really isn't a comparison between GPT-4, especially ...the full size model, and just about anything else. If you say, 'draft a 1,000 word memo style based on these facts,' you don't really have another choice. Nothing else even gets you a first draft like that," he noted.

While Bommarito sees the GPT-4 model as the most capable when it comes to legal drafting, with summarization tasks, he noted that “it’s a little bit more wide open. You can use most of these models to summarize, especially if you combine multiple steps, like if you ask it to summarize in smaller pieces, and then you ask it to combine the summaries ... You can practically use any of the models today to do that.”

GPT-4 also isn’t always the top performer with another task. Zonghui Wei, a senior data scientist at Baker McKenzie who helps the firm test generative AI models, noted that when it comes to helping lawyers brainstorm ideas related to their work, the Claude model from AI developer Anthropic performs best. “Surprisingly, we found that the Anthropic model actually can give us more practical, commercially helpful [output] sometimes compared to GPT-4. But definitely, GPT-4 is kind of the top three performing for most of the tests that we have done so far,” he said.

Why Performance Isn’t Everything

While a model may perform better on certain tasks than others, performance isn’t the only criterion legal teams prioritize with generative AI.

Given the potential high costs of using generative AI models, for instance, it’s likely that some law firms and legal departments could gravitate toward more economical options. At Baker McKenzie, “we will, depending on the task...consider the cost [of the model], and [if lower performing models] can bring a big gain in terms of cost, that’s also something to consider,” Wei said.

The speed at which a generative AI model can complete a task is also a major consideration in an industry where clients are demanding greater efficiencies from their legal service providers. Because GPT-4 is the one of the most popular models on the market, its ability to rapidly respond to all the requests it receives isn’t always guaranteed. And for data-heavy projects, that can be a major stumbling block.

“There’s this tradeoff between the quality of results that a model can produce and the speed of the model at returning that result,” Bommarito told Legaltech News. “And that speed has to do with the vendor. It has to do with the model’s technical capabilities. It has to do with how many college students are trying to write an essay that’s due the next day. All that kind of background noise goes into whether or not I can do an e-discovery project with GPT-4.”

Popular models can also face bandwidth overload. “Very few organizations actually have guaranteed capacity,” Bommarito explained. He added, “If you think about it from a business continuity perspective, to rely on these systems for very large workflows—Claude, for example, or the Google models, which don’t quite perform as well as GPT-4, but don’t have anywhere near as much of a usage constraint because fewer people are using them, provide some interesting opportunities.”

Data-heavy projects can likewise lead a law firm or legal department to prioritize a model that has a larger context window—essentially the upper limit of how many tokens, or bits of words, the model can take in and output. And the opposite can hold true, too, with some opting for less expensive, less advanced models with smaller context windows for simpler tasks.

“[What] we’ve sort of found...[is] certain models have certain kind of benefits compared to other models,” said Danielle Benecke, the founder and global head of Baker McKenzie’s machine learning practice. “[Anthropic’s Claude] is known for the large context window, which is significantly larger than GPT-4. There are certain tasks, like data-heavy or document-heavy [projects] that [the Claude model] might be better for ... But then there are other tasks that might be simpler and you may not even need GPT-4, you might just need, like GPT 3.5, for instance,” she added.

Does Model Size Matter?

Generative AI models come in different sizes in terms of varying context windows or parameters, which are connections between concepts that an AI model learns throughout its training process.

The extent to which a model’s size affects its performance is still an area of debate for AI experts and data scientists, with the old adage “bigger is better” not always applying. “Size doesn’t matter as much as we thought we did,” Bommarito said.

But looking at size can enable legal professionals to perform a cost-benefit analysis of different generative AI options.

When comparing Claude 2 and the largest GPT-4 model, Bommarito explained in an email that while GPT-4 performs much better than Claude on tasks such as taking the multiple-choice portion of the Multistate Bar Exam (MBE), it can be a more cost-effective option for larger projects.

“In practice, we have confirmed that the effort and complexity required to engineer solutions involving reasoning and legal knowledge using Claude 2 is substantially higher than GPT-4. On the other hand, GPT-4 models are only available in 8,000 and 32,000 token sizes (approximately 10 to 50 pages), whereas Claude 2 can scale up to 100,000 tokens,” he said. “This means that for simple tasks or longer documents, Claude 2 is both cheaper to run and easier to engineer solutions [with].”

But taking into account model sizes isn’t always straightforward—sometimes it’s not an apples to apples comparison.

“The only thing I would caveat about [this] is there are different tokenizers ... the idea is that some models will look at words differently than others,” Bommarito said.

He explained that GPT-4 and Claude “have slightly different vocabularies... These models have different kind of dictionaries that they’ve learned or memorized, and so if you put the same words into GPT and Claude, it might come back with different numbers of tokens. Or they might have slightly different technical implementations. And so one might say this is 1,000 tokens and [the other] might say it’s 1,100. So it’s a little bit tricky to compare them across the models in the strictest sense.”

A Multitude of Models

Comparing generative AI models out-of-box can seem simple enough, but oftentimes the model one initially chooses isn’t exactly the same one they end up using. Many legal teams are experimenting with changing models to be more responsive to legal tasks through a variety of fine-tuning methods. These include [prompt engineering](#), retrieval augmented generation (RAG), a process whereby the model leverages external sources to improve its accuracy, and the use of embeddings, which help the model understand the relationships between words and phrases.

One major generative AI model—Meta’s Llama 2—is open source, and is meant to be changed and tailored to the whims of a software developer. But other proprietary models can also be fine-tuned in a variety of ways. So while there are a handful of generative AI models dominating the market, there are also a multitude of options for how to use them, with each change affecting their speed, accuracy, and performance.

“There’s one series of pilots that we’ve been doing in the...transfer pricing part of our tax practice, and what we do is we kind of benchmark models for the same task ... When you basically throw all of the models at the same task and you customize the models in the same way...you really start to see in a very practical way how different models outperform the others, including in really surprising ways,” Benecke said.

There’s no easy answer, therefore, to what model is the best for legal tasks. It’s dependent on a variety of specific factors and contexts, leaving legal professionals with the time-consuming, though likely rewarding, work of testing out and fine-tuning different models for different tasks.

If the generative AI era in the legal market began with the introduction of OpenAI’s GPT-3.5 and ChatGPT, its maturity will be marked by a plethora of fine-tuned models targeted to very specific use cases, including for legal tasks. In fact, to some extent, it’s already happening in the legal market and beyond.

“There are now hundreds of models published every week on Hugging Face, the primary open source distribution resource,” Bommarito said. “Many of these models have demonstrated performance that exceeds GPT-4 on specific task or assessments, like truthfulness, programming or querying databases, or answering questions in specific areas like medicine.”

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Repsol Sued in Class Action for \$1 Billion Over Peru Oil Spill

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Jan. 15, 2024, 7:35 AM PST

Marcelo Rochabrun



- 10,000 barrels of oil were spilled on Peru's waters in 2022
- Pogust Goodhead says it is representing 35,000 victims in Peru

Repsol SA is being sued for \$1 billion by an English law firm representing around 35,000 alleged victims for its involvement in Peru's largest oil spill in 2022.

Tom Goodhead, chief executive officer of Pogust Goodhead, said the lawsuit was filed last week in The Hague, where a company owning Repsol's Peru's subsidiary is registered. The lawsuit is tied to the 2022 spill in which 10,000 barrels of oil were spilled into the Pacific Ocean as oil was being discharged onto the La Pampilla refinery, owned by Repsol.

The Peruvian government has labeled the incident as the worst ecological disaster in its history and has criticized Repsol for not paying most of the fines imposed as a result. Repsol said it has appealed the fines and will pay them if its claims are dismissed. The spill had significant impact on fishing communities near La Pampilla, who have yet to be allowed to resume their activities.

Read More: Peru Blasts Repsol for Paying Tiny Fraction of Oil Spill Fines

Repsol said in a statement it was aware of the Dutch lawsuit, but dismissed it as "meritless." It said Repsol has spent over \$270 million repairing damage caused by the spill, including in paying compensation to those affected. That's much less than what Pogust Goodhead hopes to reap.

The suit is the first filed by Pogust Goodhead since it got a \$552 million investment from Connecticut-based Gramercy Funds Management, but it has specialized in international class actions for years. It is scheduled to go to trial this year against BHP, claiming a £36 billion (\$45.8 billion) over a dam collapse in Brazil that left hundreds dead.

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London-based Goodhead said it had signed on some 35,000 people onto the class action, mostly during the last few months of 2023. He traveled to Lima as part of the effort and said people impacted by the spill feel "absolute fury and anger" about what happened.

“There’s a feeling that unless they took the lawsuit in the Dutch courts that they really wouldn’t see justice,” he said.

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Anthony Aarons, Jeremy Hodges

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Boeing Hit With Product Liability Class Action Over Lost Door In-Flight

 [law.com/nationallawjournal/2024/01/16/boeing-hit-with-product-liability-class-action-over-alaska-airlines-plane-losing-door-plug-mid-flight](https://www.law.com/nationallawjournal/2024/01/16/boeing-hit-with-product-liability-class-action-over-alaska-airlines-plane-losing-door-plug-mid-flight)

Passengers of an Alaskan Airlines flight that lost its left side door “plug” mid-flight earlier this month have filed a class action lawsuit against Boeing for allegedly manufacturing a defective 737 Max 9 plane and allowing the trip to go forward, despite knowing it wasn’t properly secured.

This suit was surfaced by Law.com Radar, ALM’s source for immediate alerting on just filed cases in state and federal courts. Law.com Radar now offers state court coverage nationwide. Sign up today and be first to know about new suits in your region, practice area or client sector.

Stritmatter Kessler Koehler Moore brought the suit on behalf of passengers on the Jan. 5, Alaska Airlines Flight 1282, which accuses Boeing of manufacturing a defective 737 Max 9 plane. The Jan. 11 complaint, filed in Washington Superior Court for King County, contends that Boeing knowingly and publicly admitted that the left side door “plug” was not properly secured to the fuselage either during manufacture or otherwise while the aircraft was being built by Boeing and/or its subcontractor, Spirit AeroSystems.

The Boeing Company delivered the 737-MAX 9 to Alaska Airlines without properly securing the left door plug to the airframe, and the plaintiffs allege that other bolts or seals required to secure the door were potentially defective.

The plaintiffs, Elena Berry, Bart Berry, Gwint L. Fisher, Renée Fisher, Iris Ruiz, Gareth Cunningham, Rosalba Ruiz, as well as others on their behalf, and at least 327 unnamed individuals—allege that about ten minutes into the flight from Portland, Oregon, to Ontario, California, the plane lost its mid-cabin door “plug,” resulting in clothes, cell phones, debris, and oxygen being sucked out of the cabin.

Some of the passengers reported injuries, including a concussion, soft tissue injuries, breathing problems, and emotional distress, the complaint said.

According to the complaint, the door plug on the left side of the aircraft “relies on four bolts to ensure a proper seal between the door edges and the fuselage is maintained in flight, and to prevent vertical translation of the door in flight,” which is “achieved through bolts attached through upper guide fittings and lower hinge pins.”

The aircraft had three in-flight pressure system alarms go off prior to the incident on Jan. 5, resulting in Alaska Airlines withdrawing the plan from long-range service over water, allowing the plane to quickly return to an airport if a pressurization problem occurred.

The complaint brings a claim for products liability, construction defect, and moves for class certification. It requests special and general damages, attorney fees and costs, pre- and post-judgment interest, class certification, and class notice of class member rights.

“The NTSB has yet to pinpoint an exact root cause of Flight 1282’s alarming decompression. But given Boeing CEO Dave Calhoun’s forthright admission that this terrifying event was caused by Boeing’s ‘mistake’ (a soft take on its apparent negligence), our passenger clients elected to file suit as soon as possible in order to seek fair compensation for their injuries and those of all other passengers, spouses, and registered domestic partners, as soon as reasonably possible,” said attorney Daniel Laurence, a partner at Stritmatter Kessler Koehler Moore, via a press release. “Unfortunately, although everyone is glad that the blow-out occurred while the crew could still manage to land the aircraft safely, this nightmare experience has caused economic, physical and ongoing emotional consequences that have understandably deeply affected our clients, and is one more disturbing black mark on the troubled 737-MAX series aircraft.”

Counsel has not yet entered an appearance for Boeing in the case.

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Boeing Sued by Alaska Air Passengers Over 737 Max 9 Door Blowout

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Boeing Co. was sued by passengers on an Alaska Airlines Inc. flight that was forced to make an emergency landing in Portland, Oregon, last week after a mid-air blowout of a so-called door plug on the 737 Max 9 jet.

