

Daily Journal

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Aelish Baig, a partner at Robbins Geller Rudman & Dowd LLP, has made a significant impact in the realm of consumer fraud and privacy, particularly in the context of high-profile corporate fraud cases. Her legal prowess and dedication have positioned her as a national leader in pivotal litigations that address some of the most pressing social issues of recent years, including the opioid crisis and unfair marketing practices in the pharmaceutical industry.

One of the major cases where Baig served as co-lead trial counsel was part of San Francisco's action against various drug companies, including manufacturers, distributors, and pharmacies like Walgreens, Allergan, Teva, and Anda, holding them responsible for their roles in the opioid crisis. *City & County of San Francisco v. Purdue Pharma L.P.*, 18-cv-07591 (N.D. Cal., filed Dec. 18, 2018).

Baig's expertise and leadership were instrumental from the complaint stage through discovery, dispositive motions and the trial. Her compelling presentations in opening statements and closing arguments, alongside the astute examination of witnesses, significantly contributed to the narrative of the defendants' responsibility in the crisis. The case was a crucial part of the nationwide opioid multidistrict litigation, ultimately facilitating a monumental recovery of \$50 billion for communities affected by the opioid epidemic. Specifically, the plaintiffs' team, with Baig's significant contributions, secured a nearly \$230 million settlement with Walgreens for San Francisco.

In addition to her role in the San Francisco case, Baig was a prominent figure in the *In re McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation*. Although not serving as lead counsel, she was an integral member of the Plaintiffs' Steering Committee. This litigation underscored the accountability of McKinsey, a global consulting firm reputed for its

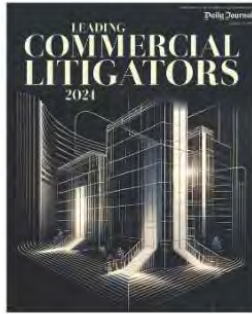
business strategies, in designing marketing strategies that significantly contributed to the opioid epidemic. The case spotlighted the consulting firm's role in shaping the deceptive marketing tactics of companies like Purdue, resulting in a substantial \$230 million recovery — a landmark achievement in holding consultants accountable for their indirect yet profound impact on public health crises.

"McKinsey is an important litigation which holds accountable an entity that, while behind the scenes, helped orchestrate the unfair marketing practices which fueled the national opioid epidemic," Baig said.

Looking ahead, Baig said she thinks access to the court will continue to be a very important issue.

"There continue to be sophisticated efforts to limit people's ability to petition the courts — ever-evolving arbitration clauses and no-class-action clauses in various instruments," she said. "There is something very egalitarian and democratic about a trial — convening a group of everyday people from the community to hear one's grievance, carefully consider the law, and decide what's right."

#376841



Leading Commercial Litigators 2024

Jan. 24, 2024

Commercial Litigators

The annual supplement honoring the best attorneys working within the broad scope of commercial and bet-the-company litigation across the country.

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Navigating prospective client obligations under Rule 1.18.

ISS Discusses Largest Securities-Related Class Action Settlements of 2023

 [lexblog.com/2024/01/23/iss-discusses-largest-securities-related-class-action-settlements-of-2023](https://www.lexblog.com/2024/01/23/iss-discusses-largest-securities-related-class-action-settlements-of-2023)

January 23, 2024

In this ISS Insights post, ISS Securities Class Action Services, an industry pioneer and expert in global claims filing, portfolio monitoring, and research solutions, will highlight the largest settlements achieved during the year 2023. A substantive year in review will be documented in ISS SCAS' forthcoming "Top 100 U.S. Class Action Settlements of All-Time" report, to be published in January 2024. In fact, four settlements in the calendar year were large enough to be featured within SCAS' forthcoming Top 100 Report, including the \$1 billion fiduciary duty-related settlement on behalf of Dell shareholders.

The high-profile securities class actions resolved in 2023 include two against Wells Fargo for an aggregate value of \$1.3 billion, as well as a \$450 million settlement with Kraft Heinz. The mega-settlements continue to drive up investor recoveries, as the top 10 largest securities settlements this year comprised \$2.6 billion.

Mega ESG-related settlements such as those with Exelon and Grupo Televisa remain an important part of the landscape, as do cases related to merger integration issues, of which there were four in this year's Top 10 (Kraft Heinz, Cardinal Health, Newell Brands, and Micro Focus).

Top 10 U.S. Securities Class Actions of 2023^[3]



Top 10 U.S. Securities Class Actions of 2023

COMPANY		SETTLEMENT AMOUNT
	1.) Wells Fargo	\$1,000,000,000
	2.) Kraft Heinz	\$450,000,000
	3.) Wells Fargo	\$300,000,000
	4.) Exelon	\$173,000,000
	5.) Allianz Global Investors	\$145,000,000
	6.) McKesson	\$141,000,000
	7.) Cardinal Health	\$109,000,000
	8.) Micro Focus	\$107,500,000
	9.) Newell	\$102,500,000
	10.) Grupo Televisa	\$95,000,000

A brief synopsis of the largest 2023 U.S. securities class action settlements follows:

1.) Wells Fargo

Investors' \$1 billion settlement against Wells Fargo comes in the wake of years of scandal and resolves allegations that the bank concealed its inability to clean up its act. After a decades-long history of alleged "reckless" and "unsound" practices, including the opening of millions of fake accounts, federal regulators imposed punitive consent orders on Wells Fargo, requiring a compliance and corporate oversight overhaul. In 2018 and 2019, Wells Fargo is alleged to have repeatedly told investors that it was implementing and developing the required governance reforms. In reality, however, Wells Fargo's compliance overhaul allegedly failed to get off the ground and was nowhere near meeting the federal regulators' requirements. The truth began to be revealed in March 2020 when the House Financial Services Committee released a 113 report, describing Wells Fargo's risk management plans as "materially incomplete" and "woefully short." During the Congressional hearings that followed, Chairwoman of the HFS Committee Maxine Waters asked the Department of Justice to consider criminal charges against former CEO Timothy Sloan for inaccurate and misleading statements. The class action – initially filed in June 2020 – survived a motion to dismiss in part and then settled while class certification was pending. The \$1 billion settlement – approved by the Southern District of New York on September 8, 2023 – is one of the Top 20 largest of all time. Shareholders were represented by co-lead counsel firms Bernstein Litowitz Berger & Grossmann and Cohen Milstein Sellers & Toll.

2.) Kraft Heinz

The \$450 million settlement against Kraft Heinz arises out of the tumultuous merger in 2015 that created the company. The merger was allegedly orchestrated by prominent buyout firm 3G Capital Partners with a plan to extract \$1.5 billion in cost savings. For years following the merger, 3G and Kraft purportedly touted these "synergies" to the market, reiterating that they were committed to sustainable cost-cutting and brand investment. In reality, however, there allegedly were fewer savings to be had. Instead, Kraft Heinz implemented extreme cost-cutting measures that decimated its supply chain and innovation, allegedly harming critical relationships with vendors and customers. According to the complaint, the undisclosed cost cuts ultimately led to a massive \$15.4 billion impairment write-down of the value of Kraft and Oscar Mayer in February 2019. Kraft Heinz's stock price also drastically declined from \$56.20 in November 2015 to \$26.50 in August 2019, wiping out about \$36 billion in market capitalization. The settlement was agreed to following the denial of the defendants' motions to dismiss in their entirety and extensive discovery. The \$450 million shareholder-related

settlement is the second largest ever reached in the Northern District of Illinois. Bernstein Litowitz Berger & Grossmann and Kessler Topaz Meltzer & Check served as lead counsel for the class.

3.) Wells Fargo

The second settlement against Wells Fargo resolves allegations that the bank hid from investors that it was unnecessarily charging customers for auto-collision protection insurance. From about 2006 to 2016, Wells Fargo allegedly enrolled more than 800,000 of its auto loan customers, without their knowledge, in insurance they did not need or want. The practices allegedly pushed approximately 274,000 of its customers into delinquency and resulted in 27,000 vehicle repossessions. According to the complaint, Wells Fargo was aware of the illicit practices by 2016, but purportedly concealed these issues from investors for more than a year. A week after a *New York Times* article exposed some of the practices in July 2017, the company admitted in a SEC filing that it had been aware of the problems previously. The settlement was reached about a week before trial scheduled for February 2023. Construction Laborers Pension Trust for Southern California and Robbins Geller Rudman & Dowd represented the class as lead plaintiff and lead counsel, respectively. Wells Fargo has also paid \$3 billion to the SEC to resolve broader conduct, including \$500 million of which was earmarked to investors as part of a Fair Fund.

4.) Exelon

The \$173 million Exelon settlement arises out of an alleged eight-year bribery scheme by its subsidiary Commonwealth Edison to influence Illinois lawmakers to enact favorable energy legislation. Specifically, senior executives of ComEd allegedly made payments and gave “do nothing” jobs and vendor contracts to the political associates of former Illinois House Speaker Michael Madigan. In exchange, ComEd received rate hikes providing the company in excess of \$150 million, and potentially billions in subsidies for its financially troubled nuclear power plants. The securities class action alleged Exelon concealed the bribery and corruption scheme from investors, and falsely attributed the legislative victories to legitimate lobbying activities. In July 2020, ComEd admitted to the bribery and corruption scheme and agreed to a \$200 million criminal penalty with the DOJ. In May 2023, the former ComEd CEO and three lobbyists – the so-called “ComEd Four” – were convicted of bribery, conspiracy, and falsifying records. The securities class action – initially filed in December 2019 – survived a motion to dismiss in April 2021. The settlement is the seventh largest securities-related settlement in the Seventh Circuit. Robbins Geller Rudman & Dowd represented shareholders as lead counsel.

5.) Allianz

Allianz Global's \$145 million payout benefits shareholders of collapsed mutual funds that Allianz managed. The SEC had charged AllianzGI with abandoning its investment and risk management strategies in the management of the Structural mutual funds. This allegedly subjected investors to "undisclosed risk and ultimately led to the massive losses the funds incurred in February and March of 2020," when the COVID-19 pandemic roiled markets. In May 2022, Allianz pled guilty to charges from the SEC regarding the management of its Structured Alpha strategies and agreed to pay more than \$6 billion in restitution, including over \$1 billion in an SEC Fair Fund, which was made available to investors. The securities class action accused Allianz of similarly harming investors, and provides a recovery to those investors.

6.) McKesson

The \$141 million settlement with McKesson resolves allegations it misled investors about profits from a price-fixing conspiracy amongst generic drug manufacturers. The drug price-fixing conspiracy – which became the focus of investigations by the Department of Justice, 49 state attorney generals, and Congress– has embroiled the generic pharmaceutical industry. The crux of the shareholder class action is that McKesson allegedly knew that the price-fixing conspiracy increased generic drug prices and improved its bottom line, and yet failed to disclose that to investors. Instead, McKesson is alleged to have falsely attributed the price increases to unrelated factors such as supply disruption, and asserted it was working to drive the prices down. As the government closed in on the price-fixing scheme, the collusive behavior was curtailed and McKesson reported weaker than expected pricing estimates in late 2015/early 2016, which caused significant declines in its stock price. The \$141 million settlement was reached after the Court granted the defendants' motion for partial summary judgment. The Pension Trust Fund for Operating Engineers served as lead plaintiff and Robbins Geller Rudman & Dowd as lead counsel for the class. In 2022, Teva Pharmaceutical Industries Ltd. also settled shareholder allegations related to the price-fixing scheme for \$420 million.

7.) Cardinal Health

The \$109 million settlement with Cardinal Health resolves allegations concerning the acquisition and integration of Cordis Corporation from Johnson & Johnson for \$1.9 billion in 2015. Cardinal Health allegedly misled investors by assuring them that they were transforming Cordis' business with Cardinal's inventory management technology and supply chain expertise. However, in reality, Cardinal Health allegedly concealed inventory management and tracking problems plaguing Cordis for two and a half years after the acquisition. According to the lawsuit, Cordis carried \$300 million in excess and obsolete inventory in its warehouses. Its inventory management system also completely shut down in

July 2017 in what is known as the “Blackout Period.” In May 2018, Cardinal Health reported disappointing earnings due to inventory and sales issues and its stock fell over 21% as a result. The settlement in the Southern District of Ohio was reached after extensive discovery and while the motion for class certification was pending. Robbins Geller Rudman & Dowd represented investors as lead counsel.

8.) Micro Focus

In July 2023, the Superior Court of California approved the \$107.5 million settlement with Micro Focus International plc. The global settlement resolves allegations in state and federal court relating to the British-based enterprise software provider’s 2017 merger with HPE Software. In the offering documents, Micro Focus allegedly failed to disclose problems undermining Micro Focus’ business, including inherent compatibility issues with the merger of the two companies. In the weeks and months following the merger, Micro Focus announced significant revenue declines and its stock price dropped more than 54% from the \$28.81 per ADS merger closing price. A substantially similar case in the Southern District of New York was subsequently dismissed and appealed. The parties in the federal action then attempted to effectuate a \$15 million settlement, while the state case proceeded into discovery and obtained class certification. In December 2022, following mediation, the parties reached a global resolution of the state and federal action.

9.) Newell Brands

The Newell action also brought in state court (Superior Court of New Jersey) resolves allegations concerning its 2016 merger with Jarden Corporation. Newell allegedly concealed in offering documents that its core sales growth was stalling as well as talent gaps and functional deficiencies, which posed a risk to Newell’s ability to successfully integrate Jarden. The truth was revealed through a series of 2017-2018 announcements that caused Newell’s stock price to decline approximately 50% from its price at the time of the merger. The \$102.5 million settlement was reached after extensive fact and expert discovery and summary judgment briefing. Scott + Scott represented shareholders as lead counsel.

10.) Grupo Televisa

The \$95 million settlement with Grupo Televisa S.A.B. resolves allegations of a bribery and corruption scheme of FIFA officials. Televisa allegedly paid millions of dollars in bribes in exchange for the broadcasting rights of World Cup tournaments. The securities class action specifically alleges the Mexican multi-media company made false and misleading statements about its internal controls over financial reporting and its code of ethics, while failing to disclose the illicit bribery scheme. The wide-ranging FIFA corruption probe came to light in 2015 and has led to U.S. indictments of at least two dozen individuals and entities from 20 different countries. The settlement was reached about two weeks after the Second Circuit

rejected the defendants' attempt to appeal the district court's order defining the class and before a decision on summary judgment. The settlement is the largest U.S.-based shareholder class action of a Mexican publicly traded company. Boies Schiller Flexner represented investors as lead counsel.

Shareholder Directly Asserted Fiduciary Duty Cases

There also have been significant settlements asserting various breaches of director and officer fiduciary duties. These cases, which are often brought in the Delaware Court of Chancery, can be asserted directly or derivatively on behalf of the corporation. While the settlement proceeds in a derivative action typically go back to the company, investors may receive the funds directly in a direct action. ISS SCAS tracks and covers the direct cases because investors benefit from the recoupment of their losses.



Top Direct Fiduciary Class Action Settlements of 2023

COMPANY		SETTLEMENT AMOUNT
	1.) Dell Technologies, Inc.	\$1,000,000,000
	2.) Viacom	\$122,500,000
	3.) Bioverativ	\$84,000,000

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1.) Dell Technologies

The \$1 billion settlement with Dell shareholders resolves allegations that they were short-changed billions of dollars for their Class V stock in connection with a 2018 transaction that turned Dell into a public company. In the asserted transaction valued at \$24 billion, Dell's controlling shareholders – Michael Dell, Egon Durban, and the private equity firm Silver Lake – allegedly expropriated \$10.7 billion from public Class V shareholders by forcing them to convert their shares into cash or privately held shares of Class C common stock at an unfair price. Class V stock was a publicly traded “tracking stock” that tracked the performance of VMware, Inc.'s publicly traded shares. However, according to the complaint, the purported \$120 per share consideration fell well below the market price of the VMware stock that the Class V stock was intended to track. The settlement – reached three weeks before the scheduled trial in Delaware Chancery – is the largest shareholder-related action to be resolved in a U.S. state court. Quinn Emanuel Urquhart & Sullivan LLP and Labaton Sucharow served as lead counsel for the class.

2.) Paramount Global

The \$122.5 million payout resolves allegations related to the \$30 billion merger between CBS and Viacom in 2019, which created what is now known as Paramount Global. The lawsuit filed on behalf of Viacom shareholders asserted breach of fiduciary duty claims against Redstone-controlled media company National Amusements Inc. and the members of the special Viacom committee that approved the merger. At the center of the allegations is media mogul Shari Redstone and her “unrelenting” desire to “re-unify” the two “family” businesses and rival the legacy of her late father, Sumner Redstone. To secure Redstone's governance priorities, the Viacom board allegedly agreed to accept a lower price than what it was worth – \$1 billion less than it had bargained for a year earlier.

3.) Bioverativ

The partial settlement of \$84 million for former Bioverativ shareholders resolves allegations that officers and directors breached their fiduciary duties in the sale to Sanofi S.A. in 2018. According to the complaint, the conflicted board agreed to sell the biotechnology company to Sanofi for \$105 per share, despite Bioverativ's financial advisor estimating its standalone value at over \$150 per share a few months earlier. The claims against Bioverativ director Alexander Denner and his hedge fund, Sarissa Capital, for insider trading are still ongoing with a trial set for April 2024.

Largest Investor-Related Antitrust Settlements of 2023

There were also six complex U.S. antitrust actions that partially settled for value in 2023. The common theme amongst all these actions is that defendants were alleged to have manipulated various forms of currency and/or pricing. The four largest settlements all involved allegations of price fixing of various interest rate benchmarks for financial instruments on global markets by the banks who set the rates.

For example, in the Euro Interbank Offered Rate action, big banks, including Société Générale which agreed to a \$105 million payout, allegedly conspired from 2005 to 2011, to rig the prices of Euribor, which is used to reflect the interest rate charged on loans between European banks. In the Relevant LIBOR-Based Financial Instruments action, the banks were alleged to have manipulated the London Interbank Offered Rate for U.S. dollars during the financial crisis. The banks on the U.S. dollar panel were specifically alleged to have artificially lowered the rate, such that purchasers did not receive as much in interest payments from the banks as they should have. Similarly, in the Swiss Franc LIBOR-Based Derivatives action, the panel banks that set Swiss franc LIBOR allegedly made submissions to set the rate to increase the banks' profitability rather than reflect the true cost of borrowing.

The complicated components of antitrust actions often lead to a significantly longer lifecycle of litigation. In fact, the six cases that settled for value in 2023 average 10.8 years from the initially filed complaint through to the settlement date.



Largest Investor-Related Antitrust Settlements of 2023

CASE	SETTLING DEFENDANTS	SETTLEMENT AMOUNT
Euro Interbank Offered Rate	Société Générale	\$105,000,000
Relevant LIBOR-Based Financial Instruments	Rabobank, Lloyds, RBC, Portigon	\$101,000,000
Relevant LIBOR-Based Financial Instruments	OTC MUFG, Norinchukin, Société Générale	\$90,000,000
Swiss Franc LIBOR-Based Derivatives	Credit Suisse, Deutsche, JP Morgan, ICAP/TP ICAP	\$73,950,000

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As all of the above large settlements indicate, investors had opportunities to recover significant lost assets in 2023 resulting from securities-related fraud. ISS Securities Class Action Services will continue to monitor and file claims on behalf of its institutional investor clients, as they move toward disbursement.

ENDNOTES

^[1] This figure includes shareholder-related class actions across the globe, as well as investor-related antitrust settlements.

[2] This figure includes securities and direct fiduciary duty class actions, but excludes antitrust, as well as SEC fair fund settlements.

[3] The data in the tables and charts throughout this report was compiled via ISS SCAS's fully transparent client platform, RecoverMax, available at <https://recovermax.issgovernance.com/recovermax>

This post comes to us from Institutional Shareholder Services. It is based on the firm's article, "Largest Securities-Related Class Action Settlements of 2023," dated January 18, 2024. The full report is available [here](#).

Beware of potential securities litigation over risk-factor disclosures

 [reuters.com/legal/legalindustry/beware-potential-securities-litigation-over-risk-factor-disclosures-2024-01-24](https://www.reuters.com/legal/legalindustry/beware-potential-securities-litigation-over-risk-factor-disclosures-2024-01-24)

Virginia Milstead, Mark Foster

The seal of the U.S. Securities and Exchange Commission (SEC) is seen at their headquarters in Washington, D.C., U.S., May 12, 2021. REUTERS/Andrew Kelly/File Photo
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January 24, 2024 - Plaintiffs are increasingly focusing their securities litigation claims on risk-factor disclosures in Securities and Exchange Commission filings. In the wake of some recent decisions from the 9th U.S. Circuit Court of Appeals in this area, those charged with preparing risk factor disclosures should pay special attention to updating risk factor and cautionary language to make sure that disclosures do not describe risks in hypothetical terms when the risks are alleged to have been actually occurring or to have occurred at the time.

The 9th Circuit's decision in *In re Facebook, Inc. Sec. Litig.*, 87 F.4th 924 (9th Cir. 2023), is the latest case where the 9th Circuit has upheld complaints of securities fraud against public companies facing securities litigation based on risk disclosure statements held to be misleading by omission.

The Facebook case arises out of the improper harvesting of personal data from millions of Facebook users by Cambridge Analytica. Facebook shareholders filed a securities class action against Facebook and certain of its officers. The plaintiffs alleged that Facebook made statements that were materially misleading by failing to disclose Cambridge Analytica's improper harvesting.

The gist of the complaint was that Facebook allegedly knew that Cambridge Analytica had improperly accessed and used Facebook users' data while Facebook's contemporaneous SEC filings disclosed in hypothetical terms the risk of improper third-party misuses of Facebook users' data harming Facebook's business, reputation, and competitive prevention. For example, Facebook's 10-K warned that "failure to prevent or mitigate security breaches and improper access to or disclosure of our data or user data could result in the loss or misuse of such data" and that if "third parties or developers fail to adopt or adhere to adequate data security practices ... our data or our user data may be improperly accessed, used, or disclosed."

In a split decision, the 9th Circuit upheld claims alleging that the warnings were misleading, reversing the district court's dismissal. The 9th Circuit's opinion applied the well-established law, *Khoja v. Orexigen Therapeutics, Inc.* and *Brody v. Transitional Hospitals Corp.*, that

statements are false and misleading only where (1) they "directly contradict what the defendant knew at the time" or (2) "create an impression of a state of affairs that differs in a material way from one that actually exists."

In concluding that Facebook's risk statements were actionably misleading, the 9th Circuit faulted Facebook's SEC filings for representing the risk of improper access to or disclosure of Facebook data "as purely hypothetical when that exact risk had already transpired." A reasonable investor, the opinion concluded, "would have understood the risk of a third party accessing and utilizing Facebook user data improperly to be merely conjectural."

The court rejected the argument presented by Facebook (and endorsed by a dissenting opinion) that the complaint failed to plead falsity adequately because the plaintiffs had not alleged that Facebook "knew that its reputation and business were *already* harmed" at the time of its SEC filings. The majority opinion countered that "case law does not require harm to have materialized for a statement to be materially misleading."

Even if Facebook did not yet know the extent of the reputational harm that it would suffer as a result of Cambridge Analytica's breach, since Facebook "presented the prospect of a breach as purely hypothetical when it had already occurred, such a statement could be misleading even if the magnitude of ensuing harm was still unknown." In other words, the court concluded that Facebook had "created an impression of a state of affairs that differed in a material way from the one that actually existed."

The Facebook decision relied heavily on the 9th Circuit's earlier decision in *In re Alphabet*, 1 F.4th 687, 703-04 (9th Cir. 2021) [opens new tab](#). In *Alphabet*, the 9th Circuit held that allegations were sufficient to survive a motion to dismiss when the complaint plausibly alleged that the company's SEC filings "warned that risks 'could' occur when, in fact, those risks had already materialized."

Alphabet had warned in its 2017 Form 10-K that public concerns about its privacy and security practices "could" harm its reputation and operating results. The following year, Alphabet discovered a privacy bug that had threatened thousands of users' personal data for years. Nonetheless, Alphabet's SEC filings repeated the earlier risk factor warning from 2017 that public concern about its privacy and security "could" cause harm while also stating that there had been "no material changes" to its "risk factors."

Given that the risks of Alphabet had "ripened into actual harm" when the privacy bug was discovered, the warning of risks that "could" or "may" occur was held to be "misleading to a reasonable investor when Alphabet knew those risks had materialized." In short, risk disclosures that "speak entirely of yet-unrealized risks and contingencies and do not alert the reader that some of these risks may already have come to fruition can mislead investors."

A third recent 9th Circuit decision reinforces the point that allegedly misleading risk disclosure statements can be the focus of securities litigation claims. In *Glazer Capital Management, L.P. v. Forescout Technologies, Inc.*, 63 F.4th 123, 137-38 (9th Cir. 2023), the 9th Circuit held that a company "cannot rely on boilerplate language describing hypothetical risks to avoid liability." There, Forescout Technologies made positive statements about closing a pending merger with Advent International.

What the company allegedly did not disclose is that Advent had advised Forescout that it was considering not closing. It was not enough, the 9th Circuit held, that Forescout made multiple warnings about the transaction and the risk of the merger not closing. That is because, the court concluded, the risk was presented as hypothetical at the same time that Forescout had notice that the merger might not, in fact, close.

Although *Facebook*, *Alphabet*, and *Forescout* involved relatively unusual corporate events (data privacy and merger transaction), it can be expected that plaintiffs will seize upon these decisions to try to bring securities fraud claims with regard to more routine-type risk disclosures.

In a recent case, a court held that the following risk-factor statement regarding excess inventory could give rise to a securities fraud claim: "If demand or future sales do not reach forecasted levels, we could have excess inventory that we may need to hold for a long period of time, write down, sell at prices lower than expected or discard." *Ferreira v. Funko Inc.*, , at *15 (C.D. Cal. Oct. 22, 2021). [↗](#), opens new tab.

The court held that the risk factor itself was potentially actionable because it "only discussed possible future risks and did not affirmatively state Funko had no excess or obsolete inventory; the statement set forth various hypothetical risks associated with maintaining excess inventory without disclosing that this risk had materialized." The claim was substantiated by allegations from former employees who said that excess inventory had been discussed in sales meetings, emails, and internal reports, and that unloaded inventory sat in ports at the time the statements were made.

Risk disclosures about competition have likewise triggered claims. Consider Snap's disclosure that one of its business risks was direct competition from Instagram. A court found that "hypothetical risk disclosures — e.g., Instagram Stories 'may be directly competitive' — do not absolve Defendants of their duty to disclose known material adverse trends currently affecting Snap's user growth and the viability of its platform." [↗](#), opens new tab.

The foregoing examples demonstrate that the plaintiffs' bar is increasingly targeting the risk factor sections of SEC filings. As such, companies should consider evaluating risk factor discussion not only to make sure that there are no new risks worth disclosing, but also for outdated risks, as well as risks that have materialized or are materializing. This could be

particularly important for companies that have made it a practice for their 10-Q filings to incorporate risk-factors discussed in earlier-filed 10-K filings. What *may* have been a risk when the 10-K was filed may be an occurring issue when a later 10-Q is filed.

Companies should carefully review disclosures to make sure that they are not described in contingent or hypothetical language if the risks have occurred, or are occurring, or recurring. It may be helpful to have risk disclosures reviewed by business leaders who have visibility into a corporation's operational, sales, accounting, financial, and legal issues. Those charged with drafting risk disclosures should consider reviewing current reports to the board of directors and the C-suite to evaluate whether business issues and risks that are being elevated internally are adequately captured in those public disclosures. Reviewing peer or competitors' risk disclosure discussions can also be beneficial in ensuring that a company's risk disclosures capture industry and macro-economic developments when appropriate.

The cases discussed in this article highlight that the plaintiffs' bar has set its sights on risk factor disclosures with success in some cases. While the 9th Circuit may remain an outlier in how it has viewed risk factor disclosure, given the increased scrutiny by plaintiffs, public companies should redouble their efforts at carefully reviewing, revising, and updating their risk factor disclosures so that they do not face enhanced securities litigation risk.

Virginia Milstead is a regular contributing columnist on securities law and litigation for Reuters Legal News and Westlaw Today.

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So here is an interesting thing - Chancellor McCormick's denial of an MTD in a SPAC case involving a company called ELMS.

courts.delaware.gov/Opinions/Downl...

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ELMS was an EV company that was taken public and ultimately failed spectacularly and arguably fraudulently. SHs filed a securities class action, which settled after the company declared bankruptcy, against all but the auditor defendants.



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The securities class action only alleged the f/s were false, beginning with the publicly filed proxy and registration statements. But as is common with SPACs, both the public SPAC and the target officers made a lot of public statements outside of the securities filings -



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hyped the transaction, even before the proxy statement was filed. Under federal securities law, some (ill-advised) Second Circuit decisions have suggested that there can be no liability for the target entity/its officers, prior to the merger, since public SHs are only -



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- buying shares in the SPAC until that time.
lawprofessors.typepad.com/business_law/2...



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Which is why the Delaware action is so important. Shareholders of the pre-merger SPAC sued for fiduciary violations in connection with the transaction, and McCormick held that the target founders were potentially liable for pre-merger conduct as aiders and abettors -

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of the SPAC managers' fiduciary breaches. That's a lot of liability that would be avoided, at least under some caselaw, for target managers for pre-merger conduct in the securities cases.

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As I've, you know, said, Delaware is kind of eating the world (here: lawprofessors.typepad.com/business_law/2... and -

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here: papers.ssrn.com/abstract=42563...)

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And - today the SEC released new rules on SPACs. Between the requirement that the target company be a co-registrant of new securities, and the new rule that the merger counts as a "sale" of securities to the SPAC's pre-transaction public shareholders, I ... think? -

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most of the problem of allowing target managers to evade liability may be addressed. Certainly some of it has been. sec.gov/files/rules/fi...