The suit, filed Thursday in Washington state court by seven passengers, seeks class-action status and unspecified damages from Boeing, which manufactured the plane. The 171 passengers and six crew on Alaska Airlines Flight 1282 experienced physical injuries and emotional trauma from the accident on Jan. 5, according to the complaint.

“The pressure change made ears bleed and combined with low oxygen, loud wind noise and traumatic stress made heads ache severely,” lawyers for the plaintiffs said in the suit. “Passengers were shocked, terrorized and confused, thrust into a waking nightmare, hoping they would live long enough to walk the earth again.”

Boeing is facing scrutiny from US regulators, who have opened a formal investigation into the company’s aircraft operations following the incident. Chief Executive Officer **Dave Calhoun** said “a quality escape” compromised the safety of jet, but the company is still trying to understand exactly what went wrong.

Boeing declined to comment on the lawsuit.

Alaska Airlines took delivery of the Max 9 jet from Boeing around Nov. 11, according to the complaint. Since the blowout on Flight 1282, inspections found some bolts that secure door plugs on similar Max 9 planes owned by Alaska Airlines and United Airlines were loose.

Passengers on Flight 1282 said they experienced a “sudden loud explosive noise” before the left door plug shot off the aircraft. The cabin “suddenly and violently depressurized,” according to the suit.

“The force of the depressurization ripped the shirt off a boy, and sucked cell phones, other debris, and much of the oxygen out of the aircraft,” the passengers claim in the lawsuit, adding that some pieces of seats near the opening were “torn off and expelled into the night.”

Oxygen masks fell from the ceiling, but many didn’t seem to work, according to the lawsuit.

The in-flight emergency response was impaired by the wind noise from the hole in the plane and shouting by passengers on board, according to the suit. One woman shouted: "There's a hole in the plane!"

"Passengers feared they would not survive the flight," lawyers said in the lawsuit. "Some prayed. Some texted family to express their trepidation. Some gripped and clung to one another. Some adult passengers were crying. Most were eerily subdued in their collective helpless state, muted with masks on."

The case is *Berry v. Boeing*, 24-2-00824-1, Superior Court of Washington (King County).

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Federal judge dumps pyramid scheme lawsuit against Trump

 [courthousenews.com/federal-judge-dumps-pyramid-scheme-lawsuit-against-trump](https://www.courthousenews.com/federal-judge-dumps-pyramid-scheme-lawsuit-against-trump)

Nika Schoonover



One of numerous pictures used in a 2018 federal complaint to demonstrate President Donald Trump's ties to the multilevel marketing company Advanced Communications Network.

MANHATTAN (CN) — A federal judge on Friday tossed out a case against former President Donald Trump and the Trump Organization over a multilevel marketing scheme involving the American Communications Network.

In a 2018 federal class action, four investors claimed they lost hundreds of thousands of dollars investing with ACN because they were duped by the Trump family's promotion of the telecommunications pyramid scheme through their appearance in promotional videos, headlined conferences boosting the company and hosting ACN executives on Trump's show "The Celebrity Apprentice."

U.S. District Judge Lorna G. Schofield, a Barack Obama appointee, previously rejected the plaintiffs' request to certify a nationwide class and three more classes of people with claims in California, Pennsylvania and Maryland.

Schofield also dismissed Trump's adult children Ivanka, Don Jr. and Eric from the case this past May. And in July, Schofield dismissed claims under the federal racketeering law because of a lack of evidence that Trump's conduct was directly related to the investors' losses.

In Friday's decision, Schofield tossed the case out of federal court and kicked it over to the three individual states.

"The only remaining claims are the common law and statutory claims of three plaintiffs arising respectively under the laws of California, Maryland and Pennsylvania where they respectively reside, with total out-of-pocket losses said to be roughly \$7,000," Schofield wrote in her order.

At a November hearing, the plaintiffs argued against severance and transfer to the state courts, claiming three appellate courts would have to review the dismissal of the racketeering claims and the denial of class certification.

Though the federal court can exercise jurisdiction over the remaining states' claims, Schofield said that doing so "would not serve economy or convenience."

"Because this case now involves only three individual plaintiffs asserting claims under their respective states' laws, it is not better suited for adjudication in this court than in state court," Schofield said.

Roberta Ann Kaplan, an attorney for the plaintiffs, said they look forward to continuing the case in state courts.

"Today's decision addresses only where — not if — plaintiffs' claims should be brought to trial," Kaplan said. "We intend to continue the fight, and our brave clients look forward to their day in court."

Represented by attorneys at Emery Celli and Kaplan Hecker, the plaintiffs refuted Trump's claims that he didn't receive endorsements from the company, recounting 10 years of endorsements the former reality star made for ACN. Trump began distancing himself from the company in 2015 as he emerged as the Republican presidential frontrunner and claimed to "know nothing about the company."

"Not a word of this is true," they said in their complaint.

The plaintiffs said ties between ACN and Trump remained after 2015. In 2017, ACN sponsored a hole at the Eric Trump Foundation's annual golf tournament, Curetivity, and held a celebrity golf tournament of its own at Trump National Golf Club in Moorseville.

The dismissal comes one day after the former president appeared at closing arguments in the New York civil fraud trial against him and the Trump Organization. Meanwhile, E. Jean Carroll's civil defamation trial against the former president is scheduled to begin after Martin Luther King Jr. Day when courts resume business.

Trump's attorneys did not respond for comment in time for publication.

VW's Fix for Dozens of Older Diesel Models Toppled by Court (2)

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Litigation

Jan. 17, 2024, 7:34 AM PST

Karin Matussek

Bloomberg News

- Court voids clearance of software updates in engine EA-189
- VW say it will appeal and sees no threat of car removals

Volkswagen AG lost another lawsuit at a German court over its software fix for engines in the wake of the diesel scandal that tarnished the reputation of Europe's biggest carmaker.

The Schleswig Administrative Court, which already issued a similar ruling a year ago, toppled the German transport regulator's clearance of the software for 62 older diesel models, according to environmental group DUH, which brought the case.

The judges revoked the permit that allowed VW to fix engines by updating the software instead of retrofitting them with potentially more costly hardware.

DUH argued the engine EA-189 still illegally dodges environmental rules because it switches off emission cleaning amid low temperatures, turning the updates into so-called defeat devices. VW had argued these exceptions are necessary to protect the engines from damage and that car security takes precedence.

Volkswagen called Wednesday's ruling wrong and promised to appeal but said it sees "no threat" of having cars removed from roads. The company has already challenged the February 2023 ruling that is now pending on appeal.

KBA, the German transport regulator, said it cleared the permit only after ordering VW to make adjustments. The agency will review the judgment once its written version is available and then decide on any further steps.

DUH said it has filed suits over similar software used by cars from Mercedes-Benz Group AG, BMW AG, Stellantis NV's Fiat and 15 other manufacturers.

The case is VG Schleswig, 3 A 332/20.

(Updates with regulator statement in sixth paragraph.)

At Quinn Emanuel, Planning for Success, Not Succession Planning

 [law.com/therecorder/2024/01/12/at-quinn-emanuel-planning-for-success-not-succession-planning](https://www.law.com/therecorder/2024/01/12/at-quinn-emanuel-planning-for-success-not-succession-planning)

By Alexander Lugo



What You Need to Know

- In May 2022, partners at Quinn Emanuel formally named Michael Carlinsky and William Burck to co-global managing partner roles. Founder John Quinn assumed the newly created title of chairman.
- The expanded leadership structure was intended to provide stability to partners who asked questions about the firm's succession plan.
- However, John Quinn said he's not planning on stepping away from client matters or firm leadership anytime soon.

At 72, John Quinn doesn't see retiring from the firm he founded or moving into an emeritus role in his near future. In an interview this week, he challenged anyone questioning his fitness to run with him at the Rose Bowl Stadium in Pasadena, California.

"I'll leave it to other people how fit and astute I am to run a \$2 billion organization," Quinn said, noting that at any time, his partners can decide who is best suited to run the firm.

As recently as 2018, the co-founder and longtime managing partner of Quinn Emanuel Urquhart & Sullivan was steadfast he would make no changes to his firm's management regime, preferring its "bare bones" leadership structure to the administrative bureaucracy of many peers.

But as the global litigation shop approached 1,000 lawyers in 35 offices generating \$2 billion in revenue, Quinn said the burdens of overseeing the firm required additional insight.

Young lateral partners began asking about the firm's succession plan because they "wanted to be at a firm that would last generations," said William "Bill" Burck, one of the global co-managing partners who's now been helping oversee the firm for almost two years. And there

was also a desire among partners for leaders representing different practice areas to bring new ideas to the table, Burck said.

“There’s a difference when you have one person managing the firm and when you have three people with new energy and new ideas,” Burck said. “That’s going to create a lot more diversity of ideas and possibilities for the firm.”

Partners at the firm in May 2022 formally named Michael “Mike” Carlinsky and Burck to co-global managing partner roles after years of acting in unofficial leadership roles and as liaisons between Quinn and the growing partnership. Quinn, meanwhile, adopted the newly created title of chairman. And partners also created a new partnership committee to formalize promotions and a service committee to consult the leaders.

“Doing everything by myself was really burdensome and these guys take up a lot of the burden and have different perspectives,” Quinn said. “I think we make better decisions across the board.”

To law firm management consultant Peter Zeughauser, Quinn Emanuel appears to have adopted one of the industry’s “best practices” in implementing an expanded leadership structure to meet the demands of a global law firm. Quinn, Zeughauser suggested, has “come around to the view of his partners ... that it’s impossible for one person to manage a firm of their nature.”

 “He’s built an entire firm from scratch and you don’t want to kick a guy like that out. He doesn’t appear to be past his time,” Zeughauser said. “I understand where he’s coming from on wanting to still play a major role in the firm’s growth.”

From Close Confidants to Co-MPs

Carlinsky and Burck said their firmwide leadership roles preceded their formal appointments.

For years leading up to May 2022, Carlinsky and Burck helped steer the firm in as “close confidants” to Quinn, Quinn said. And many colleagues “came to trust us to come to us with their hope for the firm and for themselves.”

“I don’t think there was a thought ‘let’s create structure and add the people.’ It was ‘here are the people and let’s create this structure,’” Burck recounted. “It comes from the fact we were both a little more vocal in our views about things than some other people were.”

In the years leading up to this change, Carlinsky and Burck had emerged as natural choices to help run the firm, from cultivating profitable client relationships to gaining the trust of fellow partners, according to interviews with firm leaders.

“Even before we stepped into these positions, Bill and I were heavily involved in policy and big-picture business issues for maybe a three-years’ period prior to May of 2022 in the function of unofficial leadership roles,” Carlinsky said. “A number of partners expressed desire to me and Bill to see that happen. ... Now you have the views of three people with different perspectives.”

Interviews with all three suggest there’s no difference in the job duties entailed by each title and the three operate as a trio.

When an inquiry comes in about an issue related to billing or a client, Carlinsky said whichever of the three is most immediately available will address it. Larger issues regarding firm policy, finances and strategy require the three to conference so they can each share their input.

If two of the three are in favor of something that runs counter to the wishes of the third, the majority wins out. “That doesn’t happen too often,” Carlinsky said.

The creation of a three-headed management team wasn’t the first time Quinn found himself sharing responsibilities with an expanded leadership structure.

The addition of Carlinsky and Burck followed the creation of a 12-member advisory panel, a “service committee,” in 2020 to advise on the firm’s COVID-19 response. It was that body’s decision that led to allowing U.S. lawyers to work remotely on an indefinite basis and to hold onto equity partner pay when finances were uncertain.

“We didn’t know if we were going to survive, and courts were closed around the country,” Burck said. “Because of that great uncertainty, there was a widely held view within the firm, including John, that there was a need to get input on how to manage the firm.”

Burck added this committee positioned himself and Carlinsky to move into the co-managing partner roles. “We were the two most active members of the service committee and we decided that the crisis required more consultation so John and the firm could function,” he said.

Planning for Success, Not Succession Planning

Carlinsky said formalizing these roles was, in part, a response to questions young lateral partners asked him and Burck about the firm’s succession plan.

The message to laterals was, “If John gets hit by a bus tomorrow and we’re in a position with no leadership, Bill and I will continue managing the firm,” Carlinsky said. “If John retires in five years, we will continue to manage the firm.”