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Jan. 23, 2024, 8:59 AM PST

Estee Lauder Allegedly Hid Impacts of Asia Reseller Crackdown

By Ben Miller

COURT: S.D.N.Y.**TRACK DOCKET:** [1:24-cv-00468](#)

Bloomberg Law News 2024-01-24T10:51:56642461068-05:00

Estee Lauder Allegedly Hid Impacts of Asia Reseller Crackdown

By Ben Miller 2024-01-23T11:59:00000-05:00

The Estee Lauder Cos., CEO Fabrizio Freda, and chief financial officer Tracey Travis concealed the cosmetic giant's reliance on the reseller market before a regulatory crackdown across Asia slowed sales, a shareholder class action says.

Revenue growth before February 2022 was largely driven by purchases made by resellers, who bought large amounts of cosmetics in duty-free stores to then sell in China and Korea at discount prices, which the company didn't disclose to investors before governmental restrictions hindered sales in the region, according to the complaint filed Monday in US District Court for the Southern District of New York.

Estee Lauder concealed the elevated inventory levels that resulted from governments cracking down on the resellers locally, which forced the company to discount its products in an attempt to reduce inventory and in turn manifested as lower revenues and profit margins, the complaint says.

Investors became aware of the company's revenue issues on Nov. 1, 2023, when Estee Lauder lowered its financial outlook citing a slower pace of recovery in sales and profit margins, announcing an accelerated restructuring plan to recover profitability. That day, Estee Lauder's common stock fell 19%. That was the stock's biggest single-day drop of all time, according to data compiled by Bloomberg.



Starting in February 2022, Freda touted Estee Lauder's prosperity with Chinese consumers and in the global travel retail market, and the company cited long-term growth opportunities in China and other Asian markets. In subsequent disclosures, the company assured investors that it would be able to combat inflation, supply chain disruptions and Covid-19 headwinds with strategic price increases and cost savings in certain areas.

It was not until November 2022 that the company began to acknowledge inventory challenges in its Asia travel retail business, but the company didn't fully disclose its reliance on that revenue segment and supply chain management issues at that time, the complaint says.

Then in February 2023, the company issued a press release lowering its outlook for the fiscal year due to issues with inventory and in its travel retail markets. The company's stock price fell 7% to close at \$261.17 on Feb. 6, according to the complaint.

Disclosures that followed repeatedly attributed reduced financial projections to a slow Covid-19 recovery for its Asia travel retail business. Estee Lauder lowered guidance for a third consecutive quarter in May 2023. That same day, the company's stock declined 17% to close at \$202.70 on May 3, according to the complaint.

Estee Lauder ultimately revealed that the rapid growth they had promised to investors in the Asia travel retail and China markets was far off in its November 2023 financial results disclosure, the complaint says.

The West Virginia Laborers Pension Trust Fund seeks to recover damages for a class of hundreds or thousands of shareholders who acquired Estee Lauder stock between Feb. 3, 2022 and Oct. 31, 2023, alleging that the company and executives violated the Securities Exchange Act. The plaintiff also seeks legal fees, the complaint says.

The cosmetic giant was also sued in a separate class action last month, alleging misrepresentations about supply chain issues and mismanagement of inventory in Asia and the United States. That suit is currently pending in the same New York district court.

Estee Lauder didn't immediately respond to a request for comment.

Labaton Keller Sucharow LLP represents the plaintiff and the proposed class.

The case is West Virginia Laborers Pension Trust Fund v. The Estee Lauder Cos. Inc. , S.D.N.Y., No. 1:24-cv-00468, complaint filed 1/22/24 .

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Brookdale Directors Defeat Shareholder Suit Over Quality of Care

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Brookdale Senior Living Inc. investors can't proceed with their remaining claims in a suit against the board over choices that allegedly led to poor care and harmed the company, a federal court ruled.

The investors didn't ask the board to sue first, and didn't show that such a demand would have been futile because of material benefits to the directors in a proxy statement at the center of the claims, Judge Aleta A. Trauger said for the US District Court for the Middle District of Tennessee. Her order was entered in the docket Tuesday.

A separate derivative suit on behalf of Brookdale—in which the directors were held to have effectively declined to sue by repeatedly delaying consideration of the litigation demands—is pending before the same judge.

Brookdale was hit with a proposed class action by residents in April 2020, alleging understaffing and neglect. In March 2021, California's then-attorney general, Xavier Becerra, sued Brookdale for allegedly ignoring patient-safety laws and giving false information to the Centers for Medicare & Medicaid to improve its rating.

Brian Davis and other shareholders sued, alleging that current and former executives and directors carried out an expansion that created pressure to cut costs. The company's leaders allegedly understaffed facilities, resulting in poor care at its homes, and failed to disclose this information to stockholders and the public. The company was harmed by having to face lawsuits and conduct internal investigations, among other expenses, the investors said.

Trauger threw out most of the claims in January 2023, saying the investors didn't show that enough of the board members lacked independence because of the prospect of personal liability. But she allowed claims based on an allegedly misleading 2019 proxy statement to proceed because a majority of the directors allegedly received stock awards ranging from about \$24,000 to about \$4.8 million as a result of the proxy vote.

The directors asked for dismissal, arguing that the actual text of the proxy statement didn't confer the personal benefits that were alleged.

The proxy statement merely allowed replenishing the stock pool from which later awards to the directors would be made, an action that fell within ordinary corporate practice, Trauger said. The judge also denied the investors' request for permission to replead the case.

The Brown Law Firm PC and Robbins LLP are lead counsel for the plaintiffs. Jones Day and Bass, Berry & Sims PLC represent the directors.

The case is Davis v. Baier , M.D. Tenn., No. 3:20-cv-00929, docketed 1/23/24 .

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Spectrum Cancer Drug Trial Fraud Allegations Proceed After Trim

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- Judge allows dosage, enrollment misstatement claims to proceed
- Risk warnings, FDA approval predictions not actionable in suit

Spectrum Pharmaceuticals Inc. and three top executives must face allegations that they misled investors about a clinical trial for cancer drug poziotinib, after a judge allowed two claims to proceed and dismissed the rest of a proposed shareholder class action against the drugmaker on Tuesday.

Judge Valerie E. Caproni ruled that shareholders had adequately alleged actionable misstatements regarding Spectrum's alignment with the Food and Drug Administration on dosage for the study and patients' enrollment status. But the judge tossed a raft of other allegations for lack of adequate pleading, according to the order filed in the US District Court for the Southern District of New York.

Spectrum allegedly told investors that the treatment it was developing for patients with non-small cell lung cancer was ready for a confirmatory study and showed positive clinical trial results, but the FDA later issued contradictory statements expressing concerns about the drug candidate. The drugmaker's stock then dropped 37% on Sept. 20, 2022, the stock's biggest drop in almost three years, according to data compiled by Bloomberg.

The company ultimately disclosed on Nov. 25, 2022 that the FDA was denying its application for expedited approval and announced that it would immediately deprioritize poziotinib.

The FDA briefing revealed that no patients had been enrolled in the confirmatory study and cited inadequate dosage data. Caproni kept alive allegations related to Spectrum's contradicting statements, but tossed unactionable claims tied to forward-looking risk statements or the likelihood of eventual FDA approval.

Caproni also tossed two more sets of claims, finding that plaintiff Steven Christiansen didn't adequately allege Spectrum's statements regarding dosage optimization were misleading, and seeing no indication that Chief Financial Officer Nora Brennan's statements about patient enrollment were made with prior contrary knowledge.

Christiansen adequately alleged that ex-CEO Thomas Riga was aware of the FDA's position but decided to communicate to investors that the company and FDA were aligned on the study's dosage regimen anyway, and that Riga and former Chief Medical Officer Francois Lebel consciously or recklessly misrepresented that patients were enrolled in the study, the order says.

The parties must file a case management plan by Feb. 15 and appear at a status conference on Feb. 23, the order says.

A Spectrum spokesman declined to comment. The company was acquired by Assertio Holdings Inc. in a deal that closed last July.

Baker Botts LLP and Paul Hastings LLP represent Spectrum and the executives.

Kaplan Fox & Kilsheimer LLP represent Christiansen and the proposed class.

The case is Christiansen v. Spectrum Pharms. Inc. , S.D.N.Y., No. 1:22-cv-10292, 1/23/24 .

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Traeger's CEO Veto Agreement With Backers Draws Legal Challenge

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An investor sued Traeger Inc.'s board and backers, challenging a pact that allegedly gives a veto over the grill maker's choice of CEO to private-equity affiliates of AEA Investors LP and the Ontario Teachers' Pension Plan.

The lawsuit, filed Tuesday, targets a clause in their stockholders agreement with Traeger that allegedly lets them overrule any decision by its directors to hire or fire a chief executive so long as they collectively own at least 30% of the company. The provision violates Delaware laws vesting authority over a corporation's senior management with its board, according to the 11-page complaint.

"It is hard to imagine a more egregious abdication of a board's ongoing duty to manage the company than the CEO approval right," the suit says.

Traeger, AEA, and the Ontario Teachers didn't immediately respond to requests for comment late Tuesday. Traeger, based in Salt Lake City, has traded on the New York Stock Exchange since 2021.

The proposed class action is part of a wave of shareholder lawsuits in Delaware's Chancery Court challenging contracts that give a company's founders or financiers control over the identity of its CEO, the right to block a sale, or authority over other matters traditionally entrusted to corporate directors.

Similar Suits

The litigation echoes a trio of cases targeting General Atlantic LP, which allegedly has broad contractual veto rights affecting several businesses it invests in: payments firm EngageSmart Inc., medical logistics business Alignment Healthcare Inc., and HireRight Holdings Corp., an employment-related background check company.

Some of the cases have involved Petco Health & Wellness Co.—backed by the Canada Pension Investment Board and a Luxembourg-based private equity firm—and IT services company N-able Inc., which has a parallel pact with Silver Lake Group LLC and Thoma Bravo LP.

Other similar lawsuits concern an agreement between investment bank Moelis & Co. and its billionaire founder, Ken Moelis, and a deal that autobody chain owner Driven Brands Holding Co. struck with Roark Capital Group Inc.

Ascension Health Alliance and TowerBrook Capital Partners LP, meanwhile, agreed last year to shoulder nearly \$40 million of a roughly \$46 million settlement resolving shareholder litigation over an allegedly lopsided financing round at R1 RCM Inc. that gave them certain parallel veto rights.

Like the Traeger case, many of the other challenges—including Petco, Driven Brands, N-able, HireRight, EngageSmart, and Alliance—focus on companies with stocks that started trading in 2021.

The investor leading the Traeger-related litigation, Bruce Taylor, is represented by Block & Leviton LLP.

The case is Taylor v. Alvarez , Del. Ch., No. 2024-0058, complaint filed 1/23/24 .

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Excess D&O Insurance Coverage Barred Because Underlying Insurers Didn't Admit Liability

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January 23, 2024

(Photo Library)
Excess D&O Insurance Coverage
Barred Because Underlying
Insurers Didn't Admit Liability

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By Kevin LaCroix on January 23, 2024

Posted in D & O Insurance



If the underlying insurers have paid their limits, you would generally expect that the next-in-line excess insurer would also have to pay its limit as well for losses within its layer. However, in an appellate decision with what is arguably an unexpected twist, an appellate court has held – in reliance on express policy language – that an upper

layer excess carrier is relieved of its obligation to pay because the underlying carriers, all of whom paid their full limit, did not admit liability. The Third Circuit's January 19, 2024, decision, marked "not precedential," can be found [here](#). A January 21, 2024, *LinkedIn* post about the decision by Paul Curley of the Kaufman, Borgeest & Ryan law firm can be found [here](#).

Background

In 2003, Pharmacia was sued in a securities class action lawsuit. The case ultimately settled. Pharmacia incurred total defense and indemnity costs of \$207 million.

At the relevant time, Pharmacia maintained a \$200 million D&O Insurance program consisting of a \$25 million primary layer and twelve additional excess layers. The insurers in the first seven layers of insurance paid their full limits of liability. Pharmacia sought payment from the eighth layer excess insurer, showing the eighth layer excess insurer that the primary and excess layers ahead of it had paid their limits. The eighth layer excess insurer declined. Pharmacia sued the insurer, and the parties filed cross-motions for summary judgment.

The district court granted the excess insurer's summary judgment motion, holding that the "plain language" of the insurer's policy required the other excess insurers to admit liability as a condition precedent to coverage; that six of the underlying insurers had disclaimed coverage; and therefore, that the condition to coverage had not been satisfied. Pharmacia appeal the ruling.

The January 19, 2024, Opinion

In a brief January 19, 2024, opinion marked “Not Precedential” and written by Justice Patty Shwartz for a unanimous three-judge panel, the Third Circuit affirmed the district court’s ruling, holding that Pharmacia “failed to adduce evidence that satisfies a condition precedent necessary for [the excess insurer’s] insurance policy to attach.”

The excess policy, the appellate court noted, “unambiguously” specifies two conditions precedent to coverage; in order for coverage to attach, the court said, Pharmacia must show both that the insurers ahead of the excess insurer in the tower have (1) “duly admitted liability and” (2) “paid the full amount of their respective liability.” The word “and,” the Court said, “demonstrates that both conditions must be met.”

Here, the Court said, Pharmacia “has failed to show that both conditions” to trigger the excess insurer’s coverage were met. “Regardless,” the court said, “of whether the other insurers in the tower paid their policy limits, the record does not demonstrate that all of those insurers admitted liability.”

Because Pharmacia “failed to establish at least one condition precedent,” the District Court correctly decline to find that the excess insurer owed Pharmacia coverage under its policy.”

Pharmacia tried to argue that the district court had improperly considered the other insurers’ settlement agreements (which, as settlement agreements typically do, contained the standard recital of non-admission of liability) in support of the proposition that the insurers had disclaimed liability. The appellate court rejected this argument, saying, in a footnote, that Pharmacia’s assertion that an insurer’s payment of a policy limit alone constitutes an admission of liability “is speculative as other reasons may cause a carrier to pay its policy limit, such as avoiding litigation.” In addition, the Court said, to “infer that payment of the full policy limit is a concession of liability would render the admission-of-liability condition superfluous.”

Discussion

The admission-of-liability provision in the excess policy at issue operated here as something of a hidden land mine, one that blew up on everyone’s faces after settlement. Because settlement agreements routinely include recitals of non-admission of liability, an excess policy with this kind of provision could potentially sabotage any settlement involving the excess insurance unless the presence of the provision was fully noted and taken into account when settlement agreements were drafted.

This kind of “admission of liability” provision is frankly unusual enough that it doesn’t surprise me that it caught the participants in this situation unawares. It is worth noting that the policies at issue in this coverage dispute were written and put in place some twenty years ago. As

Paul Curley observed in the *LinkedIn* post to which I linked at the top of this post, most, if any, excess D&O insurance policies these days do not require an admission of liability by underlying carriers in order for the excess coverage to be triggered.

Some reading this opinion might take comfort from the fact that the appellate court's opinion is marked "not precedential." However, the problem for any policyholder seeking coverage in the future under an excess D&O insurance policy with an "admission of liability" requirement is not going to come from the precedential value of this opinion; the problem is going to come from the policy language itself. The bottom line from this opinion is that we all now have a practice pointer: check your excess policies to make sure they don't have the "admission of liability" requirement. This case may not have precedential value in the formal sense, but it does show how much of a problem this kind of language can cause.

The opinion doesn't discuss the issue, but one thing I wonder is what the eighth level excess insurer's success in arguing non-coverage here does for the excess layers above the eight level. Does this coverage ruling mean that the excess insurers in layers nine, ten, eleven, and twelve are relieved of their obligation to pay, on the grounds that the underlying layer(s) were not exhausted by payment of loss? This is a high profile set of circumstances involving lots of players, so I am guessing there are some readers who know what happened with those upper-level excess insurers. It would be great if anyone knowing the answer could (anonymously if that is preferred) supply the answer in a comment to this post, using this site's comment feature.

By the way, if you are not following Paul Curley on *LinkedIn*, you should. He often has good stuff in his *LinkedIn* posts, as this example shows.

Kimberly-Clark Can't Appeal Refusal to Dismiss 401(k) Fee Lawsuit

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Kimberly-Clark Corp. lost its bid to appeal a decision rejecting its effort to quickly end a proposed class action by employees challenging administrative fees charged by the company's \$4 billion retirement plan.

Judge Samuel Lindsay denied the request in an order entered Tuesday in the US District Court for the Northern District of Texas. The appeal wouldn't materially advance the litigation, but it would "unnecessarily delay" the case's resolution and lead to additional "unwarranted piecemeal litigation and appeals," Lindsay said.

The manufacturer of personal care products, including diapers and paper towels, had requested in April last year an immediate appeal of Lindsay's decision holding that participants in Kimberly-Clark's 401(k) plan could continue to pursue claims that the company breached its fiduciary duty and caused them to pay higher fees than was appropriate under the Employee Retirement Income Security Act.

Kimberly-Clark said Lindsay's ruling conflicted with decisions by the Sixth, Seventh, and Eighth circuits, and it sought a "definitive statement" from the Fifth Circuit to resolve the perceived conflict, claiming it would speed up the case and provide guidance for other litigants.

The company filed a motion to dismiss in May 2022, just a little over a year after the lawsuit was filed and before it reached more sophisticated proceedings, such as discovery. The lawsuit said the company cobbled together services from multiple retirement plan service providers that each charged their own fees, instead of streamlining costs with a single provider.

Participants paid annual administrative fees of about \$78 per person, when a reasonable fee would have been closer to \$30 per person, according to the lawsuit.

The judge said arguments Kimberly-Clark made claiming the 401(k) participants relied on flawed calculations and inappropriate comparisons to other retirement plans can't serve as a basis to get rid of the lawsuit because they were "not appropriate for consideration at the motion to dismiss stage." The company's arguments that it disagreed with the ruling and wants to save time also don't justify an immediate appeal, Lindsay said.

"Defendants maintain that the purpose of their Motion is not to seek reconsideration of the court's ruling on this issue or their Motion to Dismiss," Lindsay said. "They disagree with the court's ruling, and they express the hope that a different more favorable ruling on appeal

regarding the applicable pleading standard in ERISA fiduciary duty cases would avoid wasting precious time.”

Hundreds of lawsuits challenging 401(k) fees have been filed in federal courts over the past few years. Several employers have tried to appeal decisions allowing the cases to advance in the early stages of litigation. Mass General Brigham Inc., Boston Children’s Hospital, and MITRE Corp. have seen these requests denied, while a request filed by Quanta Services Inc. remains pending.

Walcheske & Luzi LLC and Kendall Law Group PLLC represent the plan participants. Gibson, Dunn & Crutcher LLP represents the company.

The case is Seidner v. Kimberly-Clark Corp. , N.D. Tex., No. 3:21-cv-00867, 1/23/24 .

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Sutter Health Agrees to Class of Thousands Over Retirement Fees

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Class Action

A bronze statue of Gen. John A. Sutter stands in front of the Sutter General Hospital in Sacramento, Calif.

Photographer: Ken James/Bloomberg

- Judge allowed suit over Fidelity target date funds to advance
- Several employers have agreed to class status in 401(k) suits

California health-care system Sutter Health agreed to have litigation over the target date funds in its employees' \$3.7 billion retirement plan move forward on a class-wide basis.

Sutter consented to have the case certified as a class action covering "thousands" of participants in its retirement plan since 2014, according to a joint stipulation filed Tuesday in the US District Court for the Eastern District of California. The plan had more than 73,000 active participants as of 2018, according to the workers' complaint.

Hundreds of lawsuits challenging retirement plan fees have been filed in federal courts over the past few years. Many employers have agreed to have these cases certified as class actions, including Humana Inc., PPL Corp., Hy-Vee Inc., Alticor Inc., Evonik Corp., and Biogen Inc., among others.

The lawsuit says Sutter Health acted imprudently and disloyally in keeping a suite of actively managed Fidelity target date funds in its employees' retirement plan. Workers say these funds are unnecessarily risky and significantly more expensive than other Fidelity target date funds, causing them to lose out on retirement savings.

Judge Jennifer L. Thurston of the US District Court for the Eastern District of California allowed the case to advance last year.

Fidelity isn't a party to the case.

Sutter Health is represented by Jackson Lewis PC. The employees are represented by Miller Shah LLP, Capozzi Adler PC, and Rosman & Germain APC.

The case is *In re Sutter Health ERISA Litig.*, E.D. Cal., No. 1:20-cv-01007, stipulation 1/23/24.

Berkshire's PacifiCorp ordered to pay at least \$62 million to homeowners for 2020 Oregon wildfire damage

 [reuters.com/world/us/berkshires-pacifcorp-ordered-pay-least-62-million-homeowners-2020-oregon-2024-01-23](https://www.reuters.com/world/us/berkshires-pacifcorp-ordered-pay-least-62-million-homeowners-2020-oregon-2024-01-23)

Clark Mindock

A burned tuck sits in front of burned homes in a mobile home park that was destroyed by wildfire in Phoenix, Oregon, U.S. September 20, 2020. REUTERS/David Ryder/File Photo
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Jan 23 (Reuters) - An Oregon state jury on Tuesday ordered PacifiCorp, an Oregon electric utility owned by billionaire Warren Buffett's Berkshire Hathaway, to pay at least \$62 million to nine homeowners whose properties were damaged by wildfires that devastated the state in 2020.

Jurors in Portland, where PacifiCorp is based, awarded the homeowners nearly \$6.3 million in total to compensate them for the property damage and other economic losses and \$56 million for things like emotional distress, pain and suffering following a trial that started Jan. 9 in Multnomah County Circuit Court, which Reuters viewed via the Courtroom View Network.

The trial was the first of at least two scheduled this year to serve as test cases to determine how much PacifiCorp owes Oregon residents whose homes were ravaged by a series of fires that torched parts of the state over Labor Day weekend in 2020, causing nearly \$1.9 billion in property damage and other harms, according to a state estimate.

The company could face billions in liability to compensate approximately 5,000 homeowners and business owners who filed a class action against the company in 2020, claiming that the fires damaged approximately 2,400 properties.

A PacifiCorp spokesperson said in a statement that the company intends to appeal the verdict, but that the company has settled separate claims related to the fires and will continue to settle other "reasonable" claims as well.

Matthew Preusch, one of the plaintiffs' lawyers, called the verdict an "important step" toward recouping as much compensation as possible for fire victims.

A separate jury in June had already determined PacifiCorp was liable for the fires, finding the company was grossly negligent when it failed to shut down power lines that sparked during high winds and set off fires across the state. That trial involved 17 people whose homes or properties were damaged by the fires, but the liability findings apply to all the plaintiffs in the class action.

It also set punitive damages, which are damages reserved for defendants whose behavior is deemed to be particularly egregious, at 25% of compensatory damages. That finding also applies to all of the plaintiffs, which should boost the overall recovery for the plaintiffs in Tuesday's case.

The company is appealing the earlier verdicts.

The company has defended its fire prevention efforts, saying power shutoffs were not necessary based on what it knew. It has also said the plaintiffs did not establish that its equipment was to blame for the wildfires.

During the trial this month, a 12-person jury heard from several victims whose homes were destroyed.

One victim in his late 60s said he and his wife were forced to jump from a 30-foot cliff into a river below, cat in hand, to escape the flames from the Santiam Canyon fire, which formed from the merger of multiple fires east of Oregon's capital Salem.

Other victims described walls of flames dozens of feet high from that fire and others including the Echo Mountain fire in Lincoln County and the South Obenchain fire in Jackson County.

Attorneys for the plaintiffs had asked the jury for at least \$5 million in damages for pain and suffering and other non-economic harms for each plaintiff, in addition to the costs associated with damaged property. A lawyer for PacifiCorp had said the company supported fully paying victims for damaged property, but suggested that awards of \$2 million or less per plaintiff would be enough to compensate them for non-economic harms.

Wildfires throughout Oregon in 2020 burned approximately 1,900 square miles (1.22 million acres), destroying an estimated 5,000 or more structures and killing at least nine people.

Reporting by Clark Mindock, Editing by Alexia Garamfalvi, Chizu Nomiya and Daniel Wallis

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Class Action Claims Oil Producers Conspired With OPEC to Drive Up Prices

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NEWS

Class Action Claims Major Oil Producers Conspired With OPEC to Drive Up Prices

"Defendants agreed with OPEC to constrain production of crude oil worldwide, with the purpose and effect of fixing, raising, and maintaining the price of crude oil in and throughout the United States of America and worldwide," the complaint said. "Defendants are not sovereign nations, and they are not immune to U.S. antitrust law."

January 24, 2024 at 09:36 AM

Energy and Natural Resources

Colleen Murphy

Pioneer Natural Resources, Occidental Petroleum, Hess and other major U.S. shale oil producers were hit with an antitrust class action accusing them of conspiring in coordination with OPEC to curb production for the purpose of driving up crude oil prices.

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 among the first to know about new suits in your region, practice area or client sector.

The 76-page lawsuit, filed by Cohen Milstein Sellers & Toll and Eglet Adams Eglet Ham Henriod on Jan. 22 in Nevada federal court, claimed the alleged conspiracy resulted in billions of dollars in additional costs for individuals and businesses that purchased motor vehicle fuel for commercial use.

"Crude oil is the main input into gasoline and diesel fuel," the complaint said. "The price of crude oil is the main determinant of the price of gasoline and diesel fuel at the pump, with approximately 90% of variation in the price of these fuels directly related to the price of crude. For all intents and purposes, a conspiracy to raise crude oil prices is also a conspiracy to raise the prices of gasoline and diesel fuel."

The complaint alleged that the defendants conspired to coordinate and constrain domestic shale oil production, which ultimately fixed, raised and maintained the price of crude oil both in the U.S. and worldwide.

“Defendants have also conspired with the Organization of the Petroleum Exporting Countries (OPEC), the international oil cartel that believes that it can escape U.S. antitrust law because its members are sovereign nations,” the complaint said. “Defendants agreed with OPEC to constrain production of crude oil worldwide, with the purpose and effect of fixing, raising, and maintaining the price of crude oil in and throughout the United States of America and worldwide. Defendants are not sovereign nations, and they are not immune to U.S. antitrust law.”

The case, *Andrew Caplen Installations v. Permian Resources*, sought treble damages and injunctive relief against Permian Resources, formerly known as Centennial Resource Development, Chesapeake Energy, Continental Resources, Diamondback Energy, EOG Resources, Hess, Occidental Petroleum and Pioneer Natural Resources Co.

Counsel have not yet appeared for the defendants.

The plaintiffs in the case, Pennsylvania-based Andrew Caplen Installations and New York-based Edward Allegretti, doing business as Alfred Auto Center, purchased gasoline and diesel fuel for commercial use. They alleged that they paid higher retail gasoline and diesel prices as a result of their allegations in the complaint.

The 46-count complaint included one count for Section 1 of the Sherman Act while the other 45 counts were filed on behalf of class members who purchased retail gasoline or diesel fuel in 28 individual states and Washington, D.C.

The plaintiffs are represented in the matter by Robert T. Eglet, Artemus W. Ham IV and Erica D. Entsminger of Eglet Adams in Las Vegas. Also serving as counsel to the plaintiffs are Brent W. Johnson, Benjamin Brown and Robert W. Cobbs of Cohen Milstein in Washington, D.C., and Michael Eisenkraft and Christopher Bateman of the firm’s New York office.

The complaint sought a determination of the case as a class action and appointment of the plaintiffs as class representatives, as well as a declaration that the acts taken by the defendant were illegal and unlawful and were a per se violation of various state antitrust and competition laws. It additionally sought permanent enjoinder of the defendants from engaging in activities that have a similar effect.

And the complaint sought a judgment against the defendants both jointly and severally for treble damages plus costs and attorney fees and pre- and postjudgment interest.

“Occidental denies that it engaged in any of the conduct alleged by the plaintiffs attorneys and intends to vigorously defend itself against this meritless lawsuit,” Jennifer Brice, Occidental’s director of communications and public affairs, said.

Chesapeake Energy declined to comment on legal matters, while requests for comment from the other defendant companies were not immediately returned.

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January 23, 2024

5 Universities in Student Aid Antitrust Suit Agree to More Than \$100M in Settlements

By Ross Todd

2 minute read

January 22, 2024

LoanDepot Sued Over Data Breach Affecting 16.6 Million People

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LoanDepot Inc. failed to protect the personal information of 16.6 million people that was exposed in a January data breach, a proposed federal class action said.

Jonathan Rosa alleged that LoanDepot, a nationwide home-mortgage lender, ignored the risks of data breaches and failed to invest in sufficient privacy and security protections despite its promises to consumers that it would do so.

Information exposed in the incident likely included names, addresses, phone numbers, Social Security numbers, mailing addresses, property addresses, email addresses, account user names and passwords, loan-account information, bank-account information, credit-card numbers, and information about income and assets, according to a complaint filed Tuesday in the US District Court for the Central District of California.

Victims have suffered injury in the form of increased risk of fraud and identity theft, lost time and out-of-pocket expenses incurred responding to the breach, invasion of privacy, and lost benefit of the bargain, the complaint said.

Rosa seeks to represent a class of all people who used LoanDepot's title-insurance, homeowner's-insurance, mortgage, refinancing, home-warranty, and other closing services.

The lawsuit brings claims of negligence, breach of contract, unjust enrichment, invasion of privacy, breach of implied contract, breach of fiduciary duty, declaratory relief, and violations of the California Consumer Legal Remedies Act, the Unfair Competition Law, and the Customer Records Act.

Rosa is seeking injunctive relief, compensatory damages, consequential damages, incidental damages, statutory damages, restitution, disgorgement, identity theft-protection and credit-monitoring services for class members, attorneys' fees and costs, and pre- and post-judgment interest.

Robinson Calcagnie Inc. and Barrack, Rodos & Bacine represent Rosa and the proposed class.

The case is Rosa v. LoanDepot Inc. , C.D. Cal., No. 8:24-cv-00167, case filed 1/23/24 .