But don't take Carlinsky and Burck's appointments as a sign that the gears of leadership succession are already in motion at Quinn Emanuel, said Quinn, who reiterated his belief that "succession planning" is business school lingo without practical application.

"There will come a time when I'm not chairman and when I'm doing something else," he said. "Deciding that three years in advance doesn't make sense."

Burck agrees with Quinn, albeit with less aversion to what Quinn calls business school speak.

"The view was this is a succession concept, not in the sense that John is going somewhere but that we all live under mortality, and having a broader representation of the firm in terms of age and practice was an important perspective," Burck said.

Since their formalized addition to firmwide leadership, Carlinsky and Burck have taken credit for formalizing the process of electing new partners starting in 2022 and doubling down on associate recruitment and retention with "special fall bonuses" in 2023.

Quinn said the firm has a new partnership committee tasked with nominating eligible lawyers for the partnership. He and other leaders said the firm had "outgrown" its prior practice.

"Our previous partner meeting was an open meeting where there was open discussion and debate on every partner," Quinn said. "It was almost an all-day meeting. There was literally almost no structure to it. We've grown to the point where that was almost unwieldy."

Carlinsky said the old process had become antiquated and frustrated partners.

"Now we've been through two election cycles and everyone has lauded the new process," he said. "I think it's served us well in terms of making absolute superstars partners."

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New Hampshire GOP Officials Seek to Make Using ESG a Crime

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Securities Law

Photo Illustration: Jonathan Hurtarte; Photos: Getty Images

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Saijel Kishan

Bloomberg News

- ‘Knowingly’ violating the anti-ESG law would be a felony
- Lawmakers in Missouri have also introduced an anti-ESG bill

Republican lawmakers in New Hampshire are seeking to make using ESG criteria in state funds a crime in the latest attack on the beleaguered investing strategy.

Representatives led by Mike Belcher introduced a bill that would prohibit the state’s treasury, pension fund and executive branch from using investments that consider environmental, social and governance factors. “Knowingly” violating the law would be a felony punishable by not less than one year and no more than 20 years imprisonment, according to the proposal.

The bill calls on the treasurer and pension fund to produce an annual report for the governor and legislature that would note the existence of any investment funds that have “mixed, rather than pure, fiduciary interest investment motivations.” The proposal will be reviewed by a state committee before it goes to the House and then the Senate for a vote.

“As it presently exists, ESG operates like a cartel with perverse incentives created by both government policy and activist networks imposing their investing mandates via mobbish mechanisms and threats,” Belcher said in an email. “My bill fixes an existing executive order by making it enforceable.”

Republican lawmakers have for the past two years lambasted ESG, saying the investment strategy furthers Democratic goals such as fighting climate change at the expense of the fossil fuel industry. Last month, lawmakers in Missouri introduced a law where the state treasurer would create a list of financial companies that “boycott” companies.

New Hampshire Retirement System said the pension plan’s board hasn’t yet taken a position on the proposal and is expected to discuss it at its next meeting in February.

“ESG isn’t considered as an end unto itself, but is one of many factors viewed in regard to its potential impact on our ability to obtain the highest return for New Hampshire’s active and retired public employees,” said Marty Karlon, a spokesman for the plan, said in an emailed statement.

The bill’s introduction was earlier reported by Pensions & Investments.

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UBS Calls Out 'Shortsighted' Bias of Climate Investors (1)

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- UBS study says lack of focus on biodiversity is 'shortsighted'
- Nature Taskforce unveils 320 signatories from 46 countries

UBS Group AG is warning that investors have vastly underestimated the financial and economic impact of the biodiversity crisis.

"Biodiversity loss requires just as swift action as climate change," UBS Chair **Colm Kelleher** and Chief Executive Officer **Sergio Ermotti** wrote in a study published by the bank's sustainability and impact institute on Monday. The situation requires a "new wave of transition finance, governmental resolve and stakeholder partnerships," they said.

While climate change has dominated the green investing agenda in recent years, biodiversity has remained under the radar. That bias is "shortsighted, considering almost two-thirds of the economy is at least moderately dependent on it," according to the UBS study.

Read More: AI, Climate Change Threaten Nearly Half the World's Businesses

Most corporations and investors don't treat biodiversity and natural capital risks — the loss of species, as well as air, water and soil pollution — as an issue that can affect financial outcomes. Nor is there adequate data to measure its real impact. The result has been that "private capital allocation, corporate actions, and consumer behaviors mostly ignore its value in their everyday activities," the UBS study said.

The first hurdle is figuring out how to accurately measure biodiversity, UBS said. For now, however, an absence of reliable data has left assets mispriced.

It's a warning that others have also issued. Analysts at Barclays Plc noted last year that failure to correctly price biodiversity risk opens the door to lost value and even litigation. And some investors are already looking for ways to profit from the skewed asset prices that have resulted as corporations and governments ignore natural capital.

On Tuesday, the Taskforce on Nature-related Financial Disclosures said that 320 organizations from more than 46 countries have "committed to start making nature-related disclosures" based on a list of recommendations that it published last year. The signatories,

which include UBS, have agreed to start releasing nature-related disclosures as part of their annual reports, TNFD said.

The finance industry has faced pressure to pay closer attention to biodiversity since a landmark deal was struck at the COP15 summit in late 2022, paving the way for new regulations and more investor demand. The Global Biodiversity Framework requires the roughly 200 signatory states to work toward a reversal of biodiversity loss by the end of this decade.

“Now the challenge is delivery, and based on the targets, it will be a race against time,” a team of authors led by William Nicolle wrote in the UBS report. If key ecosystems start to collapse, the toll on global gross domestic product may reach \$2.7 trillion a year by 2030, according to the World Bank.

For now, there’s a huge gap between what the world is spending on protecting biodiversity, and what’s needed, UBS noted. And the larger role for private finance envisaged in the COP15 agreement “sits uncomfortably next to the needs of institutional investors for stable returns and efficiency, which nature-related assets struggle to offer today,” it said.

Some banks and asset managers have already been adjusting their operations to adapt. These include Standard Chartered Plc hiring its first head of biodiversity, while Deutsche Bank AG set up a panel to help it assess nature-related risks and identify new financial product offerings tied to biodiversity.

And late last year, UBS named **Ramzi Issa** as its head of global structured credit and sustainable credit products. The former Credit Suisse banker helped build the current market for debt-for-nature swaps, one of the fastest-growing corners of finance for biodiversity.

Delays in action risk making “the task of reversing biodiversity decline by 2030 harder as time passes,” UBS said.

(Adds reference to TNFD early adopters in seventh paragraph.)

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Ohio Supreme Court: Ex-regulator's assets can be frozen in connection with FirstEnergy case

ohiocapitaljournal.com/2024/01/17/ohio-supreme-court-ex-regulators-assets-can-be-frozen-in-connection-with-firstenergy-case

By Susan Tebben

January 17, 2024



Former Public Utilities of Ohio Chair Sam Randazzo at court. (Photo by WEWS.)

The Ohio Supreme Court unanimously ruled Tuesday that assets owned by the former head of the Public Utilities Commission of Ohio can be frozen in connection with a federal public corruption case.

Sam Randazzo's bank accounts and brokerage accounts can now be frozen, according to a ruling by the state's highest court that reversed an appeals court decision. This keeps Randazzo from moving money out of his accounts as the state's civil action continues to recover proceeds from an alleged bribe given by FirstEnergy Corporation.

The case came to the Ohio Supreme Court almost exactly one year ago, when the state said the case arose "from a brazen conspiracy perpetrated by an energy conglomerate, FirstEnergy Corp., to defraud Ohioans out of billions of dollars," Ohio Attorney General Dave Yost told the court at the time.

FirstEnergy was the company at the heart of a public bribery and corruption scandal related to House Bill 6, which eventually took down former Ohio House Speaker Larry Householder, who was convicted and sentenced to 20 years in federal prison for racketeering.

In the sentencing of Householder, U.S. District Judge Timothy Black called out Householder for leading a scandal in which FirstEnergy poured out more than \$59 million in political bribes for a nuclear plant bailout in Northern Ohio costing \$1.3 billion.

The Randazzo civil case involves a \$4.3 million bribe FirstEnergy said it paid to the former PUCO chair through his company, Sustainability Funding Alliance of Ohio, Inc., just before he started at the commission. Randazzo was appointed to the commission by Gov. Mike DeWine, Justice Pat DeWine's father.

"The state claims that this payment was allegedly in exchange for Randazzo promising to give favorable treatment to FirstEnergy as PUCO chairman," Justice DeWine wrote as the lead in the supreme court's Tuesday opinion.

This comes after Ohio sued FirstEnergy in Sept. 2020 in connection with bribery and corruption, a lawsuit that was held up by federal criminal litigation. The company then entered an agreement with the U.S. Attorney's Office, and the agreement "revealed Randazzo's role in the corruption scheme," wrote Justice DeWine in the Tuesday opinion.

The state sued Randazzo in 2021 to freeze assets and "preserve the future sale of property," according to a Tuesday statement from the Ohio Attorney General's Office.

When the state argued to seize Randazzo's financial accounts before a judgment was leveled in the case against him, attorneys said there was "probable cause that (the state) would obtain a money judgment against Randazzo."

"It pointed to the FBI's raid of Randazzo's home in late 2020 (shortly after which Randazzo resigned from his position at PUCO) and FirstEnergy's essentially admitting to bribing Randazzo in the deferred-prosecution agreement," Justice DeWine wrote on behalf of the court.

After the FBI raided Randazzo's house, evidence showed he transferred a house valued at more than \$500,000 to his son without charge, sold two Florida properties for about \$4 million, and also sold two Ohio properties for about \$800,000.

"This pattern, the state claimed, indicated a 'present danger' that Randazzo was attempting to transfer assets to make them unreachable by a judgment creditor," DeWine wrote.

In a separate court case, Randazzo was indicted on Nov. 29, 2023 by a federal grand jury on felony criminal bribery and embezzlement charges.

He pleaded not guilty in December after surrendering to U.S. District Court in Cincinnati on the 11-count indictment.

Before heading to appeals court in the civil case, Randazzo attempted to convince a lower court to vacate the orders of seizure for his accounts, claiming the state hadn't established 'irreparable injury,' saying some properties were exempt from seizure and alleging a violation of his due process rights.

“The trial court held a hearing on the motion, but Randazzo chose not to offer any evidence,” the Ohio Supreme Court opinion stated. “Instead, he offered legal theories as to why the attachment (seizure requests) was improper.”

The Tenth District Court of Appeals ruled in favor of Randazzo, saying the orders to freeze assets were made in error because the state had failed to prove the “irreparable injury” caused by a delay in an asset freeze. This led the state to appeal to the state’s highest court.

“But it’s hard to see how Randazzo suffered any resulting injury because the assets in Randazzo’s accounts would have been frozen regardless,” DeWine wrote in the Tuesday ruling, adding that Randazzo had “failed to demonstrate any prejudice.”

Yost, whose office represents the state in legal matters, said in a statement that his office is “pleased that the court recognized that Mr. Randazzo cannot spend down his bribe proceeds and render himself judgment-proof.”

Ronald Lewis, judge for the Second District Court of Appeals, sat in for Justice Joseph Deters in the decision.

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A \$60 Billion-Plus Pay Package? Musk Gives Tesla's Board a Nightmare Task

Corporate-governance tensions are unavoidable in owner-managed companies, but they needn't be inflamed on social media

By [Stephen Wilmot](#) [Follow](#)

Jan. 17, 2024 8:15 am ET



The real problem with Elon Musk's compensation is governance. PHOTO: MARCO LANNI/ZUMA PRESS

It was never going to be easy for Tesla's **TSLA -3.36% ▼** board to craft a new pay package for Chief Executive Officer Elon Musk. By taking the negotiations to his social-media platform X, Musk has made the task harder.

"I am uncomfortable growing Tesla to be a leader in AI & robotics without having ~25% voting control. Enough to be influential, but not so much that I can't be overturned. Unless that is the case, I would prefer to build products outside of Tesla."