To contact the reporter on this story: Christopher Brown in St. Louis at ChrisBrown@bloombergindustry.com

Senators, states ask US Supreme Court to curb 'two-step' bankruptcy abuse

 [reuters.com/legal/government/senators-states-ask-us-supreme-court-curb-two-step-bankruptcy-abuse-2024-01-23](https://www.reuters.com/legal/government/senators-states-ask-us-supreme-court-curb-two-step-bankruptcy-abuse-2024-01-23)

Dietrich Knauth

The U.S. Supreme Court building is seen in Washington, U.S., June 26, 2022.

REUTERS/Elizabeth Frantz/File Photo Acquire Licensing Rights , opens new tab

- Supreme Court asked to review Georgia-Pacific unit's bankruptcy
- 4th Circuit has paused asbestos lawsuits against Georgia-Pacific
- Lawmakers say the ruling makes "mockery" of congressional intent

Jan 23 (Reuters) - Three U.S. senators and 24 state attorneys general have urged the U.S. Supreme Court to stop well-off companies like Georgia-Pacific from using bankrupt shell companies to sidestep lawsuits.

Senators Dick Durbin of Illinois, Sheldon Whitehouse of Rhode Island and Josh Hawley of Missouri asked the court in an amicus brief on Monday to reverse a June 2023 decision from the 4th U.S. Circuit Court of Appeals, which stopped tens of thousands of lawsuits alleging that Georgia-Pacific products contained asbestos and caused cancer from proceeding while its subsidiary Bestwall remains in bankruptcy.

"Bestwall has created a legal stratagem that radically expands the authority of bankruptcy courts and makes a mockery of congressional intent," the senators said in a Tuesday statement.

Attorneys general for 24 states and Washington, D.C., also urged the Supreme Court in a separate amicus brief to stop what they called bankruptcy "abuse," noting the 4th Circuit's decision undermines the states' "authority to enforce their state laws to protect their people."

Georgia-Pacific, a unit of industrial conglomerate Koch Industries, pioneered a legal strategy known as the "Texas two-step" in 2017, spinning off its asbestos liabilities into a newly created subsidiary, Bestwall, which then filed for bankruptcy in North Carolina. At the time of the filing, the company faced 64,000 asbestos lawsuits.

The amicus briefs contend that Georgia-Pacific, a company worth tens of billions of dollars, is abusing the U.S. bankruptcy system by using it to shield its assets from people who have been harmed by its products by preventing lawsuits from individuals and states from moving forward, without having to file for bankruptcy itself.

Georgia-Pacific declined to comment.

The Supreme Court has not yet weighed in on the "Texas two-step," but it is already considering how far bankruptcy courts can go to protect non-bankrupt company owners in an

appeal of Purdue Pharma's bankruptcy plan. It has not yet signaled whether it will take up the Georgia-Pacific case.

North Carolina, which has become a venue of choice for two-step cases in the wake of the Bestwall filing, wants to discourage potential copycats from creating shell companies in North Carolina so they can file "abusive" bankruptcies in the state, according to the states' brief.

"Wealthy companies that engage in wrongdoing should not be able to get off the hook by cheating the legal system," North Carolina Attorney General Josh Stein said in a Tuesday statement.

Unlike other courts that have tossed two-step bankruptcies, including Johnson & Johnson's and 3M's, U.S. bankruptcy judges in North Carolina have declined to dismiss Texas-two step bankruptcies.

Attorneys representing asbestos victims suing Georgia-Pacific petitioned the Supreme Court in December, saying that the 4th Circuit's decision would give bankruptcy courts "virtually boundless power to halt litigation against non-bankrupt companies."

In its June 2023 decision, a divided 4th Circuit panel ruled that blocking lawsuits against Georgia-Pacific, which is not bankrupt, would give Bestwall a better chance to reorganize in bankruptcy.

The majority opinion largely blamed the years-long pause in litigation on plaintiffs' lawyers who refused to settle their asbestos claims in Bestwall's bankruptcy, while a dissenting opinion blamed Georgia-Pacific and Bestwall for attempting a "corporate shell game" to avoid the lawsuits.

The case is Official Committee of Asbestos Claimants v. Bestwall LLC, U.S. Supreme Court, No. 23-675.

For the senators: Deepak Gupta and Greg Beck of Gupta Wessler

For the states: North Carolina Attorney General Josh Stein

For the asbestos plaintiffs committee: David Frederick of Kellogg Hansen Todd Figel & Frederick; and Natalie Ramsey of Robinson+Cole

For Bestwall: Noel Francisco of Jones Day

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Realtors group, home sellers clash over venue for antitrust lawsuits

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Mike Scarcella

REUTERS/Larry Downing Acquire Licensing Rights , opens new tab

Jan 23 (Reuters) - With billions of dollars potentially on the line, the National Association of Realtors and a group of plaintiffs lawyers are sparring over where to determine the fate of at least a dozen consumer lawsuits challenging a brokerage industry fee that has long been a facet of home sales.

The realtors association told a U.S. court panel in a filing , opens new tab on Tuesday that the growing spate of antitrust lawsuits should be consolidated and heard by a U.S. judge in Chicago. The trade group opposed an earlier request from plaintiffs lawyers to move all of the new cases to Missouri, where a jury last year awarded \$1.8 billion in damages to home sellers in a related lawsuit.

U.S. courts have been flooded with lawsuits in the aftermath of the Oct. 31 verdict in Missouri federal court against the realtors association and several brokerages.

The cases broadly allege that sellers are paying an artificially inflated commission to buyers' agents.

New cases were lodged in New York, Pennsylvania, California, Texas and other venues in the weeks following the blockbuster verdict.

A related case against the National Association of Realtors and a group of brokers has long been pending in Chicago.

The association, which is based in Chicago, said in a statement on Tuesday that it "believes that centralizing all cases in the Northern District of Illinois will promote efficiency and consistency in addressing the industry-wide issues these cases present."

Attorneys for plaintiffs suing the realtors group and major home brokerages did not immediately respond to a request for comment.

The venue dispute is pending before the U.S. Judicial Panel on Multidistrict Litigation. In December the plaintiffs lawyers asked the panel to assign new real-estate antitrust cases to U.S. District Judge Stephen Bough in Kansas City, Missouri, federal court.

Bough oversaw the trial that ended in a victory for a class of Missouri-area home sellers. The attorneys who won that case filed a new, broader lawsuit in the same court on the day of their trial victory.

The plaintiffs' attorneys argued that Bough's familiarity with the legal issues "militates strongly in favor of transfer to his courtroom."

The realtors association and a group of brokers have denied any wrongdoing and are appealing the October verdict.

Read more:

Brokerages push to undo \$1.8 bln verdict in real estate commissions case

As real estate commission lawsuits rise, consumer attorneys seek case consolidation

Realtors group urges end to home sellers' \$13 bln commission lawsuit

Appellate veterans to defend broker fees after sellers win \$1.8 bln verdict

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Reporting by Mike Scarcella

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Class counsel get \$75M in fees for HIV drug antitrust case

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Jan. 24, 2024

Plaintiffs lawyers argued the fee was warranted because there was no companion criminal case for them to utilize or leverage.

Class counsel in an antitrust lawsuit against Gilead Sciences Inc. will receive \$75 million in fees after the parties resolved allegations last fall that the company conspired to delay generic HIV drugs from entering the market.

Attorneys for the direct purchasers, led by Roberts Law Firm PA in Dallas and NastLaw LLC in Philadelphia, will get an additional \$2.9 million to reimburse out-of-pocket costs, according to the order signed Friday by U.S. District Judge Edward M. Chen in San Francisco. The court also granted final approval to the \$247 million settlement it preliminarily approved in September.

Kirkland & Ellis LLP and Proskauer Rose LLP represented Gilead in this litigation. The firms successfully defended their client at trial last June in a different case as a federal jury found that the alleged deal between Gilead and Teva Pharmaceutical Industries — the former would pay the latter to hold off on marketing its generic drugs — did not violate antitrust regulations. The end payer plaintiffs were seeking almost \$4 billion in damages. In re: HIV Antitrust Litigation, 3:19-cv-02573-EMC (N.D. Cal., filed May 14, 2019).

In August, KPH Health Services pursued a class action against Gilead on behalf of direct purchasers. The settlement between the plaintiff class and Gilead “represents an excellent recovery for the [direct purchaser class], given the novel and complex nature of the antitrust claims at issue and the significant risks class members faced of receiving no recovery had their claims proceeded to verdict,” San Francisco practitioner and plaintiff liaison counsel Francis O. Scarpulla wrote in the final settlement motion. He added that the class counsel spent almost 40,000 hours working on the case and that the resources required for this matter were so significant that they were forced to turn down other cases.

“In contrast to certain other high-profile antitrust cases, no government agency prosecuted the defendants for the misconduct at issue in this case. As a result, [the direct purchaser class] did not have the luxury of utilizing or leveraging a preexisting investigation, indictments, or guilty pleas all but guaranteeing a massive recovery,” Scarpulla continued.

Based in Foster City, Gilead will head to trial again in April to defend allegations that it sold defective HIV medication to patients. U.S. District Judge Jon S. Tigar handed Gilead a partial win in September by granting summary judgment to Gilead on some claims but held that the company must face certain design defect and negligence claims.

“The court is not persuaded by Gilead’s argument that presenting evidence that a reasonable alternative design existed is insufficient to create a disputed fact over whether a design was defective,” wrote Tigar. “Gilead has cited no authority, and the court has located none, for the proposition that a plaintiff cannot withstand summary judgment on a design defect claim by presenting evidence of a reasonable alternative design.”

#376853

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Plaintiff moves to certify class in consumer fraud case against Nestle

DJ [dailyjournal.com/articles/376850-plaintiff-moves-to-certify-class-in-consumer-fraud-case-against-nestle](https://www.dailyjournal.com/articles/376850-plaintiff-moves-to-certify-class-in-consumer-fraud-case-against-nestle)

Jan. 24, 2024

Class certification is ideal for claims involving violations to California's Consumers Legal Remedies Act and Unfair Competition Law, argued Schonbrun Seplow Harris Hoffman & Zeldes LLP partner Helen I. Zeldes.

Counsel for a plaintiff in a long-running consumer fraud complaint against Nestle USA Inc. moved to certify a class.

The case relates to claims about how the confectionery conglomerate advertises how its chocolate products are farmed. The third amended complaint states the company deceptively labeled its products as "sustainably sourced," despite knowing that approximately two-thirds of its cocoa is farmed in West Africa through unethical child labor practices. *Marie Falcone v. Nestle USA Inc.*, 3:19-cv-00723 (S.D. Cal., filed April 19, 2019).

The certification motion was filed by attorneys at Schonbrun Seplow Harris Hoffman & Zeldes LLP and Reese LLP. They argued a class action was the most appropriate way to handle claims of violations to California's Consumers Legal Remedies Act and Unfair Competition Law.

These claims against Nestle "are ideal for class certification because they will not require the court to investigate class members' individual interaction with the product," Schonbrun Seplow partner Helen I. Zeldes wrote in the motion.

The plaintiff, Marie Falcone, seeks injunctive relief in the form of product labeling changes, monetary damages and restitution based on the full price that she and all other potential class members paid for various products.

"A full refund is appropriate because the products are worthless, and it is inherently unfair to sell them because contrary to their representations they are the product of child slave labor and environmental devastation," Zeldes wrote.

Nestle's attorneys at Gibson Dunn & Crutcher LLP denied the allegations and filed a motion to dismiss the third amended complaint in September 2022. It was denied last June by U.S. District Judge M. James Lorenz.

Gibson Dunn partner Theodore J. Boutrous Jr. argued Falcone failed to plead a plausible claim for relief “because she does not plausibly allege that the label statements she challenges are false and no reasonable consumer would be misled the way she alleges.”

Boutrous was not available for comment Tuesday.

Falcone’s complaint focuses primarily on the logo on products referencing the “Nestle’s Cocoa Plan,” which is often accompanied with the statement: “Sustainably Sourced Through Nestle Cocoa Plan Certified Through UTZ.” The label sometimes includes more information about the company’s initiative to support Ivory Coast cocoa-farming families.

Falcone claimed those statements were deceptive, meant to trick customers into believing the company’s products were “procured in accordance with environmentally and socially responsible standards, when it knows they were not. ... Had she been aware of the misrepresentations described herein, she would not have purchased Nestle’s products,” the amended complaint states.

In declining to dismiss the third amended complaint, Lorenz wrote that these “interpretive disputes” were best left to trial.

In her motion, Zeldes stated Falcone’s evidence will show Nestle’s representations likely cause deception to customers.

“The common question of deceptiveness, based on a reasonable person standard, will predominate over any individual questions,” Zeldes wrote. “The central question for the damages class is whether the sustainability representations were likely to deceive reasonable consumers under the circumstances.”

#376850

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Standard Contracts Would Improve Litigation Funding's Reputation

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Standardized agreements can play a pivotal role in improving transparency in litigation funding. To solve this challenge, the focus has historically been on standardizing the documentation itself. That's natural, given how the syndicated loan market has grown thanks to the work of the Loan Syndications and Trading Association in the US and the Loan Market Association in Europe.

However, this isn't the only approach. In the derivatives market, the International Swaps and Derivatives Association created a master agreement—a framework under which all derivative contracts globally could be transacted, followed a standard set of definitions and terms. This framework still retained flexibility to retain the bespoke nature of derivatives. In the spirit of creating frameworks, other practical standards were also agreed among market participants. Applying the same approach seems far more suitable for the litigation funding market.

Visualizing Standardization

To understand how this could work, the credit default swap market provides a useful reference point. Initially governed by the 1999 ISDA Credit Derivatives Definitions—updated in 2003 and 2014—standardized definitions and practices reaped enormous gains in market efficiency and transparency.

A CDS is a contract where one pays a quarterly premium for the term in return for the other paying the notional amount if the referenced corporate entity—e.g., Ford or GE—defaults during the same term. For example, pre-2003, a CDS didn't define clearly whether a restructuring event constituted a default.

The ISDA's 2003 update clarified restructuring into three categories that parties could select as appropriate, depending on the nature of the underlying risk. This removed any confusion around restructuring as an event of default, thereby making CDS contracts more credible and transparent.

An example of a practical standard agreed among market participants was the contract term where pre-2003, a CDS was traded to the anniversary of the trade date—i.e., a five-year CDS traded on Nov. 16, 2000, had a term date of Nov. 16, 2005.

However, the same CDS traded on Nov. 18, 2000, wasn't a perfect match because of the two-day difference, causing significant market inefficiencies. CDS contracts were globally harmonized to trade only to the 4 IMM (standard FX futures and option market) dates of March 20, June 20, Sep. 20, and Dec. 20.

A CDS traded on Nov. 16 or 18, 2000, now had the same Dec. 20, 2005, maturity date, simplifying the market and bringing significant efficiencies immediately.