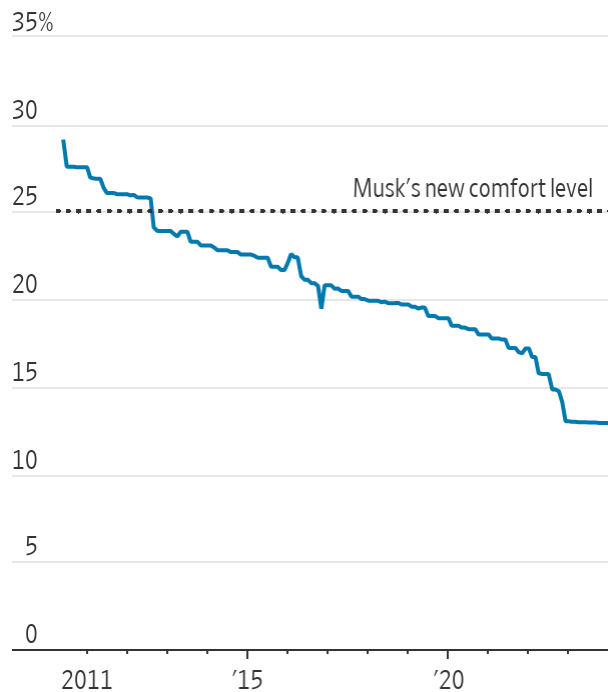
So Musk tweeted late on Monday in response to a discussion about whether the world's richest person needed another compensation package to keep his focus

on Tesla. It is six years since his last pay deal in 2018, which came roughly six years after the previous one in 2012.

He clarified the reason why he hasn't yet got a new one in a follow-up post: A legal case against his 2018 plan is still open. Closing arguments were given to a Delaware court last February, but the judgment has yet to come.

The 2018 deal entitled Musk to a maximum gain of \$55.8 billion, according to Tesla's estimates at the time, likely more than any CEO has been paid in history. But achieving that required hitting targets that seemed equally wild, including a market value of \$650 billion—11 times the numbers at the time. In the end, he hit most of them, helped by the bubbly car-industry conditions created by the pandemic, as well as the global success of the Model 3 and Model Y. His options, which remain unexercised, are worth \$55 billion at Tesla's current \$699 billion market value.

Share of Tesla owned by Elon Musk



Source: FactSet

His 2024 deal, assuming it comes to that, sounds like it might be more of the same, only with even bigger numbers. Musk now owns about 13% of Tesla's shares outstanding, according to FactSet. Exercising his stock options would, after selling shares for tax, take that up to perhaps 17% of the diluted share count. The difference between that and 25% would still be worth more than \$60 billion at the current share price and diluted count. Factoring in further dilution and tax, Musk would need much more.

These would be extraordinary numbers for executive pay, but if they again depend on extraordinary targets there would still be alignment of management and shareholder interests. In October 2022 Musk said he “saw a path for Tesla to be worth more than Apple and Saudi Aramco combined,” which was then about \$4.4 trillion. Tying another

batch of stock options to such dreams is unlikely to hurt other investors, even if they get substantially diluted.

The real problem with Musk's compensation is governance. Although he has denied dictating the terms of his 2018 package, it seems too crazy to have been dreamed up by anyone else. This feeds into suspicions that he dominates the board that is supposed to hold him to account. This is a long-held worry of corporate-governance consultants such as Glass Lewis and ISS, and a focal point of both the lawsuit about his pay and a previous one about Tesla's 2016 acquisition of SolarCity.

Publicly threatening to take his latest ideas elsewhere if he doesn't get 25% of Tesla puts the company's compensation committee—the three-person subgroup of directors tasked with deciding his pay—in a tough position. If they even come close to obliging his wishes, it would appear to confirm their weakness, potentially exposing them to further legal challenge. And letting him have a quarter of the company would only aggravate the governance conundrum of how to control a CEO who in turn controls the board through his voting power.

Musk will be hard to refuse, even if his threats to leave aren't very credible. Last year he set up a separate artificial-intelligence company, X.AI, but he has every incentive to avoid deflating Tesla's valuation and the AI hopes it is built on. His \$90 billion stake in the EV pioneer is his single largest asset even after the 2022 stock sales he made to fund his rash acquisition of what is now X. Tesla's stock didn't move much Tuesday.

Engaged manager-shareholders such as Musk stand behind many of the world's most valuable companies, from U.S. tech to European luxury. But the unavoidable corporate-governance tensions need to be carefully managed—not inflamed on social media.

Write to Stephen Wilmot at stephen.wilmot@wsj.com

Tesla slashes Model Y prices in Europe after China price cuts

 [reuters.com/business/autos-transportation/tesla-cuts-model-y-prices-germany-after-china-price-cuts-2024-01-17](https://www.reuters.com/business/autos-transportation/tesla-cuts-model-y-prices-germany-after-china-price-cuts-2024-01-17)

Hyunjoo Jin, Christoph Steitz

Model Y cars are pictured during the opening ceremony of the new Tesla Gigafactory for electric cars in Gruenheide, Germany, March 22, 2022. Patrick Pleul/Pool via REUTERS/File Photo Acquire Licensing Rights , opens new tab

Jan 17 (Reuters) - Tesla (TSLA.O) , opens new tab has slashed prices of its Model Y cars across Europe including in Germany, a week after the company cut prices in China in the face of uncertain electric-vehicle demand.

The cuts, as well as lowered price targets from brokerages UBS and Wells Fargo, sent Tesla's shares down nearly 3%, adding to what has been a poor start for the stock in 2024.

Germany-listed rivals Mercedes Benz Group (MBGn.DE) , opens new tab, Volkswagen (VOWG_p.DE) , opens new tab and Bayerische Motoren Werke (BMWG.DE) , opens new tab fell between 2.3% and 3.3%. In the United States, Ford Motor (F.N) , opens new tab and General Motors (GM.N) , opens new tab were down 2% and 1.1%, respectively.

Tesla reduced prices in Germany for its Model Y Long Range and Model Y Performance by 5,000 euros to 49,990 euros (\$54,340) and 55,990 euros respectively, representing a discount of 9% and 8.1% compared to their previous prices.

It also cut the price of Model Y rear-wheel drive models by 4.2%, according to data on Tesla's website.

In France, the company reduced its Model Y prices by as much as 6.7%. Prices were cut by up to 10.8% in Denmark.

In the Netherlands, prices for the Model Y were slashed by up to 7.7% and, Tesla cut prices by between 5.6% and 7.1% in Norway, CNBC reported , opens new tab.

While no reason was given for the move, EV demand has generally been slowing as a deduction in state subsidies and high borrowing costs prompt buyers to rethink big purchases.

Tesla struggled in Germany in 2023, posting a 9% decline in new registrations to 63,685 vehicles, against an 11.4% increase in EV sales in Europe's top economy, according to figures from the German federal motor authority KBA.

As a result, Tesla lost its crown as the largest seller of EVs in Germany to Volkswagen, which took a 13.5% share of the market compared to Tesla's 12.1%.

On Wednesday, Wells Fargo and UBS cut their price targets on Tesla's stock by more than 8% and nearly 11%, respectively. The stock has already declined about 11.5% so far in January, based on the last closing price.

The latest price cut comes after Tesla announced last week that it would suspend most of its car production at its factory near Berlin from Jan. 29 to Feb. 11. The company blamed a lack of components due to changes in transport routes because of attacks on vessels in the Red Sea.

Germany's EV subsidy programme, originally intended to apply until the end of 2024, ended prematurely last month, a move that was expected to hit German carmakers already struggling to bring down prices to levels offered by Chinese and U.S. competitors.

(\$1 = 0.9200 euros)

Reporting by Hyunjoo Jin in San Francisco, Christoph Steitz in Frankfurt and, Maria Ponnezhath and Arsheeya Bajwa in Bengaluru; Editing by Ros Russell, Mark Potter and Maju Samuel

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Blackstone, Oaktree Burned by Morgan Stanley's Block-Trade Leaks

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- US agencies hint that key clients of bank caught up in leaks
- Settlement ended investigation into prized Morgan Stanley unit

Just after lunch on a Tuesday in March 2019, a top-ranking Blackstone Inc. executive emailed Morgan Stanley's **Pawan Passi**, seeking help to start exiting one of the investing giant's most lucrative real estate bets ever.

The very minute Passi got the message, he called a hedge fund, which spent the next two hours wagering against the shares of Invitation Homes Inc. After US markets closed, Morgan Stanley offered Blackstone its bid for a block of stock and won the mandate.

Pawan Passi

Photographer: Alex Kent/Bloomberg

In the process, Blackstone's request for secrecy was ignored. Morgan Stanley allocated the hedge fund about 2.5 million shares of Invitation Homes, allowing the firm to unwind its bet. The New York-based bank made a clean \$3.4 million from that afternoon's work.

These were among the findings disclosed Friday by federal prosecutors in Manhattan and the US Securities and Exchange Commission, who accused Morgan Stanley of betraying the trust of its clients by leaking non-public information and levied a \$249 million penalty to end a multiyear probe into a dominant business in the bank's vaunted equities unit.

Passi, who was running the US equity syndicate desk when he was put on leave in 2021, was barred from the industry for a year by the SEC.

While authorities omitted names in describing the transactions they unearthed, the deals involve some of the finance industry's most prized clients in New York and London. Beyond Blackstone, the world's biggest alternative-asset manager, other firms whose deals were leaked by Passi include Oaktree Capital Management, which oversaw \$183 billion at the end of September, and European private equity pioneer Cinven.

Rather than by name, their identities are revealed in the granular details cited by investigators — such as the specific size of certain past stock holdings or the trades in which they participated. Representatives for all three firms declined to comment.

“This whole affair points to a failure of risk culture,” said **Moorad Choudhry**, a former NatWest Group Plc banker who wrote *The Principles of Banking*. “It is further bad behavior from a senior executive at a bank. The solution lies in what kind of person large banks want to appoint to executive-committee positions, and whether the risk culture in place means they actually do what they say they do.”

Hugh Fraser, a Morgan Stanley spokesman in London, referred to the bank’s statement last week that said “the core of this matter is the misconduct of two employees” who violated policies and that the firm is “confident” in its enhanced controls.

George Canellos, a lawyer for Passi, said last week that he was pleased the government didn’t pursue a criminal case against his client.

Easy Money

Block trades are highly sensitive transactions, often involving enough stock to move the market price. Banks compete to handle the sales, flipping the shares to other investors — such as hedge funds — for a profit.

In the cases outlined by the SEC, Passi allegedly tipped off hedge funds that bet against — or “shorted” — shares before they were sold through a block trade and later repurchased them at a lower price from Morgan Stanley, locking in near-certain profits.

The bank benefited because those ready buyers lowered any risk to its balance sheet as it bid alongside competitors to win mandates. The desk run by Passi dominated the business.

Read More: Morgan Stanley banker lifts hedge fund from ‘kiddie table’ with stock tips

In Blackstone’s case, it wasn’t just any investment it was looking to sell. The firm had created Dallas-based Invitation Homes by pouring billions of dollars into distressed residential real estate after the 2008 financial crisis. It gobbled up homes and emerged as a major player in the US rental sector, withstanding intense political scrutiny as it scored big gains from that bet.

At 1:35 p.m. on March 19, 2019, a top Blackstone executive emailed Passi about arranging a potential block trade: “As we just discussed, we appreciate your protecting the confidentiality of this discussion from the marketplace, as well as your consideration and thoughts.”

Before the minute turned, Passi called a hedge fund portfolio manager and discussed the proposed sale, according to the SEC. By the time markets closed, the fund had made a \$22 million bet against Invitation Homes, amounting to almost half of the total volume of shares traded that day.

The SEC didn’t identify the hedge fund, the portfolio manager or the Blackstone executive.

Talks with investors about block trades often occur in legal gray areas. Bankers routinely canvass prospective buyers about their hypothetical interest in specific stocks. They take care not to leak deals that are actually in the works — except when they don't.

In late April 2021, an Oaktree executive contacted a Morgan Stanley employee about possibly offloading a large stake in Star Bulk Carriers Corp., an Athens-based shipping company whose motto is "Give me a Ship and I shall move the Earth." A Morgan Stanley banker warned colleagues that Oaktree's executive was "VERY focused on confidentiality," and the executive himself told Passi and others he didn't want the market to know about the transaction until it occurred, according to the SEC.

By mid-May, Passi had alerted the founder and head of an investment firm, who began betting against Star Bulk's stock, the agency said. A week later, Morgan Stanley bought 10.6 million shares from Oaktree and sold 2 million of them to the investment firm, generating \$3.7 million in profits.

The SEC didn't identify the investment firm or its founder.

"The problem with trust is that it can make you vulnerable to exploitation," said Renee Adams, a professor at the University of Oxford's Saïd Business School. "This seems to be exactly what happened in this case: Mr. Passi clearly exploited the trust placed in him."