Parallels to Funding

Numerous areas of litigation funding and insurance documentation, not just in the US but globally, could be similarly standardized and subsequently evolved over time to enhance the market's global credibility, legitimacy, and transparency. Just immediately, a few key basic concepts—among many others—come to mind that could be applied regardless of jurisdiction:

- Proceedings, commonly referred to as legal action, proceedings, litigation, or claims, the latter which often creates confusion with insurance policy wordings as claims refer to claims made under the policy.
- Funder profits, referred to as funder returns, success fees or funder commission, made even more confusing by the fact some funders calculate profits net of fees and taxes, while others don't.
- Reduced prospects, in particular the process to determine if the merits of the case have deteriorated, as this often gives the funder rights to terminate the LFA and the insurer rights to cancel the policy.
- Termination events and default provisions, which should be made consistent across all LFAs and policy wordings, giving courts and tribunals the confidence to know when LFA contracts may be terminated.
- Successful outcome, especially around partial settlements and success on liability-only trials, in addition to whether the trigger is a successful trial or a successful recovery of monies.
- Drawdown processes, which could be harmonized so there is one industry process globally.
- Waterfalls/priorities agreements, for example a menu of five standard waterfalls that could be picked.

And as the market evolves, more concepts will become obvious candidates for standardization.

Standardization Benefits

Harmonizing key terms and definitions would produce immediate benefits such as execution efficiencies—economic theory suggests these become savings passed onto plaintiffs. This approach would add significant credibility and sustainability by creating a deeper, more robust, global market, as it did for the syndicated loan and derivatives markets. It would also encourage openness and transparency, which is a major tool in removing rogue funders.

Most interestingly, it would address the supposed influence some argue foreign governments exercise through litigation funding. Although foreign governments have a stake in swathes of corporate America, litigation, with its connection to matters that have already occurred, is backward-looking in nature.

The litigation funding market's youth, size, and lack of structure probably creates the fear of interference. Standardization would bring a level of maturity that brings the market structurally closer to other financial markets. This framework would also provide the same constructive practical mechanisms that make the market no more vulnerable to foreign government influence than other financial markets.

An established trade body from the financial markets, such as ISDA, would be ideal. Alternatively, the International Legal Finance Association, along with the litigation and contingent risk insurance industry, could provide a great platform to drive such an initiative.

With the increasing range of professionals entering the litigation funding and insurance markets, this seems eminently more plausible and possible than even only three years ago.

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- Pilot is wrongly fishing for CEO communications, airline says
- Case questions legitimacy of socially conscious investing

American Airlines Inc. pushed back on a pilot's "absurdly overbroad" request to see documents related to its 401(k) plan's ties to BlackRock Inc. and investments aimed at environmental, social, and corporate governance strategies.

The airline says it's already turned over 401(k)-related communications between its benefits committee and BlackRock. Plaintiff Bryan Spence's request to see all exchanges between every employee of the two companies is both untimely and as "burdensome as it sounds," given that both employ tens of thousands of workers "with no plausible connection" to the litigation, American said in a Monday court filing.

"Plaintiff's request would require the review of tens of millions of emails that are facially non-responsive, including, for example, emails in which BlackRock employees book flights on American," the airline said.

The airline also opposed Spence's request to see communications from chief executive Robert Isom, calling this a "fishing expedition" based on misconceptions about Isom's involvement in the company's 401(k) plan or questions of ESG investing. The mere fact that American's sustainability report includes a "message from the CEO" doesn't indicate otherwise, the airline said.

Spence's lawsuit, which seeks to represent a proposed class of more than 100,000 people, says American's \$26 billion 401(k) plan improperly favored ESG funds and invested billions with BlackRock, which he describes as a proponent of the investment strategy. It's one of the first private-sector lawsuits to argue that a retirement plan fiduciary breached its duties by pursuing ESG investments—those aimed at promoting socially conscious goals—at the expense of workers' financial interests.

American said in a 2023 court filing that the case should be dismissed, calling Spence's legal theory "as wrong as it sounds." There are no ESG funds on the plan's core investment lineup, and such funds can be accessed only through a self-directed brokerage account, the airline said.

The case is assigned to Judge Reed O'Connor of the US District Court for the Northern District of Texas.

BlackRock is not a party to the suit.

O'Melveny & Myers LLP and Kelly Hart & Hallman LLP represent American. Hacker Stephens LLP and Sharp Law LLP represent Spence.

The case is Spence v. Am. Airlines, Inc. , N.D. Tex., No. 4:23-cv-00552, opposition 1/22/24 .

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EU Anti-Greenwashing Law to Shake Up Eco Advertising

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Jan. 24, 2024, 1:30 AM PST

Column

Rob Chesnut

Bloomberg Law

Rob Chesnut, former general counsel and prosecutor, writes on in-house and ethics issues. He says in-house counsel should start preparing for upcoming changes to how enforcers evaluate products' environmental claims in the EU and US.

It's getting harder to ignore the regulatory storm clouds gathering around greenwashing. On Jan. 17, the European Parliament overwhelmingly voted to implement a new directive banning businesses from making misleading or unclear environmental claims to consumers.

And the Federal Trade Commission is soon expected to issue its first guidance on responsible environmental advertising since 2012—known as the Green Guide. The eco-marketing party is about to end, and it's time for in-house counsel to get ready.

The new EU anti-greenwashing legislation is pending approval by the European Council. Member states would then have 24 months to implement the law nationally.

The proposed law would prohibit deceptive environmental marketing practices. It emphasizes transparency and accuracy in green claims, requiring businesses to substantiate their environmental assertions with a comprehensive assessment.

Such language as “environmentally friendly,” “biodegradable,” “sustainable,” and “climate neutral” would be banned in advertising or on packaging without concrete evidence. Only sustainability labels based on official certification schemes or established by public authorities would be allowed in the EU.

There's little question a regulatory crackdown on environmental marketing claims is overdue. Advertisers know consumers are deeply concerned about climate change and the environment, and see eco-advertising as a way to build their brand.

Studies show consumers want to buy sustainable products. But research also shows the market is awash with misinformation and misleading environmental claims, which can take many forms.

This includes misleading claims around packaging, particularly relating to “recyclable” or “compostable.” There is also vague terminology about products and services, such as “eco-friendly,” “sustainable,” “green,” “net zero by 2050.” Or marketing misdirects consumer attention from a product’s negative environmental impact by using green images.

The EU estimates 75% of products sold within the bloc carry some form of green claim, and over half of those claims are vague or misleading. A 2022 Harvard study found some form of greenwashing in 72% of social media posts by oil and gas companies, often trumpeting small low-carbon projects to rehabilitate their environmental image while expanding their core businesses of oil, gas, and coal.

There’s little doubt that when the new regulatory frameworks take effect, their enforcement will be a priority for the responsible agencies. Investigations will be painful, time-consuming, and well-publicized, and fines will be stiff.

Since green marketing is such a big part of brand advertising for companies of all sizes, it will take time for companies to make the necessary adjustments to comply with upcoming regulatory changes.

Revised corporate policies would include new labels, new social media campaigns, new marketing strategies. This work will all begin with the legal department, so in-house divisions should start budgeting some legal time now for the work that’s coming.

First, I’d start now by cataloging your use of green marketing—look at your packaging, labeling, sales materials, advertising, and social media, including statements made by your influencers. Be comprehensive.

For each claim, start collecting information that substantiates the claim, and ask whether the claim stands up to real scrutiny. Will it mislead the average consumer? You may find you have some bad habits to break—easy catch phrases “everyone uses” that sound good, but lack real meaning.

Second, if you’re a global company, start talking to your marketing team about the pending EU directive, and how it will impact your current practices. Expect updates to the FTC Green Guides, and determine what changes you’ll want to make as a business.

Do you want to change your products and packaging, for example, to better substantiate the claims you’ve been making or want to make? Perhaps your company has been putting off real sustainability-related changes that might now be necessary to live up to how you need

to portray your brand. Engage outside marketing law counsel now to help you think through your strategy.

Lastly, think about how you'll stay on top of the issue going forward. Do you have the legal resources to review all labels, ads, and social media posts before they go live without slowing up the business?

Think about creating a dynamic guidebook for your marketing with pre-approved claims that you're comfortable making, and specific "no go" claims that might be tempting, but would likely run afoul of the stricter regulations.

If your company has publicly pledged big things in the area of environmental responsibility and sustainability, the approaching regulatory winds may be a time of reckoning—and an impetus for real action.

Rob Chesnut consults on legal and ethical issues and was formerly general counsel and chief ethics officer at Airbnb. He spent more than a decade as a Justice Department prosecutor.

Read More Good Counsel

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Prosecutors Descend on DWS as Greenwashing Probe Drags on (2)

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- Information was handed over to stop a raid at DWS' Offices
- German prosecutors first searched DWS premises in 2022

German prosecutors descended on Deutsche Bank AG's investment arm DWS for a second time as part of a long-running investigation into whether the firm misled clients over its sustainability capabilities.

Law enforcement officials on Jan. 16 executed a search warrant at the firm's headquarters to obtain further evidence on the veracity of the greenwashing allegations, a spokesman for the office said in an emailed statement. The probe is targeting a former executive and yet unidentified employees, according to the statement.

A DWS spokesman said the firm avoided a raid of its offices by voluntarily handing over the documents that the law enforcement officials were seeking.

"We have provided further information on premises at the request of the Frankfurt public prosecutor's office," the spokesman said by email. "This concerns the publicly known and still ongoing investigation in connection with the greenwashing allegations made against DWS."

The incident serves as a reminder that DWS still hasn't fully resolved the long-running issues, which erupted when ex-Chief Sustainability Officer **Desiree Fixler** went public in 2021 with claims that the asset manager had inflated its ESG credentials. Frankfurt prosecutors first raided DWS in 2022.

DWS has since replaced then-Chief Executive Officer **Asoka Woehrmann** with **Stefan Hoops** and settled at least one related probe that was being conducted by the Securities and Exchange Commission.

"We have reviewed and shared a total of around 3 million documents - both on request and proactively," the DWS spokesman said in the email. "We will continue to cooperate fully in order to come to a resolution of this investigation as quickly as possible, but we are dependent on the timing of the prosecutor's office."

In September, DWS settled an SEC investigation into the same matter by paying \$19 million. The total fine paid was \$25 million at the time as it also involved other issues.

Handelsblatt first reported the news.

Read More: Deutsche Bank's DWS to Pay \$25 Million to Settle SEC Probes (1)

(Updates with search details in second paragraph.)

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Oil Companies' Win in Delaware Climate Case Vulnerable on Appeal

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- State judge narrows climate deception case
- Delaware appeals decision seeking reversal

Oil companies scored victories from a Delaware judge this month for the first time in years of ongoing climate litigation, but they face an appeal that could set back some of their wins.

Delaware is part of a coalition of cities, states, and counties that have levied lawsuits against energy companies over allegations that they lied about how their products fuel the climate crisis. Brought by state Attorney General Kathy Jennings (D) in 2020, Delaware's case is one of multiple that have made it back to state courts after yearslong federal court jurisdiction battles.

Judge Mary M. Johnston of the Delaware Superior Court on Jan. 9 narrowed the field of Delaware's eligible arguments, while still moving the case forward and leaving room to appeal the decision. Johnston granted and denied a mix of Delaware's claims, bestowing wins to embattled oil and gas companies that are rarely seen in this type of litigation.

"The trial court correctly rejected all of Delaware's climate change claims based on out-of-state and international emissions," Theodore J. Boutrous Jr. of Gibson, Dunn & Crutcher, counsel for Chevron, said in a statement.

"The court's decision is consistent with the decisions of the U.S. Supreme Court and a ruling by the U.S. Court of Appeals for the Second Circuit dismissing a similar case, which held that 'such a sprawling case is simply beyond the limits of state law,'" according to Boutrous.

The state filed an interlocutory appeal on Friday, asking the Delaware Supreme Court to take another look at Johnston's decision and "to clarify the scope of remedies available" for the "unprecedented harm" climate change has already imposed on the state.

In its appeal, Delaware says Johnston's decision conflicts with state law and runs counter to a decision by the Hawaii Supreme Court in a similar case from Honolulu. The state claims that an appeal is necessary to avoid substantial wasted time and expense as the case proceeds.

"Without immediate review, the State will need to expend significant public resources prosecuting a case that will not afford the State complete relief for the harms caused by Defendants' tortious activity," according to the appeal. "And if the Supreme Court ultimately

reverses the Order on appeal from a final judgment, the parties will need to conduct significant additional discovery and potentially a new trial.”

But Ryan Meyers, senior vice president and general counsel for defendant American Petroleum Institute, said they “believe that the deficiencies identified by the Delaware superior court in the state’s baseless allegations should be upheld on appeal,” according to a statement.

“This ongoing, coordinated campaign to wage politicized lawsuits against a foundational American industry and its workers is nothing more than a distraction from important national conversations,” Meyers told Bloomberg Law.

‘Extraordinarily Significant’

One of the biggest wins for companies came in Johnston’s decision to cut out interstate emissions from the case. She found that those claims “seeking damages for injuries resulting from out-of-state or global greenhouse emissions and interstate pollution, are preempted” by the Clean Air Act and beyond Delaware common law.

“The inability to hear a lawsuit in the state of Delaware for interstate effects, or out of state contributors, is extraordinarily significant in and of itself because it limits the state’s authority and reach and limits the size and scope of the overall claim,” George Mason University Antonin Scalia Law School professor Donald Kochan said.

If the decision isn’t reversed on appeal, it could increase the burden on climate plaintiffs to attribute specific harms to specific companies, a concern that has long been on the table in these cases but hasn’t yet been broached in the courtroom with judges that have been preoccupied with jurisdiction questions.

“It’s almost like a warning shot to plaintiffs that you’re not going to be able to get away with more generalized allegations when you are trying to hold defendants liable for action,” Kochan said.

‘Wrong’ Analysis

More so than a legal boost, Yale Law School professor Doug Kysar says the language of the decision contributes to industry efforts to spin these cases as doomed to fail—a strategy that could affect whether areas weighing similar litigation launch their own lawsuits.

Like with tobacco, opioids, and other sprawling litigation, plaintiffs turn “to tort law and public nuisance to try to address this unaddressed widespread harm,” Kysar said. “But for it to work, you need momentum, you need this snowball effect where lots of cities and states are going to get on board.”

The opinion's stance on preemption is especially vulnerable on appeal, according to Kysar, who found the decision to be too "quick" in its analysis.

"I have to believe that other actors will see what I see, which is that this is not even a chink in the armor," Kysar said of the decision's impact. "This is like a noticeable dent."

It remains to be seen how this decision may be used in similar cases that have made it to state and local courts in Hawaii, Colorado, and other municipalities. But Pat Parenteau, Professor of Law Emeritus and Senior Fellow for Climate Policy at Vermont Law, insists that "no one decision in any one state is going to govern another one."

Johnston's analysis was "very, very poor," Parenteau said. "It's not the way you approach federal preemption questions at all."

The judge based her preemption on emissions facts that aren't even quite at play in the case yet, according to Parenteau. The analysis failed to draw stark lines between what the tortious, or wrongful, conduct of the companies is, versus the damages that will eventually be sought when the cases get to the merits.

"Distinguish the tort conduct from the damages, where the emissions come in is on the question of damages," Parenteau said.