Preventing 'Leakage'

Passi's team also worked with Cinven in mid-2018 to cut its stake in clinical researcher Medpace Holdings Inc., and the pattern was the same. That June, acting on a tip from Passi, a hedge fund shorted the shares, accounting for almost 89% of all trading in the stock that day. Morgan Stanley bought the block and allocated shares to the fund, generating almost \$2 million in profits.

A few weeks later, Passi's team pitched Cinven on another block sale. One of the advantages of working with Morgan Stanley, according to a presentation the bankers made, was that information wouldn't creep into the market and cause the price to fall. They cited the June deal as an example.

Cinven agreed to proceed and Passi received an email about it at 1:02 p.m., requesting confidentiality. Minutes later, he called a hedge fund portfolio manager, who bet against Medpace almost immediately, the SEC said. The bank successfully bought the block later that afternoon, flipping 12% of the stock to the fund and clearing roughly \$3.1 million of profits.

As the evening approached, Passi sent an email to several Cinven employees.

"Pleased we were able to execute this block for you," he wrote. "Hopefully you felt that Morgan Stanley was good to our word."

Passi's team made its discretion a calling card. In a presentation, it claimed that when rival banks sold about \$652 million of shares in winter-clothing company Canada Goose Holdings Inc., someone "leaked" on that deal.

The team neglected to mention that just a few months earlier, the Morgan Stanley team had heard that another Canada Goose block trade was in the offing. While Passi's desk didn't take part in the deal, one of his colleagues still tipped off a hedge fund, which bet against the stock and cleared a \$760,000 profit, the Justice Department said.

--With assistance from **Jenny Surane**.

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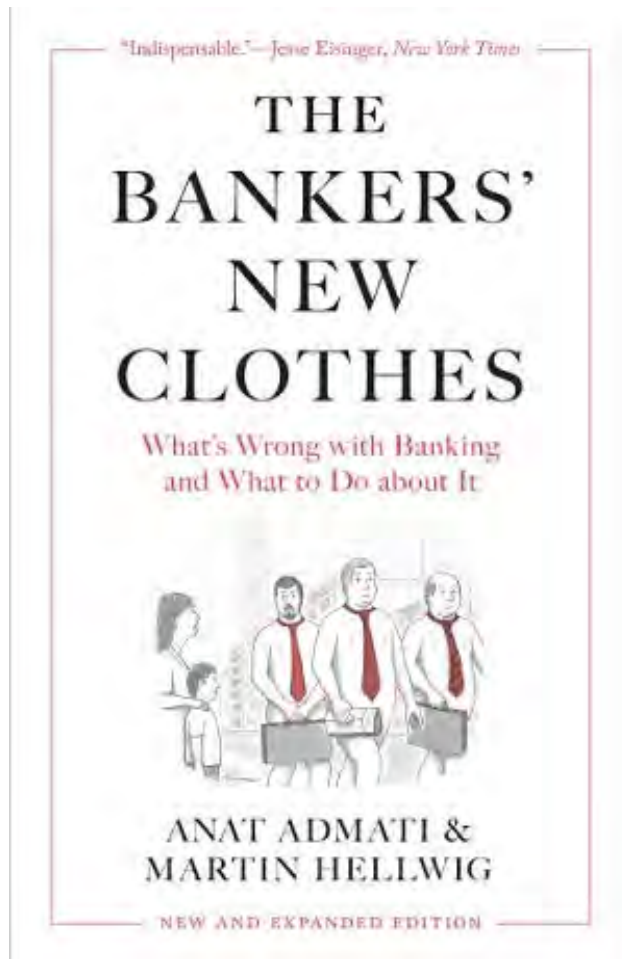
David Scheer, Peter Eichenbaum

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Everything that's Dangerous about U.S. Banks Today in One Highly Readable Book

 wallstreetonparade.com/2024/01/everything-thats-dangerous-about-u-s-banks-today-in-one-highly-readable-book

By Pam Martens: January 17, 2024 ~



Anat Admati, Professor of Finance and Economics at Stanford Graduate School of Business, and German economist Martin Hellwig, have performed a public service to all Americans with their newly released, updated and expanded book *The Bankers' New Clothes: What's Wrong with Banking and What to Do about It*. It puts the interlocking web of corruption that is mistakenly referred to as the U.S. banking system into a pristinely documented and highly readable book.

Let us first explain those men without pants on the book jacket. That provocative graphic comes from the storyline in the Hans Christian Andersen tale "The Emperor's New Clothes." Tailors offer to make the emperor magical clothes that will be visible only to smart people and invisible to the stupid and unfit. When the emperor's ministers go to inspect the clothes, they see nothing, but they are fearful of being called stupid if they admit this. The emperor,

also fearful of being regarded as intellectually lacking, says nothing and tours the capitol in his nonexistent garments. Only a child is brave enough to shout out in the capitol “The emperor has no clothes,” thus breaking the conspiracy of silence.

The authors explain in example after example how corruption has taken over the banking system today but the guardians of our democracy have bought into the “pervasive myth that banks and banking are special and different,” so they have allowed themselves to be socialized to silence out of fear of being “declared incompetent to participate in the discussion.”

As I read that insightful analogy, the image of *60 Minutes*’ Lesley Stahl treating JPMorgan Chase’s crime boss, Jamie Dimon, like a revered financial wizard in a televised interview in 2019 flashed through my mind. (Less than a year after that program aired, JPMorgan Chase admitted to another two felony counts brought by the U.S. Department of Justice, bringing its total to an unprecedented five felony counts in the span of six years.)

A key area on which Admati and Hellwig shine much needed sunshine is the accounting gimmickry that allows U.S. banks to hide billions of dollars in losses on bonds by simply labeling them “held to maturity” securities. (For background, see [here](#) and [here](#).) The authors write that “Accounting rules should be changed so that banks must apply fair-value accounting to all assets regardless of how long they intend to hold them.”

Admati and Hellwig also provide brilliant new insights into the second, third and fourth largest bank failures in U.S. history that occurred in the spring of last year. Those bank failures resulted in the Federal Reserve creating yet another new bailout program, the Bank Term Funding Program, despite the American people being reassured since 2010 that the Dodd-Frank financial reform legislation ended “too big to fail.”

The authors compare the persistent attack by banks, their lobbyists, and their toadies in Congress that bank regulations impose a “cost” on society to “chemical companies complaining about increased costs when they are prohibited from dumping toxic chemicals into rivers next to their plants.”

This is a spot-on comparison considering that the worst financial crisis in the U.S. since the Great Depression occurred from 2007 to 2010 as a result of the Wall Street mega banks dumping their toxic mortgage securities across the financial landscape of America and imploding a vast stretch of it.

The final chapter of the book, “Above the Law?” is a testament to the encyclopedic banking knowledge of the authors. They have selected some of the most revealing episodes of banking crimes to illustrate how Americans now live under the jackboot of Wall Street banking titans with all avenues of redress locked up tight.

One example cited in the chapter is vital to understanding the perilous nature of how Americans have been stripped of their ability to fight back against the banking cartel – whose tentacles now extend into the courts, the Congress, the Justice Department and federal prosecutors' offices across the land.

On November 19, 2013 the Justice Department, together with a number of state attorneys general, announced a stunning \$13 billion settlement with JPMorgan Chase for “misleading investors about securities containing toxic mortgages.” The Justice Department’s Statement of Facts was so devoid of critical details that it was impossible to unravel the scope of what had gone down.

The nonprofit watchdog, Better Markets, was so incensed by the subterfuge that it filed a lawsuit against the U.S. Department of Justice in February 2014, writing as follows:

“...the Executive Branch, through DOJ, acted as investigator, prosecutor, judge, jury, sentencer, and collector, without any review or approval of its unilateral and largely secret actions. The DOJ assumed this all-encompassing role even though the settlement amount is the largest with a single entity in the 237 year history of the United States and even though it provides civil immunity for years of illegal conduct by a private entity related to an historic financial crash that has caused economic wreckage affecting virtually every single American. The Executive Branch simply does not have the unilateral power or authority to do so by entering a mere contract with the private entity without any constitutional checks and balances.

“Notwithstanding such extensive and historic illegal conduct that resulted in a \$13 billion payment, the DOJ did not disclose the identity of a single JP Morgan Chase executive, officer, or employee, no matter how involved in or responsible for the illegal conduct. In fact, the DOJ did not even disclose the number of executives, officers, or employees involved in the illegal conduct or if any of them are still executives, officers, or employees of JP Morgan Chase today. Moreover, the DOJ did not disclose the material details of what these individuals did, when or how they did it, or to whom and with what consequences. The DOJ was even silent as to which specific laws were violated, to what degree, and by what conduct. The DOJ also did not disclose even an estimate of the amount of damage JP Morgan Chase’s years of illegal conduct caused or how much money it made or how much money its clients, customers, counterparties, and investors lost. Remarkably, the DOJ does not even clearly state the period for which it is granting JP Morgan Chase immunity....”

So what happens when a genuinely non-partisan watchdog attempts to stand up for the rights of everyday Americans against the largest and most serially-charged bank in America? The federal court dismissed Better Markets case on the basis that it lacked standing.

The Attorney General at the Justice Department at the time of Better Markets' lawsuit was Eric Holder, who did not bring one criminal charge against any top Wall Street executive despite the worst financial collapse since the Great Depression and despite the Financial Crisis Inquiry Commission referring nine individuals to the Justice Department for potential criminal prosecutions. Eric Holder and his head of the criminal division at the Justice Department, Lanny Breuer, both hailed from Covington & Burling, the corporate law firm that a federal judge called out for fronting for Big Tobacco for decades. See more from *Wall Street On Parade* related to Holder's Justice Department here.

Summing up where we find ourselves today, the authors write:

"In an earlier era, conflicts between aristocrats and ordinary people would be decided in favor of the aristocrats no matter what; judges who were themselves aristocrats took it for granted that people of their own class must prevail. Some of the developments that we have sketched suggest that we may be returning to such a system. This situation poses a fundamental threat to our democracies, which are built on a rule of law in which all people are treated as equal before the law."

Related Article:

New Court Documents Suggest the Justice Department Under Four Presidents Covered Up Jeffrey Epstein's Money Laundering at JPMorgan Chase



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Ohio Justices Refreeze Assets Of Indicted Ex-Utilities Chair

By **Madeline Lyskawa**

Law360 (January 16, 2024, 7:32 PM EST) -- The Ohio Supreme Court unraveled an appellate panel's decision Tuesday to unfreeze the assets of Samuel Randazzo, a recently indicted former state regulator and lawyer connected to the FirstEnergy Corp. bribery scandal, paving the way for the Buckeye State to secure an \$8 million garnishment.

In a slip opinion, Justice R. Patrick DeWine, who penned the ruling, said the Tenth Appellate District panel erred when it based its decision to vacate the trial court's asset freeze orders on the conclusion that Ohio failed to show it would suffer an "irreparable injury" if Randazzo was given the opportunity to attend a hearing for the ex parte orders.

Instead, the justice said, that requirement "was no longer at issue on appeal" because Randazzo's remedy for an allegedly improper ex parte order was to request a hearing on the order, which he already did before his appeal and was granted.

According to court documents, Randazzo, who was **indicted by a federal grand jury** in early December, has been accused of having accepted a \$4.3 million bribe from FirstEnergy through his company Sustainability Funding Alliance of Ohio Inc. as part of a scheme to have him selected as chairman of the Public Utilities Commission of Ohio and help House Bill 6 pass. The legislation, which was passed by the state legislature in 2019, included a \$1.3 billion ratepayer bailout of two nuclear power plants.

The state's attorney general's office subsequently filed its civil suit against FirstEnergy in September 2020, before adding Randazzo and his company as defendants a year later. Around the same time, the state also sought to prevent Randazzo from draining his bank and brokerage accounts — an ex parte request the trial court later granted without prior notice to Randazzo and his attorneys.

Randazzo, in response, first urged the trial court to vacate the orders before turning to the Tenth District Court of Appeals. Finding the state failed to meet its statutory requirement to show it would have suffered irreparable harm if the order had been delayed until Randazzo was given notice, the appellate panel reversed the trial court's judgment, vacating the asset freeze, or attachment orders and subsequent garnishment orders seeking \$8 million.

During oral arguments, however, the state of Ohio **warned the justices** that such a ruling by the Tenth Appellate District could set a dangerous precedent. Persuaded by the state's contention, the justices reinstated the trial court's orders on Monday.

While Randazzo had a right to appeal the trial court's denial of his motion to vacate the attachment orders, Justice DeWine said he did not have a right to challenge the trial court's conclusion that the state was likely to incur irreparable injury unless it issued the orders ex parte.

"Thus, the court of appeals erred in vacating the trial court's attachment order based on its conclusion that the state had failed to meet the irreparable injury requirement for an ex parte order," the justice said.

As for Randazzo's additional position that the state failed to submit any admissible evidence supporting the attachment orders, Justice DeWine said because such argument was not made in his motion to vacate, it had been forfeited.

Following the court's issuance of the attachment orders, the justice said the state sent post-judgment garnishment forms to two banks and one brokerage firm where Randazzo had accounts seeking \$8 million. Although the state hadn't yet secured such a judgment, it claimed the clerk did not have a garnishment form with prejudgment attachment language and reasoned that Randazzo may be liable for up to treble damages for the \$4.3 million bribe he allegedly received, Justice DeWine said.

Because Randazzo never challenged the \$8 million figure, which was included in the attachment orders, during the trial-court proceedings and failed to show he was prejudiced by the state's use of the improper garnishment forms, the panel further erred in vacating the garnishment orders, Justice DeWine said.

In response to the Ohio Supreme Court's decision, Ohio Attorney General Dave Yost said the state is pleased the court recognized that Randazzo cannot "spend down his bribe proceeds and render himself judgment-proof," in a press release Tuesday.

Representatives for Randazzo did not immediately respond to requests for comment on Tuesday.

The state is represented by David Anthony Yost, Mathura Jaya Sridharan, Leandro Martin Cordero, Charles Michael Miller and Margaret Eastburn O'Shea of the Office of the Ohio Attorney General.

Randazzo is represented by Jeffrey Robert Corcoran, Tom Shafirstein and Richard Keith Stovall of Allen Stovall Neuman & Ashton LLP and Roger Philip Sugarman.

The case is State of Ohio ex rel. Dave Yost et al. v. FirstEnergy Corp. et al., case number 2022-1286, before the Supreme Court of Ohio.

--Additional reporting by Catherine Marfin. Editing by Jay Jackson Jr.

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High Court Signals Narrow Ruling Against Shareholder Suits

By **Jessica Corso**

Law360 (January 16, 2024, 8:30 PM EST) -- The U.S. Supreme Court seems poised to curtail the ability of investors to sue corporate management for allegedly failing to warn them of future business hurdles, with many of the justices on Tuesday casting doubt on shareholders' arguments that omitting such information can, by itself, be the basis of a fraud lawsuit.

The high court heard oral arguments Tuesday in a case known as *Macquarie Infrastructure Corp. v. Moab Partners LP*, in which it is being asked to determine whether a company can be sued for failing to warn investors about the anticipated financial ramifications of a soon-to-be implemented regulation.

Question presented in *Macquarie Infrastructure Corp. v. Moab Partners LP*

Whether a failure to make a disclosure required under Item 303 of SEC Regulation S-K can support a private claim under Section 10(b), even in the absence of an otherwise-misleading statement.

Investor Moab Partners LP is arguing that Macquarie Infrastructure Corp. did just that, violating its obligations under an SEC regulation known as Item 303 by not disclosing the harm that a proposed international ban on high sulfur fuels would have on its oil storage business.

But the justices seemed to struggle with arguments put forth by Moab Partners and the U.S. government, which was given the green light to argue in favor of the investor, that omitting statements from an Item 303 discussion can lead to liability under a provision of the securities laws known as section 10(b).

Several members of the court, including Justice Brett Kavanaugh, wondered whether omissions alone were enough to form the basis of a 10(b) lawsuit or if the law required investors to point to a specific statement that rendered the omission misleading.

"Can we just say an omission alone is not good enough, you have to identify a statement as well and send it back?" Justice Kavanaugh asked David Frederick of Kellogg Hansen Todd Figel & Frederick PLLC, who was arguing on behalf of Moab Partners.

"I don't think that is going to help anyone, Justice Kavanaugh, quite frankly," Frederick responded.



The U.S. Supreme Court is being asked whether Item 303 of SEC Regulation S-K can support a private claim under Section 10(b), even in the absence of an otherwise-misleading statement. (AP Photo/Mariam Zuhaib, File)

"It will help us," Justice Kavanaugh said, to laughter in the courtroom.

Frederick said that lawyers, however, will be helped by clarification from the high court around Item 303, which requires company management to disclose known trends or uncertainties that could materially impact their company down the line.

"We're not going to fly-speck every sentence and the placement of every comma," Frederick said. "This company didn't disclose what was going to happen to 40% of their business."

Justice Samuel Alito was also skeptical, asking whether the investor and the government were avoiding fully addressing the question before the Supreme Court.

"The question is whether a failure to make a disclosure required under Item 303 can support a private claim under section 10(b) 'even in the absence of an otherwise misleading statement,'" Justice Alito said, seemingly unhappy with the government's argument that a failure to make a required 303 disclosure renders the entirety of the management's discussion misleading.

"Don't you have to identify a statement or a number of statements, even if it's every single statement in the 303, that is otherwise misleading to bring it within 10(b)?" Justice Alito asked Ephraim McDowell of the U.S. Solicitor General's Office, which argued on behalf the U.S. Securities and Exchange Commission.

McDowell said that the management discussion "is the relevant statement" and that a company would be speaking in "half-truths" by failing to provide investors with an important piece of information.

This is not the first time that the Supreme Court decided to take up the question of Item 303 liability, with the very same question being brought before the justices in 2017. But the parties to that case, **Leidos Inc. v. Indiana Public Retirement System** , **settled** a month before the high court was scheduled to hear oral arguments in the case.

Macquarie appealed to the Supreme Court to once again take up the issue following a Second Circuit revival of the case against it, arguing that the Second Circuit's position that Item 303 could form the basis

of a private 10(b) claim was out of step with several other circuits.

And while Moab and the government were the targets of much of Tuesday's questioning, at least some justices seemed receptive to the case against Macquarie.

"If you have a set of paragraphs or a set of sentences which paints a very rosy picture of the prospects of a company, and then it turns out that you've omitted the thing that is actually going to crater the company next month, that rosy picture seems to be rendered misleading," Justice Elena Kagan said in questioning Macquarie attorney Linda Coberly of Winston & Strawn LLP.

Coberly said that the Private Securities Litigation Reform Act, the law that governs shareholder class actions, requires that a specific false statement be identified. In the case of Justice Kagan's example, that could be the company's statement that the future is rosy when it knows it is not, Coberly said.

"To have, as the government argues, the statement be the entire narrative — which, here, was pages and pages and pages on many different topics with respect to multiple different subsidiaries of a holding company — that kind of statement isn't what Congress had in mind when it used the word 'statement' in the PSLRA," Coberly argued.

Justice Amy Coney Barrett suggested that the court's ruling was likely to be narrow, since "it can sometimes be difficult to tell when an omission causes a statement or statements in the disclosure to be misleading."

Justice Kagan seemed to agree.

"So what everybody is arguing about is just sort of how narrow or how capacious we should understand the requirement that there needs to be another statement that's rendered misleading?" she asked.

"I think that's basically right in terms of framing the battlefield here, Justice Kagan," Kellogg Hansen's Frederick responded.

Macquarie Infrastructure Corp. is represented by John E. Schreiber, Kerry C. Donovan, Lauren Gailey and Linda Coberly of Winston & Strawn LLP, as well as Richard W. Reinthaler.

Moab Partners is represented by Salvatore J. Graziano, Lauren Amy Ormsbee, Jesse L. Jensen and William E. Freeland of Bernstein Litowitz Berger & Grossmann LLP, David C. Frederick, Joshua D. Branson and Dustin G. Graber of Kellogg Hansen Todd Figel & Frederick PLLC, and Lori Marks-Esterman, John G. Moon and Shriram Harid of Olshan Frome Wolosky LLP.

The government is represented by Megan Barbero, Michael A. Conley, Jeffrey A. Berger and Rachel M. McKenzie of the U.S. Securities and Exchange Commission, and Elizabeth B. Prelogar, Malcolm L. Stewart and Ephraim A. McDowell of the Department of Justice.

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

--Editing by Michael Watanabe.



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Rakoff Details Why He Axed JPMorgan Investors' Epstein Suit

By **Katryna Perera**

Law360 (January 16, 2024, 10:02 PM EST) -- A New York federal judge has published an opinion for his August order dismissing a pension fund's derivative suit against some of the top brass of JPMorgan Chase & Co. over their connections to Jeffrey Epstein, explaining in greater detail why he concluded that the plaintiffs had failed to make a pre-suit demand on the bank's board of directors.

U.S. District Judge Jed S. Rakoff issued an **opinion** on Friday supplementing his **August order** that dismissed the Operating Engineers Construction Industry and Miscellaneous Pension Fund's suit against eight current and former JPMorgan directors, along with CEO Jamie Dimon and the former CEO of its investment bank, James Staley.

Judge Rakoff said Friday that when the pension filed suit, it was required to adequately plead that at least six board members were conflicted to avoid the requirement for a pre-suit demand.

However, of the 12 board members at the time, only four were on the board while Epstein was a bank client, Judge Rakoff said, and the pension fund failed to allege with particularity that any of the remaining eight board members were conflicted.

According to the opinion, the pension fund acknowledged that four of the eight remaining directors were disinterested and capable of considering a litigation demand. But the pension fund argued that the other four — Linda Bammann, Todd Combs, Michael Neal and Phebe Novakovic — were conflicted.

First, the pension fund argued that Bammann, Combs and Neal were conflicted because they faced a substantial likelihood of liability based on a deferred prosecution agreement JPMorgan entered into with the U.S. Department of Justice in 2014 related to Bernie Madoff's Ponzi scheme and a similar consent order the bank entered into with the Office of the Comptroller of the Currency.

According to the pension fund, in the DPA and consent order, the bank agreed to review past suspicious activity reports to make sure that any other potentially suspicious activity was identified and reported, among other things.

"Plaintiffs argue that it is 'reasonable to infer' that JPMorgan management complied with the DPA's obligations to review past transactions and thereby learned of the alleged failures to file SARs regarding Epstein," the opinion states. "From this, plaintiffs claim that '[i]t logically follows that it is reasonably inferable that the post-DPA board members ... learned of JPM's failure to timely file Epstein-related SARs and of Epstein's criminal conduct more generally.'"

However, Judge Rakoff disagreed on Friday, saying the argument is "riddled with holes." He first noted that the amended complaint's allegations do not match this argument and said the pension fund cannot "amend their complaint through opposition papers."

Additionally, the inferences the pension fund is asking the court to draw from these claims "are simply not plausible," he said.

"Even assuming hypothetically that the review did identify the Epstein-related conduct, there is no reason to think that information was transmitted to the board," the opinion states. "While the DPA did require the written findings of the review be reported to the board, it does not follow the board would have received information about every single client who was the subject of concerns."

The pension fund also argued that Novakovic and Bammann lacked independence. According to the opinion, the pension fund said Bammann has "extensive" professional ties with Dimon, the CEO of JPMorgan, who allegedly knew of Epstein's misconduct and failed to eliminate him as a client, and Novakovic is the CEO and chairman of a company that has ties to James Crown, who was on the board while Epstein was a client.

Judge Rakoff again disagreed with the pension fund's arguments, saying that just because Bammann and Dimon worked together "does not give rise to an inference that Bammann is disabled from considering a litigation demand against Dimon."

For Novakovic, the judge said that the pension fund has failed to allege that her ties to Crown rose beyond a "general business relationship" and that it is not plausible that Crown had sufficient power over her employment to render her not disinterested.

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

The pension fund is represented by Rebecca Ann Musarra, Christopher J. Orrico and Vivek Upadhyia of Grant & Eisenhofer PA, and Daniel Meyer and Sara Swartzwelder of Bernstein Litowitz Berger & Grossmann LLP.

JPMorgan and Dimon are represented by Timothy Perla and Noah A. Levine of WilmerHale.

The director defendants are represented by Audra J. Soloway, Jessica S. Carey and Jacobus J. Schutte of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is Operating Engineers Construction Industry and Miscellaneous Pension Fund v. Dimon et al., case number 1:23-cv-03903, in the U.S. District Court for the Southern District of New York.

--Editing by Rich Mills.

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Robins Kaplan Wants To Undo Sanction Over Dropbox Access

By **Rose Krebs**

Law360 (January 16, 2024, 4:40 PM EST) -- Litigation funding firm KrunchCash and its counsel Robins Kaplan LLP want a New York state appellate court to undo a \$156,000 sanction levied over the law firm's access to an opposing litigation party's Dropbox account, arguing the monetary sanction was unwarranted.