The case is Delaware v. BP Am. Inc. , Del. Super. Ct., No. N20C-09-097, Decision 1/9/24 .

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FirstEnergy selling downtown Akron headquarters for \$15 million

 [beaconjournal.com/story/news/2024/01/23/firstenergy-selling-downtown-akron-headquarters-for-15-million/72326941007](https://www.beaconjournal.com/story/news/2024/01/23/firstenergy-selling-downtown-akron-headquarters-for-15-million/72326941007)

NEWS

FirstEnergy selling 19-story downtown Akron headquarters, consolidating operations



Eric Marotta

Akron Beacon Journal



A fixture in downtown Akron for more than 40 years is up for sale as FirstEnergy Corp. works to move its operations to the west side of town.

FirstEnergy is selling its 19-story office tower at 76 S. Main Street, seeking \$15 million for the property it purchased in December for around \$49 million.

More:FirstEnergy to move out of downtown Akron, consolidate corporate offices in West Akron

In 2019, the company signed a 10-year lease extension with building owner McKinley Inc., which would have kept the headquarters downtown until 2035. Summit County property records show that FirstEnergy paid \$49 million for the 359,000-square-foot, Class A office building in December.

Young said that price included buying out the remainder of the utility's 10-year lease extension. The building's appraised value is \$18.4 million, according to Summit County property records.

Though FirstEnergy is seeking far less than what it purchased the property for, Young said the sale will benefit the company.

"Purchasing the building gave us the flexibility to exit our long-term lease ... so it made business sense for us to do so, so that would have that flexibility to combine our operations."

More:FirstEnergy staying put for decade

Plans are to move all operations this year from the downtown location to the company's West Akron campus on White Pond Drive, which would leave the South Main Street building vacant unless it is sold and reoccupied.

About 925 workers were at the building before the pandemic, when the company shifted operations, said Jennifer Young, manager of corporate communications for FirstEnergy. She said about 90% of those employees now have the option of working from home.

"After the pandemic, we instituted what we call a remote workforce," she said. "That's where a lot of our employees are not required to be in the office on a regular basis, and that impacted a lot of people who worked out of that facility."

The company had previously announced it would be consolidating facilities in Ohio, Pennsylvania and New Jersey.

The South Main Street building opened in 1976 with Ohio Edison as the main tenant. After the 1997 merger of Ohio Edison and Centerior Energy that formed FirstEnergy Corp., the company headquarters remained in the same building in Akron.

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Matt Levine's Money Stuff: Pastor Got His Crypto Scam Audited

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Audit

Often, if you are marketing an investment, it helps to have your thing validated by some trusted third party. If you've got a company and you want investors, it's good to send them financial statements that have been audited by a well-known accounting firm. If you're selling bonds, it's good to have a high credit rating from a recognized ratings firm. If you're a software company, it is good to have a security audit from a reputable firm.

If you are running a scam, all of this is also true, maybe even more so: If you're selling a fake thing, it is very helpful for you to say "this thing has been certified by a trusted third party." But of course that is hard, because the reason the trusted third parties are trusted is because they are in the business of *not* certifying scams, so they are unlikely to certify you.

There are ways, of course. Perhaps if you are clever you can deceive the auditors into certifying your financial statements. Perhaps you can bribe them. Perhaps you can hire (or set up) some shady fake auditor and give it a trusted-sounding name. Maybe your financial statements were audited by KMPG and your bonds are rated AAA by Moodie's Investors Service.

An approach that I had not really thought of is:

- 1. Go to a real, well-regarded, trusted auditing firm.
- 2. Ask them to audit your thing.
- 3. They conduct the audit and send you back a letter being like "no, see, this is actually a scam."
- 4. You go around to investors saying "you can trust us because we were audited by the good firm!"
- 5. The investors are like "ah well anyone audited by that firm must be fine" and give you their money.

Technically, I think, "we were audited by X" just means that they *did* the audited, not that you *passed*. It's maybe true? And yet misleading? Also seems not that helpful: A sophisticated investor would probably say "ah right let's see the audit report," while an unsophisticated one

probably wouldn't care, or recognize the auditing firm's name. Still. It helps with the patter; it gives things the ring of truth.

Anyway here's a Colorado Securities Commission fraud case against a pastor named Eli Regalado and his wife Kaitlyn, who started a crypto thing called INDXcoin, and a crypto exchange called Kingdom Wealth Exchange to trade it. Standard stuff, you know, God told them to sell crypto, etc.:

According to the complaint filed by the Colorado Attorney General's Office, investigators from the Colorado Division of Securities found that from June 2022 to April 2023, INDXcoin raised nearly \$3.2 million from more than 300 individuals. The complaint alleges that Regalado targeted Christian communities in Denver and claimed that God told him directly that investors would become wealthy if they put money into INDXcoin. ...

The Regalados allegedly continued to promote the INDXcoin as a low risk, high profit investment.

The complaint alleges that in reality, the INDXcoin was illiquid and practically worthless; investors lost millions; and Defendants dissipated investor funds to support their lavish lifestyle.

Again, the appeal to a trusted third-party authority (God). Plus some bizarre claims about the mechanics of the crypto thing; from the complaint:

The "INDXcoin, as described by Defendants in the Whitepaper, is purportedly an "index-based cryptocurrency that tracks and indexes the value of the top one hundred cryptocurrencies (ranked by market cap) through an AI-based data procurement mechanism sourced from multiple data points to ensure accuracy."

Nooo.

Defendants persuaded investors that the INDXcoin was uniquely situated to provide its holders with big returns. Defendants explained that INDXcoin was designed to be "a less volatile and risky coin to hold...with less exposure to the risks associated with single coin offerings." Defendants said INDXcoin was "immune to investors 'pumping and dumping' cryptocurrency through a coordinated liquidation event," as the value of the INDXcoin was pegged to "the overall momentum of the crypto market." Defendants' future plans would only provide more assurance to coin holders, acting to "solidify INDXcoin's global value, acting as the first line of defense against exchange-specific price volatility if a large portfolio holding INDXcoin is liquidated on an exchange."

Whatever. But for some reason they decided to go to a crypto auditing firm called Hacken, whose website tells me that they have done smart contract audits for crypto things including Binance. “Defendants touted the safety of INDXcoin and the KWE by telling investors that the coin and the exchange had undergone a rigorous audit.” How’d the audit go?

The auditor, Hacken, told Defendants their products’ “security score” was zero out of ten. Additionally, wrote Hacken, “[c]onsidering all metrics, the total score of the report is 0 out of 10.” ...

According to the Hacken report, “[w]hen proof-of-stake mining is enabled, value of reward in coinbase is not validated which allows to generate any number of new coins...In practice, it allows to generate an infinite number of new coins.” ...

To the extent that Hacken could evaluate Defendants’ code, Hacken highlighted that the code submitted by Defendants contained changes that “did not align with the standards upheld by Bitcoin Core,” and contained transcription errors that lead to “numerous critical issues.”

Seems bad! And yet also good marketing:

However, upon receiving the Hacken Report, Defendants posted in the KWE Community Forum the “BREAKING NEWS” that “INDXcoin has been proofed by Hacken! The toughest, most legit crypto audit in the world! And before we launch! We are so far ahead of 90% of the cryptos that have existed for years!”

Nowhere in the post did Defendants disclose that the results of the Hacken Report reflected that Defendants’ products were catastrophically technologically deficient.

Anyway I have been quoting the Colorado complaint, these are just allegations, etc., but Coindesk reports on Eli Regalado’s magnificent response to the charges:

The pastor – who had worked in digital marketing – responded in a video message posted on the project’s website, sharing a sentiment that’s unusual from a crypto founder cornered by government authorities: “Those charges are true.”

“We sold a cryptocurrency with no clear exit,” he said, explaining that God told him to build it and give investors ten times the money they put in. “We did. We took God at his word.”

“The Lord told us to walk away from our parking company. ... He took us into this cryptocurrency ... well, that cryptocurrency turned out to be a scam.... And I said Lord ... you told me to do this,” he said in the video.

The couple also took about \$1.3 million from more than \$3 million raised for the project. Regalado said about \$500,000 went to the Internal Revenue Service, and a “few hundred thousand” was devoted to a home remodeling project that “the Lord told us to do.”

Well right but you said that about Hacken too. I think I will need a bit more proof for the claim “God told us to do some scams and also remodel our kitchen.”

Private markets are not the new public markets

I used to say a lot around here that “private markets are the new public markets.” Part of this was about *fundraising*: In the olden days, companies would raise money privately early in their lives, but if they wanted to graduate to the big leagues — to get big, to be respected by customers and suppliers, and to raise a lot of money — they’d need to go public. But in the last decade, it became easier to raise lots of money at huge valuations without going public: There were more investors (big venture capitalists, sovereign wealth funds, SoftBank Group Corp., even mutual funds) that had lots of money and were willing to invest it in private companies, and globalization and improved technology infrastructure made it easier for those companies to connect with those investors. And so you could have household-name private companies that could raise billions of dollars at \$50 billion valuations without going public.

Part of it, though, was about secondary markets. Historically companies went public, not only to raise more capital, but to allow their early investors (and founders and employees) to sell stock. Private companies could raise money by selling stock to investors, but those investors couldn’t really *resell* the stock to anyone else; there were no organized markets for trading private-company stock. But that has changed too. For one thing, there *are*, sort of,

for

, though they have never really boomed as much as people hoped. (We

a

recently about one of them, CartaX, which was shut down ignominiously this month after misusing a startup’s data to pitch an investor on a trade.) Still there is more secondary-market trading between venture capitalists than there used to be, there are dedicated secondaries funds, and big private tech companies have where new investors buy old shares from employees, letting them resell before the company goes public.

Still there are some differences. The biggest might be that, for the most part, private companies can *prevent* trading in their shares. They can make their investors (and employees) sign agreements promising not to sell shares without the company’s permission (or without offering them to the company first, etc.). One reason for these agreements is that the companies just want to have some control over their stock trading, their shareholder base, etc. Your company might cheerfully let you sell as much stock as you want to

whomever you want, but you have to ask them first; or they might let you sell a lot of stock but not to an annoying activist investor; or they might expect you to be a long-term committed investor and not let you sell too much too fast.

Another reason, though, might be stock *price* management. Big private tech startups are, in part, in the business of giving their investors steadily growing valuations. Everyone involved in the startup — the founders, the employees, the venture capitalists — is betting on it making them rich. If the valuation steadily goes up, then that bet looks good. If the valuation goes down, then nobody wants the bet anymore; employees with worthless options are disgruntled and leave, and venture capitalists see things going in the wrong direction and won't invest more.

If you're a public company, your stock price goes up and down based on what people are willing to pay for it on the stock exchange; there's only so much you can do about it. If you're a private company, (1) your stock price goes up each time you do a fundraising round at a higher valuation, (2) your stock price does *not* go down if you do a fundraising round at a lower valuation, because you try very hard not to do that, and you

to avoid a lower price, and (3) your stock doesn't *have* to trade in the secondary market at all. If people want to buy your stock at a higher price than your last fundraising round, sure, why not, you can let them; that's a good print for your valuation. If people want to buy your stock at a *lower* price than your last fundraising round (and others want to sell at that price), you can stop them. You don't ever *need* to have a bad print. You can just decide that the stock can only trade at a higher price than the previous price; if no one wants to trade at a higher price, no one can trade.

And so as startup valuations were going up, private markets looked like the new public markets: People wanted to trade at higher prices, and companies let them. When valuations go down, though, things change.

That is too oversimplified, but it is also kind of true. Bloomberg's

:

lately, companies have gotten increasingly creative at trying to avoid being considered less valuable, particularly when investors seek to unload their stakes, either out of disenchantment or because they need the cash for something else.

This has sparked a sort of tug of war between investors and founders over the information needed to decide how much a company is worth. At least one venture capital outfit says it has stopped buying startup stakes on the secondary market because lack of access to financials makes it too hard for auditors to determine the fair value of the firm's portfolio.

A somewhat devious approach is to withhold information so no one feels comfortable trading:

One way to do so is by keeping some stakeholders in the dark about what's really happening at the company, since management typically isn't required to provide full information to anyone other than key backers contractually entitled to access. Until recently, though, even investors without those rights could often get such updates, says Javier Avalos, chief executive officer of data provider Caplight. "But in this tougher fundraising environment, far fewer are receiving them unless they have the explicit right," Avalos says.

Months before chat platform Discord laid off 17% of its staff in early January, the company went silent and refused to fulfill some investor requests for basic data such as revenue, expenses or cash-flow projections, according to people with knowledge of the matter, who asked not to be named discussing private information. Discord declined to comment.

Indigo Ag Inc., which helps farmers adopt more sustainable technologies, last January stopped issuing updates to investors, and the CEO and other staff ignored calls, according to people with knowledge of the matter. In July the company raised funds at a valuation of \$200 million, about 95% below the \$3.8 billion valuation it had in 2022.

But the simpler approach is just to (1) contractually require the company's permission to do trades and (2) refuse to give permission:

Grocery delivery startup Instacart, for instance, for years refused to allow most shareholders to sell. They were able to cash out only in the company's IPO last September, which yielded a market cap of \$10 billion, a fraction of the \$39 billion valuation the company had in a 2021 funding round. Instacart didn't respond to requests for comment.

Finance app Revolut was valued at \$33 billion in its most recent funding round, in 2021. But last year, when secondary market bidders were pricing it at about \$13 billion, it didn't approve transfer requests, according to people familiar with the company. Revolut says it allows secondary sales only immediately after funding rounds.

Important shareholders who try to sell their stake at a discount may get a call from the CEO discouraging the move because it would suggest a lower valuation to the market, brokers say. But at many startups, it's increasingly common for the CEO—and everyone else—to simply ignore requests for approval.

I guess that is rude? After years of rising markets, giant private companies and endless promises of private-market secondary liquidity, it is not what investors *expect*: They want to be able to sell, and think it's rude if they can't. But from a broader perspective it is *kind* of what they signed up for? Like if you invest in a startup, the traditional deal really is that you get your money back when they go public (or sell to a big tech company). For a while, you got the added bonus of being able to sell along the way. But that was never part of the core deal.

By the way, this problem too can be solved with structure:

Some sellers have developed workarounds to unload shares without the startup knowing. They can place their stake in a special purpose vehicle that a buyer can invest in. Others create so-called forward contracts: They officially retain ownership of the shares, but the buyer assumes the right to any future gains or losses and will become the registered owner after an IPO or sale of the company.

“I own some shares of a hot startup, but I can’t sell them to you, but I can sell you some sort of derivative claim on those shares” is in some ways the great financial product of the tech boom and also a great source of scams.

Elsewhere in third-party audits

Here is a report from Moody’s about shell companies. “Shell company” is a somewhat vague term, referring to “corporations without significant business assets or operations,” in Moody’s words. There is in general nothing particularly nefarious about having some spare corporations lying around, to optimize liability or ownership or debt subordination or jurisdiction or, yes, fine, of course, taxes. (When I was a young mergers-and-acquisitions lawyer I would occasionally form a bunch of Delaware shell companies for future use doing mergers, and I always got a tiny Bond-villainish thrill from putting my name on them.) But, says Moody’s, “these legal instruments can be abused by bad actors to launder money gained through illicit activities, such as trafficking and environmental crime. They can create a mask for sanctioned individuals to disguise their business ownership, and they can hide financial crimes, such as tax evasion, fraud, and bribery.”