In a **brief** filed Friday, KrunchCash LLC, represented in the appeal by Robins Kaplan and Pillsbury Winthrop Shaw Pittman LLP, took aim at the **sanctions order** issued in October by a New York state judge.

The order "found no violation of any order, rules, or statute," but still awarded investment fund plaintiff Pursuit Special Credit Opportunity Fund LP "\$155,977 in fees and costs as a sanction without holding a separate hearing and without reviewing any of plaintiff's legal invoices because they were not submitted by plaintiff," KrunchCash contends.

"Novel discovery questions" at issue in the underlying case resulted in sanctions for KrunchCash and its counsel, "who had never been sanctioned in twenty-six years of practicing law," the brief said.

"Defendants were unable to challenge the amount awarded because there was no separate hearing, as is customary," KrunchCash said.

Also, the brief asserted that "a monetary sanction was unwarranted" because the state court hadn't found any violation of a civil practice law or rule, confidentiality or restraining order, statute, or ethical rule.

"Even if there had been misconduct identified, the plaintiff placed no legal invoices in the record, as required by New York law," KrunchCash said.

And beyond that, "there was no analysis performed comparing plaintiff counsel's rates to any other law firm in the marketplace," the brief argued.

Pursuit was awarded fees by New York Supreme Court Justice Joel M. Cohen in October in a suit it filed against KrunchCash in 2022, accusing it of squandering a \$10 million investment that was supposed to be deposited as advances to a Maryland law firm and a Texas-based pharmaceutical company.

In his order, Justice Cohen excoriated Robins Kaplan for waiting a week before informing opposing counsel that it had gained access to Pursuit's files via a Dropbox link accidentally shared with the firm by an outside party.

Attorneys "should have ceased reviewing the Dropbox files as soon as they realized that they had obtained unauthorized access," Justice Cohen said in the sanctions order.

"Instead, the directory was surreptitiously and repeatedly accessed by counsel and their client under circumstances that should have raised professional alarm bells — loud ones," the order said.

The judge ordered KrunchCash to pay nearly \$156,000 to refund Pursuit for having to pursue sanctions.

In November, Justice Cohen **denied** Robins Kaplan's motion to renew and reargue the amount of legal fees and expenses awarded to Pursuit, but agreed to stay the ruling pending appeal.

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

Pursuit is represented by Kimberly Grinberg, Evan Fried and Renee Bea of Slarskey LLC.

KrunchCash is represented by Gabriel Berg of Robins Kaplan LLP and James M. Catterson of Pillsbury Winthrop Shaw Pittman LLP.

The case is Pursuit Special Credit Opportunity Fund LP v. KrunchCash LLC et al., case number 2023-04998, in the Supreme Court of the State of New York, Appellate Division, First Judicial Department.

--Additional reporting by Jessica Corso and Matt Perez. Editing by Adam LoBelia.

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Cummins Faces Shareholder Suit After \$2B Clean Air Act Deal

By **Emilie Ruscoe**

Law360 (January 16, 2024, 10:34 PM EST) -- Engine manufacturer Cummins Inc. faces an investors' proposed class action alleging it concealed unlawful emissions control devices in certain engines, eventually leading to a record \$2 billion settlement with federal and state regulators over alleged violations of the Clean Air Act.

In a complaint filed Sunday in Los Angeles federal court, Cummins investor Tom Baker took aim at Cummins with claims that the company failed to disclose that engines it made for certain Ram-branded trucks used defeat devices, also known as auxiliary emission control devices, to allow the engines to bypass emissions tests in violation of the Clean Air Act.

In his suit, the investor cited company statements about investigations made during Baker's proposed class period. Baker characterized those company statements as suggesting the regulator questions were focused only on "model year 2019 RAM 2500 and 3500 trucks."

But at the time those statements were made, Baker said, the company was still making engines for Ram trucks that included unlawful emission control devices, opening up Cummins to an even greater risk of regulatory enforcement than it had disclosed to investors.

Baker pointed to allegations made in December by the U.S. Department of Justice as it announced an agreement in principle to settle Clean Air Act violations against Cummins.

At the time, the government claimed Cummins allegedly installed the illegal devices on 630,000 RAM 2500 and 3500 pickup truck engines made in model years 2013 and 2019.

But the Justice Department also claimed that there were unlawful devices on RAM 2500 and 3500 pickup truck engines made in model years spanning 2019 to 2023.

When finalized complaints and consent decrees were filed against Cummins in January by the Justice Department, the Environmental Protection Agency, the California Attorney General's Office and the California Air Resources Board, the Justice Department valued the settlement at over \$2 billion.

That sum includes a \$1.675 billion civil penalty that the Justice Department described as the largest ever assessed in a Clean Air Act case. The company also made a \$326 million commitment to fund federal and California emission mitigation projects.

Alongside Cummins, Baker's suit names Cummins' former CEO, N. Thomas Linebarger, its current CEO Jennifer Rumsey and its Chief Financial Officer Mark A. Smith.

The proposed class would include those who bought Cummins shares between April 30, 2019, and Dec. 21, 2023.

Representatives for the parties didn't immediately respond to requests for comment Tuesday.

Baker is represented by Laurence M. Rosen of the Rosen Law Firm PA.

Counsel information for the defendants wasn't immediately available Tuesday.

The case is Baker v. Cummins Inc et al., case number 2:24-cv-00369, in the U.S. District Court for the Central District of California.

—Additional reporting by Linda Chiem and Ryan Harroff. Editing by Emily Kokoll.

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Halliburton Investors Say Board Infringed Their Voting Rights

By **Leslie A. Pappas**

Law360 (January 16, 2024, 6:38 PM EST) -- A proposed class of Halliburton stockholders recently sued the energy services giant and its board of directors in Delaware's Court of Chancery, accusing the board of subverting investors' rights by changing the company's bylaws to effectively give itself the power to unilaterally remove directors.

The purported violations of state law appear in two separate provisions that were added to the company's bylaws on Dec. 8, 2022, Halliburton Co. shareholder Eric Gilbert said in a complaint lodged late Friday.

"The challenged provisions effectively give the board the power to remove directors and improperly impinge on the stockholders' right to elect directors of their choosing," the filing read.

Headquartered in Houston, Texas, Halliburton is one of the world's leading providers of products and services to the oil and gas industry, according to its website.

The lawsuit names Halliburton as a defendant, along with Chair and CEO Jeffrey Miller and the rest of the directors on the company's 13-member board.

Delaware law does not permit directors to remove other directors, Gilbert asserted in the complaint. Section 141 of Delaware's General Corporation Law says a company's directors may only be removed by stockholders, the investor noted.

Yet the 2022 amendments that the Halliburton board made to the firm's bylaws include two provisions that the board can use to remove directors, Gilbert argued.

He asserted that the first provision requires stockholders nominating company directors to provide in an advance notice "reams of disclosures" about not only the nominating investor but also their "affiliates" and "associates." Many of the disclosure requirements are "ambiguous," making strict compliance impossible, according to the suit.

The ambiguity makes it possible for the board to reject a shareholder-nominated candidate since "the vague and far-reaching disclosure requirements of the advance notice bylaw set up a minefield of potential subjective judgments by the board that some requirement or another was breached," the complaint said.

"Given the vague and arbitrary ways the board can choose to interpret the advance notice bylaw, the bylaws provide the board with an option to remove a stockholder nominated director," Gilbert wrote.

The second provision the shareholder is challenging involves what he dubbed the "reckless participation option," which gives the board another mechanism to remove a director it doesn't like, the investor alleged.

According to the complaint, that provision requires any director nominee to give the board a signed, irrevocable letter of resignation that could be invoked at a later date if the rest of the board determines that the director "recklessly disregarded his or her duty" as a board member.

"As with the notice of nomination option, the reckless participation option gives directors the ability

to 'frame charges against' and remove another director," the filing read. "While couched in the form of accepting an already given irrevocable resignation, the substance of both the notice of nomination option and the reckless participation option provides for the improper and inequitable removal of a director by other directors contrary to Delaware law and bedrock principles of stockholder democracy."

The proposed class action seeks a court declaration that the bylaw provisions are invalid and void, a court order to prevent the provisions from being followed, damages for the shareholders, and an award of attorney fees and court costs.

Counsel for Gilbert declined Tuesday to comment beyond what was already written in the complaint.

Halliburton did not immediately respond to a request for comment.

Gilbert is represented by Abbott Cooper of Abbott Cooper PLLC, D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC, and Joseph L. Christensen of Christensen & Dougherty LLP.

Counsel information for Halliburton and its directors was not immediately available.

The case is Gilbert v. Albrecht et al., case number 2024-0035, in the Court of Chancery of the State of Delaware.

--Editing by Covey Son.

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Judge Nixes Six Flags Suit After Finding No Skadden Conflict

By **Katryna Perera**

Law360 (January 16, 2024, 5:23 PM EST) -- A Texas federal judge has dismissed with prejudice a shareholder derivative suit against Six Flags' board of directors over the company's failed attempt to expand amusement parks into China, saying the shareholder's argument that conflicted counsel advised the board is without merit.

U.S. District Judge Mark T. Pittman issued an opinion and order Friday saying shareholder Antonio Dela Cruz has failed to adequately allege that Six Flags' board of directors acted in bad faith in refusing his litigation demand, which Dela Cruz claimed was due to conflicted counsel from Skadden Arps Slate Meagher & Flom LLP. The firm is not named as a defendant in the suit.

Judge Pittman said Friday that Skadden did not have a conflict of interest. The firm did not lead an investigation into the merits of Dela Cruz's allegations that the board misrepresented projections regarding Six Flags' ability to open parks in China, he said. Instead, Skadden advised the board under the assumption that the claims did have merit, and gave counsel on whether pursuing the litigation demand would force the company "to take a position inconsistent" with its position in a parallel securities class action.

The board ultimately concluded it was in the best interest of the company not to pursue Dela Cruz's claims, and Judge Pittman said Skadden was "well-suited to advise the board on this issue" because it is representing the company in the securities class action.

There also does not appear to be any conflict between the company and the individual executive defendants named in the securities class action, the judge said, and Skadden is not representing any of the alleged wrongdoers in any criminal proceedings.

Judge Pittman further stated that Skadden did not "dominate" the investigation or consideration of Dela Cruz's litigation demand.

"Skadden did not investigate the merits of the allegations and did not furnish the board with voluminous factual and legal analyses responsive to the demand. Instead, Skadden presented various considerations to the board under the assumption that the allegations were meritorious," the judge said. "In fact, Skadden attorneys did not attend the board's executive session in which it deliberated and voted to refuse the demand."

According to the opinion, Dela Cruz argued the board's decision to assume that the allegations were meritorious and forgo an investigation supports the theory that Skadden dominated the consideration of the demand.

However, Judge Pittman disagreed, noting there is no "prescribed procedure" a board must follow in considering a litigation demand.

"Indeed, a board's decision to refuse a litigation demand that would force the company to take inconsistent positions is routinely upheld as an exercise of business judgment," the opinion states.

Judge Pittman also noted that the impact of pursuing Dela Cruz's claims against the securities class action was only "one of several" considerations the board made and identified in its reasoning for refusing the demand.

Counsel for Six Flags declined to comment on Tuesday and representatives for the parties did not immediately respond to requests for comment.

Judge Pittman **tossed** the securities class action against Six Flags in June following a Fifth Circuit panel's **holding** that narrowed the class period.

Judge Pittman said the Oklahoma Firefighters Pension and Retirement System lacked standing because it bought stock after Six Flags' leadership began to cast doubt on its ability to expand in China during earnings calls in October 2019.

Dela Cruz is represented by William B. Federman of Federman & Sherwood, Gustavo F. Bruckner and Samuel J. Adams of Pomerantz LLP and Rusty E. Glenn and Brett D. Stecker of Shuman Glenn & Stecker.

Board members David McKillips, Mark Kane and Stephen Purtell are represented by Brian A. Jacobs and Kevin Grossinger of Morvillo Abramowitz Grand Iason & Anello PC.

Six Flags is represented by Jay B. Kasner, Scott D. Musoff and Jenness E. Parker of Skadden Arps Slate Meagher & Flom LLP and by Ralph Duggins and Scott Fredericks of Cantey Hanger LLP.

The case is Dela Cruz v. Reid-Anderson et al., case number 4:23-cv-00457, in the U.S. District Court for the Northern District of Texas.

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

Update: This story has been updated with additional counsel information.

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7th Circ. Revives Ethanol Pricing Suit Against Archer Daniels

By **Gina Kim**

Law360 (January 16, 2024, 9:21 PM EST) -- The Seventh Circuit has revived a tortious interference suit accusing Archer Daniels of shifting ethanol prices downward, disagreeing with a lower court's decision to toss the suit absent directions from the Nebraska Supreme Court on applying state laws.

In a decision Friday, a three-judge panel from the Seventh Circuit Court of Appeals vacated an Illinois federal court's decision that permanently tossed Green Plains Trade Group LLC's tortious interference with contract dispute against Archer Daniels Midland Co. The company was accused of unlawfully manipulating the benchmark indexes used to establish the prices of ethanol and its derivatives nationwide, and Green Plains alleged ADM's manipulation forced it to sell physical ethanol cheaper to third parties than it would have otherwise.

Green Plains asserted the tortious interference claim against ADM without alleging the specific contracts it had with third parties, theorizing that Nebraska law "does not always require a breach," after relying on Section 766A of the American Law Institute's second Restatement of Torts, according to Friday's opinion.

Section 766A allows a claimant to pursue tortious contractual interference claims if the defendant's interference caused the claimant's performance of a contract to be "more expensive or burdensome," even if a breach hadn't occurred, the opinion said.

U.S. District Judge Colin S. Bruce dismissed the case, finding that while Green Plains referenced a slew of agreements it claimed ADM interfered with, Green Plains didn't reference the third parties it had the contracts with, the contracts' terms or any losses it suffered, according to the opinion. Judge Bruce also determined Green Plains failed to state a contract breach claim, and could not, as it had to show an actual breach occurred under Nebraska's tortious interference law.

After reading dueling submissions by ADM and the plaintiffs about whether Nebraska law recognized claims under Section 766A, the district judge observed that the Nebraska Supreme Court didn't expressly adopt or recognize 766A, but also didn't outright reject it or declined to recognize it as a claim under Nebraska tort law, Friday's ruling said. Nevertheless, Judge Bruce dismissed the case.

On Friday, the Seventh Circuit ruled the lower court "employed improper methodology in determining the content of Nebraska state law," and that if the state's highest court hasn't spoken on an issue and leaves it ambiguous, the district court's duties are to "ascertain, as best we can, the rule of law that the highest court of the state would apply if the case were now before it."

"We must 'decide, not avoid' the question," the panel said, adding the "north star" of the federal court's inquiry would ask what the state's highest court would do if it had the present dispute before it.

"We also have regularly employed another 'guardrail,'" the panel said. "We have said, albeit in varying formulations, that a federal court, faced with two equally plausible readings of state law, should not choose the alternative that requires us to predict a chance or an expansion in extant legal doctrine."

While Judge Bruce appeared to believe in his decision that the Nebraska Supreme Court could be willing to apply 766A to the case, he also seemed to think he couldn't apply 766A, since it would

require him to apply it for the first time in Nebraska, absent any directions from the high court, the panel wrote.

But nothing is stopping Judge Bruce from applying the rule he thinks the Nebraska high court would apply, the Seventh Circuit pointed out.

"Of course, if the evidence as to whether the Nebraska Supreme Court would apply section 766A was in equipoise, the district court could have determined, in its sound judgment, to resolve the conundrum before it by opting for the more restrictive approach and ruling that section 766A did not apply," the opinion said. "But a district court should not fear adopting the 'less restrictive' approach if it believes the state's highest would adopt that approach."

The Seventh Circuit also invited the lower court to possibly certify the 766A issue to the Nebraska Supreme Court.

Friday's opinion comes four months **after the Seventh Circuit heard oral arguments** on Green Plains' appeal of Judge Bruce's dismissal order.

At the time, U.S. Circuit Judge Kenneth Ripple suggested an appropriate option for resolving Green Plains' appeal was to perhaps certify the state law issue for the Nebraska Supreme Court to resolve, particularly given the "tension" caused by an apparent ambiguity in Nebraska law; circuit precedent requiring the court to adopt a narrower reading in such cases; and the U.S. Supreme Court's precedent directing courts to resolve state law issues according to how they believe that state's highest court would apply the law at the time.

Representatives for Archer Daniels did not immediately respond to inquiries for comment Tuesday.

In an emailed statement to Law360 Tuesday afternoon, counsel for the Green Plains parties wrote: "We are pleased that the Seventh Circuit has clarified the legal standards in this litigation and look forward to continuing to press Green Plains's claims against ADM for its illegal market manipulation."

U.S. Circuit Judges Kenneth Ripple, Candace Jackson-Akiwumi and John Lee sat on the panel for the Seventh Circuit.

Green Plains is represented by John Tangren, Adam Levitt and Mark Hamill of DiCello Levitt.

Archer Daniels is represented by Linda Coberly, Scott Glauberman, Stephen D'Amore and Samantha Maxfield Lerner of Winston & Strawn LLP.

The case is Green Plains Trading Group LLP et al. v. Archer Daniels Midland Co., case number 23-1185, in the U.S. Court of Appeals for the Seventh Circuit.

--Additional reporting by Lauraann Wood. Editing by Caitlin Wolper.



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BREAKING: High Court Wrestling With Chevron Deference During Oral Arguments

By **Juan-Carlos Rodriguez**

Law360 (January 17, 2024, 10:26 AM EST) -- U.S. Supreme Court justices on Wednesday morning dove into the thorny question of whether they should overturn decades-old precedent that favors federal agencies' legal interpretations in rulemaking.



The U.S. Supreme Court on Wednesday is hearing oral arguments in two cases challenging precedent that favors federal agencies' legal interpretations in rulemaking. (Nicolas Economou/NurPhoto via AP)

After Roman Martinez — a partner at Latham & Watkins LLP who's representing fishing groups that want to topple the high court's 1984 ruling in *Chevron v. Natural Resources Defense Council* — finished his opening remarks at oral arguments, Justice Clarence Thomas asked Martinez where he thinks courts should draw the line in deferring to agency interpretations of law.

"How much deference is in tension with the judicial role?" Justice Thomas asked. "I'm just trying to determine whether you're saying that, if it's not *de novo* review without any presumptions or deference, then it's problematic."

Martinez replied that judges shouldn't be forced to adopt a legal interpretation they don't agree with.

"I think deference becomes problematic when it requires a judge to say that the law means X, when really the judge thinks the law means Y," Martinez said. "Of course, courts should pay special attention to what

agencies say, but the agency ultimately has to bring its expertise to bear in a way that's persuasive. And ... if the court thinks that the law means X, even though the agency thinks the law means Y, then the court needs to go with the best interpretation of the statute, just like it does in every other area of statutory or constitutional interpretation."

On Wednesday, the justices will dedicate all of their time for oral arguments to two cases that present the same question: whether they should overrule or narrow the precedent set in *Chevron*, which established that federal judges must defer to agencies' "reasonable" legal interpretations of ambiguous laws in litigation over rulemaking.

The federal government is **strongly defending** the principle of *Chevron* deference and will present its arguments later Wednesday.

All nine justices are sitting to hear arguments in *Relentless Inc. et al. v. Department of Commerce* — the case *Martinez* is arguing — but for the second case, *Loper Bright Enterprises et al. v. Gina Raimondo*, Justice Ketanji Brown Jackson will leave the bench as she's recused herself due to her involvement in the matter as a judge at the D.C. Circuit.

Justice Jackson sat for oral arguments in the D.C. Circuit case but did not participate in crafting **the decision**.

Both *Relentless* and *Loper Bright* are centered around fishing groups' challenges to a 2018 National Marine Fisheries Service rule requiring fishers to pay part of the cost of having federal compliance monitors aboard their ships. The plaintiffs in both cases have thus far argued unsuccessfully that NMFS interpreted the Magnuson–Stevens Fishery Conservation Management Act too broadly and created regulations that exceed the agency's authority.

But some of the current justices have **expressed hostility** to the *Chevron* precedent, leading to speculation that the plaintiffs' luck could change at the Supreme Court.

The *Relentless* case was **filed** in 2020 in Rhode Island federal court and was tossed in 2021. The First Circuit last year **upheld** the lower court's ruling.

The *Loper Bright* plaintiffs brought their case in Washington, D.C., federal district court in 2020, lost there in 2021, and then lost again at the D.C. Circuit in 2022.

The federal government is represented by Elizabeth B. Prelogar, Todd Kim, Edwin S. Kneedler, Matthew Guarnieri, Rachel Heron, Dina B. Mishra and Daniel Halainen of the U.S. Department of Justice.

The fishing companies in *Relentless* are represented by John J. Vecchione, Mark S. Chenoweth, Kara M. Rollins and Philip Hamburger of the New Civil Liberties Alliance, and Roman Martinez, Charles S. Dameron, Michael Clemente, William J. Seidleck and Alexander G. Siemers of Latham & Watkins LLP.

The fishing companies in *Loper Bright* are represented by Paul D. Clement, Andrew C. Lawrence and Chadwick J. Harper of Clement & Murphy PLLC and Ryan P. Mulvey, Eric B. Bolinder and R. James Valvo III of Cause of Action Institute.

The cases are *Loper Bright Enterprises et al. v. Gina Raimondo*, case number 22-451, and *Relentless Inc. et al. v. Department of Commerce et al.*, number 22-1219, in the Supreme Court of the United States.

--Additional reporting by Brian Dowling and Katie Buehler. Editing by Alyssa Miller.



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Judge Rejects Suits Claiming PFAS In O.B., Playtex Tampons

By Collin Krabbe

Law360 (January 16, 2024, 5:48 PM EST) -- Two putative class actions alleging that certain types of tampons have harmful "forever chemicals" are deficient because they lack sufficient backing for the claim, a California federal judge has ruled.

U.S. District Judge Araceli Martínez-Olguín of the Northern District of California granted Edgewell Personal Care Co.'s motions to dismiss the cases concerning O.B. Organic and Playtex Gentle Glide product lines on Friday.

In doing so, the judge ruled that allegations concerning testing are "cursory," with no specificity as to the results reached or "any other findings that would support the plaintiffs' interpretation of those results."

"As such, these allegations are devoid of the factual content necessary to nudge plaintiffs' claims, based on the theory that Edgewell's tampons contain [per and polyfluoroalkyl chemicals], from possible to plausible," the order says.

"Similarly, allegations referencing patent applications or product labels that mention certain tampon components or ingredients are likewise deficient, as plaintiffs merely speculate that the hydrophobic components mentioned therein must or are likely to contain forever chemicals because those chemicals are 'frequently' used to make materials water-repellent," according to the judge.

The cases — one from plaintiff Brigitte Lowe and another from plaintiffs Saraha Mack and Yajaira Solano — were filed in February and seek to represent three classes, each saying they sought independent, third-party testing to confirm the presence of such chemicals.

But the judge wasn't convinced, saying both complaints were "silent" as to the amount of organic fluorine — a surrogate for PFAS — that was detected, as well as whether the amount is significant. Plus, the suits lack allegations about whether the fluorine "may be indicative" of natural sources or is largely, if not exclusively, linked to "forever chemicals."

"Nor do the complaints allege whether the presence or absence of any other substance might bolster plaintiffs' interpretation of their testings' findings," according to the order.

So-called because they do not break down naturally, forever chemicals are synthetic compounds found in everyday products like nonstick cookware, carpets, food packaging, stain repellents and water-resistant clothing.

With the judge's findings in mind, the order compels the parties to meet over how to efficiently litigate *Bounthon v. Procter & Gamble Co.*, referring to the case as an "overlapping matter." The plaintiffs in all three cases are represented by the same counsel.

The plaintiffs in that proposed class action also filed in February, alleging that P&G's tampon packaging **falsely claims** that its products contain no harmful ingredients, with labels such as "100% organic" and "Tampax pure cotton."

Michael Pearson, counsel for the plaintiffs, declined to comment on the case Tuesday. Counsel for Edgewell could not be reached for comment.

Lowe and Mack are represented by Rachel Soffin, Erin J. Ruben, Harper T. Segui and Thomas A. Pacheco of Milberg Coleman Bryson Phillips Grossman LLP and by Melissa S. Weiner and Michael H. Pearson of Pearson Warshaw LLP.

Edgewell is represented by Megan McCurdy and John Moticka of Stinson LLP and by Danielle K. Lewis of Hawkins Parnell & Young LLP.

The cases are Lowe v. Edgewell Personal Care Co. and Mack et al. v. Edgewell Personal Care Co., case numbers 23-cv-00834 and 23-cv-00837, in the U.S. District Court for the Northern District of California.

--Additional reporting by Emily Field. Editing by Karin Roberts.

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