So Moody’s analyzed a database of “more than 472 million companies” to identify red flags for when a company might be a *bad* shell company, or a shell company anyway?

Moody’s industry practitioners say that a company that raises two or more flags may be at a heightened risk of being a shell company, that is to say, a corporation without active business operations or significant assets. The indication that an entity is a shell company gives customers the ability to further investigate whether the company is potentially being used for illicit activities.

Red flags include “mass registration” (if someone forms 100 companies on the same day, they’re probably shells), “jurisdictional risk” (Panama), “financial anomalies” (“a China-based textiles and clothing manufacturer reported more than \$2 billion in revenue in 2019 — and only one employee”), “dormancy,” “circular ownership” and “atypical directorships” (too many directors at a company, or one director being on too many boards). And: “By sector, the

business services sector raises the most flags with approximately 3.6 million total,” which sounds right; if you’re going to set up a fake company it will probably be in the “business services” sector rather than, like, biotech. (“Wholesale” comes in second.)

But the best red flag is director age. Directors of big public companies tend to be serious professionals chosen for their expertise and judgment, but directors of shell companies are often warm bodies chosen for their willingness to sign their names to documents. (Again, as a young mergers-and-acquisitions lawyer, I probably made myself a director of a few merger subs.) Directors of *shady* shell companies, then, have some propensity to be ... cold bodies? People who signed fake names to documents?

The average age of registered company directors in Moody’s database is 52 years. A director is typically appointed by the company’s shareholders or board of directors, and their name is listed on the public register of the company. In many jurisdictions, minors under the age of 18 aren’t eligible to be directors.

Moody’s tool has revealed thousands of directors who are as young as zero or older than the world’s longest-living person on record. One listed director — at 943 years old — would have been born in the 11th century. This director is allegedly a minority shareholder and beneficial owner of a Belgium-based business services firm that incorporated in 2018.

Har har har but also there are allegedly more than 30,000 shell company directors who are older than 100? Seems high.

Elsewhere in crypto security

Crypto as an industry is getting a bit better at

?

The number of North Korean-linked hacks of cryptocurrency platforms rose to a record high in 2023, though the actual amount of funds stolen dropped around 40%, a report Wednesday from blockchain analysis firm Chainalysis Inc. showed.

In a series of 20 hacks throughout the year, cybercriminals linked to the Democratic People’s Republic of Korea siphoned slightly more than \$1 billion worth of cryptocurrency, compared to \$1.7 billion in 2022. North Korean hackers often target cryptocurrency to raise money as a way around international sanctions, according to US officials. ...

Better security practices, coupled with an overall decrease in DeFi activity, were most likely behind the decline in funds stolen in 2023, Chainalysis said. More DeFi applications are improving their code auditing and receiving guidance from companies like Microsoft Corp. and Alphabet Inc.’s Google on how to strengthen their networks, according to Plante.

I guess. CoinMarketCap tells me that the total market capitalization of crypto peaked at almost \$3 trillion in late 2021, was over \$2 trillion for much of early 2022, and then fell below \$1.5 trillion for late 2022 and most of 2023, before rallying into the recent Bitcoin exchange-traded-fund excitement. The *average* daily market cap of crypto in 2022 was about \$1.3 trillion; in 2023 it fell to \$1.18 trillion, down about 10%. The peak in 2022 was \$2.25 trillion; in 2023 it was \$1.68 trillion, down 26%. Surely *part* of why North Korea was able to steal less money from crypto in 2023 than in 2022 was improved security, but probably part of it is also that there was less money in crypto in 2023 than in 2022.

Workplace excellence

If you are a big bank and you want your employees to work from the office three days a week, and some of your employees don't do that, it seems pretty reasonable to send those employees a letter saying "our policies require you to be in the office at least three days a week, you have not met that requirement, and if you keep it up you might get fired." A lot of companies, understandably, have some sort of work-from-the-office policy, and if you have that policy, you will probably need an enforcement mechanism, warnings of consequences, records of warnings of consequences, etc., the whole apparatus of human resources formality.

Still the *language* here just sounds like it was generated by an artificial intelligence set to "evil":

Bank of America has sent "letters of education" to employees who have not been showing up at the office, warning them of disciplinary action, in the latest move from a large company to push staff back to the workplace.

One of the messages said its recipient had failed to meet the bank's "Workplace Excellence Guidelines" for work location "despite requests and reminders to do so".

"Failure to follow the workplace excellence expectations applicable to your role within two weeks of the date of this notification may result in further disciplinary action," according to the text of the letter that a BofA employee posted online.

You can say "showing up at the office" instead of "workplace excellence expectations"! That's clearer and less, like, dystopian. You can call it a "warning" instead of a "letter of education." Why does everyone have to be so *weird* about return-to-office.

Things happen

Regional Banks Had Another Ugly Quarter. Thoma Bravo, Permira Plan Exits as PE Firms

. AI expert warns of algo-based market manipulation. For Property Investors, the Price of Homes Is Still Not Right. Credit Card Debt Is Up—and It's Taking Longer to Pay Down. Ackman Ramps Up Israel Support With 5% Stake in
 . Oil Trader Sues UAE Claiming Bankrupted His Firm. China Beefs Up Support for By Easing Loan Uses. China cuts bank reserve ratio to boost growth as sentiment sours. Desperate Chinese Property Developers Resort to Bizarre Marketing Tactics. Chipotle Looks to Hire 19,000 Workers to Handle This Year's '
 .' Potty-mouthed parrots teaching other birds to swear as zoo hatches plan to stop problem. Woman Arrested for Allegedly Stealing \$2,500 of Stanley Drinking Cups.
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- 1. By the way, I feel like this was just in crypto? It was not uncommon for people to decide to make a crypto thing that was pegged to the price of some other crypto thing (a crypto index, etc.), or some other non-crypto thing (a startup's stock price, etc.). But the pegging mechanism was not, like, "we will hold a basket of the reference thing, create and redeem tokens for the reference thing, and generally set up an arbitrage mechanism to preserve the peg." It was just vibes-based, just "wouldn't it be *nice* if this thing tracked the price of something else?"
- 2. When CartaX, for pitching an investor in a startup called Linear on selling stock, it's not clear that Linear even cared about the investor selling. It just didn't want the investor contacted without Linear knowing about it first.
- 3. Unless Fidelity is one of your investors, in which case (1) they will publicly disclose their updated valuations, (2) they will feel free to mark down your value and (3) there will be lots of news stories about it. If I google "Fidelity marks down Twitter" I get more than 2 million results.

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ADM Accounting Probe Centers on Dubious Footnote Investors Watch

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news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThkLTM3YWMTZDFiYS1hN2ZkLWJmZmYzYTJhMDAwMCI6ImN0eHQiOiJTTE5XliwidXVpZCI6ImpOOFM0UnBpMXg0OEpsSHphem5tTkE9PUtvM1laRXVYYmJRbzJGL252ZGNhZHc9PSIsInRpbWUiOiIxNzA2MDk4MzY3NTk3Iiwic2lnIjoieVFTNWV0bjQrN1IzcXdyOHlHVDJJeEhrOUFJPSIsInYiOiIxIn0=

- ADM investigating reported revenue for its nutrition division
- Investors have long sought better segment revenue reporting

A probe into Archer-Daniels-Midland Co.'s accounting is aggravating investors' long-time concerns that large, complex companies are more prone to the risk of undetected manipulation of crucial financial figures.

The Chicago-based agricultural giant has released few details since it said Sunday that it had suspended its chief financial officer and cut its earnings forecast, sending its stock tumbling 24%. A Securities and Exchange Commission request for information sparked the company's inquiry into how it reported revenue for its nutrition business, one of three major operating divisions, including any transactions among those units that could have impacted the totals.

Corporate managers have wide latitude under US accounting rules on how to divvy up their results and set what business units charge each other for services or supplies. But shifting revenues from one operating segment to another could mislead investors, and any intentional mingling could cast doubt on the reliability of the company's other financial reporting.

"If a segment is struggling or has come under increased scrutiny from investors, then arguably there is certain incentive that management has to prop that segment up if it would otherwise not look as good as investors would like it to look," said Bruce Pounder, founder of GAAP Labs, an accounting advisory firm. "At its worst, the manipulability could be deliberate and thus fraudulent."

That discretion given to corporate leaders also poses challenges for regulators and auditors who police the reporting. ADM's auditor is Ernst & Young LLP, which has worked with the crop trader since 1930.

A spokesperson for ADM declined to comment. EY did not immediately respond to a request for comment.

Over the past decade, ADM sought to diversify its portfolio with a push into making ingredients for animal and human feed products. But expansion in the segment trailed off in the past two years from double-digit earnings growth reported in 2021.

The company's CFO Vikram Luthar, who was placed on administrative leave, had been in the role for less than two years and previously was the CFO of ADM's nutrition business.

Segment Disclosure

Investors often track the performance of specific operating segments whether it's animal feed or cloud computing, said Bill Floyd, president of Floyd Analytics, an accounting analysis firm.

"Getting that breakdown was incredibly valuable to you," Floyd said. "If they just gave you aggregate revenue, it's hard to drill into."

Companies also like to show stable income especially in new or high growth businesses that get more scrutiny from analysts. One way to do that is through the prices those business segments charge one another for products or shared costs, helping one segment without hurting a larger or more established branch of the company.

Some companies report their segments by geographic location, such as McDonald's Corp., which divides its segments based on where in the world it sells burgers. Others, like Walt Disney Co., define their segments by business line, such as media and film in one segment and theme parks in another.

Companies have long resisted the now almost 50-year-old accounting requirements, concerned about providing too many details to competitors or hampering their ability to manage earnings. That pushback also can create headaches for auditors, who have no outside customer or entity to check the numbers against.

Unlike topline revenue, which is reported on the face of the income statement, segment revenues are reported in a footnote tucked into the reams of disclosures that follow the financial statements and may not receive the same level of scrutiny.

The subjective nature of segment reporting also makes SEC enforcement difficult, said Tom Selling, a retired consultant and former academic fellow in the commission's Office of the Chief Accountant.

"There's very rarely a smoking gun," Selling said.

New Rules, Expanded Reporting

For years, companies only had to report profits or losses within each segment. Under a Financial Accounting Standards Board update that goes into effect in 2025, companies must break down further details about expenses in their segments, such as payroll or costs of goods sold.

The updated rules, part of Generally Accepted Accounting Principles, promise to arm analysts with more details, but they won't address the underlying quality of the reporting, Pounder said.

"Nobody out there who wants that information is happy with what they're getting under existing and now new GAAP around segment disclosures," he said.

-With assistance from Nicola M. White

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ADM Puts CFO on Leave as Farm Giant Probes Accounting

Company says it is cooperating with the SEC after receiving a document request

By [Patrick Thomas](#) [Follow](#)

Jan. 21, 2024 7:09 pm ET



ADM says it expects to delay its fourth-quarter earnings release and full-year 2023 financial results.
PHOTO: DANIEL ACKER/BLOOMBERG NEWS

Agriculture company Archer Daniels Midland **ADM 1.06% ▲** placed its chief financial officer, Vikram Luthar, on administrative leave as it investigates accounting practices at the company.

The Chicago grain merchant and commodity trader said that the continuing investigation centers around ADM's nutrition business and that it follows a voluntary document request by the U.S. Securities and Exchange Commission.

ADM said Luthar's leave is pending an investigation by outside counsel and its board's audit committee, focused on certain intersegment transactions in the company's nutrition business. ADM said it is cooperating with the SEC, and a

company spokeswoman declined to comment further. The SEC didn't respond to requests for comment.

"The board takes these matters very seriously," company director Terry Crews said in a statement Sunday.

Ismael Roig will serve as interim CFO, the company said. Roig has most recently been ADM's president of Europe, the Middle East and Africa, and the company's animal-nutrition unit. He has served in a variety of operational and financial leadership roles since joining the company two decades ago.

ADM said it expects to delay its fourth-quarter earnings release and full-year 2023 financial results from its usual late January reporting schedule. The company said it now expects to report above \$6.90 in adjusted earnings per share for its 2023 fiscal year. ADM said it is withdrawing its forecast for its nutrition unit.

The company said it expects to report fourth-quarter and full-year 2023 operating profit for its larger segments, which include its commodity trading and ethanol businesses, in line with prior estimates.

ADM has spent billions of dollars over the past decade trying to expand its nutrition business, which designs and sells ingredients for products such as protein drinks, plant-based meat alternatives and animal feed. Its efforts have included acquiring European ingredient companies and makers of pet food and livestock feed.

Profits for the business have lagged behind analysts' expectations in recent quarters, partly because of a decline in demand for plant-based food products. ADM has said that growing the nutrition unit would help make its business less susceptible to commodity price swings in its sprawling grain trading business.

ADM reported more than \$101 billion in revenue in 2022, and roughly \$8 billion of that came from its nutrition segment. In its latest quarter, the company's nutrition business generated an operating profit of \$138 million, down from \$177 million the prior year.

ADM's stock has declined about 20% over the past 12 months. Commodity prices have fallen globally, after grain prices surged in 2022 in response to Russia's

invasion of Ukraine, benefiting commodity-trading firms.

Write to Patrick Thomas at patrick.thomas@wsj.com

Appeared in the January 22, 2024, print edition as 'ADM Puts CFO On Leave During Accounting Probe'.

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Securities Law

Jan. 24, 2024, 9:09 AM PST

ADM Unit Being Probed Helped Make Leaders Over \$70 Million (1)

By Tarso Veloso and Anders Melin

- Segment had less than 10% of sales but large bonus weighting
- It's unusual to put so much weight on a small unit: expert

Bloomberg Law News 2024-01-24T14:25:48222826176-05:00
ADM Unit Being Probed Helped Make Leaders Over \$70 Million (1)

By Tarso Veloso and Anders Melin2024-01-24T12:09:34865-05:00
Segment had less than 10% of sales but large bonus weighting
It's unusual to put so much weight on a small unit: expert

The division of Archer-Daniels-Midland Co. that's [under investigation](#) for its accounting practices is responsible for less than 10% of the crop giant's revenue. Yet it has had an outsized influence on recent executive bonuses, records show.

ADM's board in 2020 and 2021 staked a considerable share of senior executives' stock award payouts to the profitability growth of its nutrition unit. The company blew past the goals for the first round of awards, helping the executives collect shares worth more than \$70 million. Payouts for the second round of awards were set to be determined early this year.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/X23LL2HK000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6...>

1/5



WATCH: Archer-Daniels-Midland is under investigation for its accounting practices.

Source: Bloomberg

ADM disclosed this past week that it had suspended its chief financial officer and opened a probe of the nutrition unit. The news triggered a selloff in the company's shares that wiped out almost a quarter of its market value.

The company declined to comment.

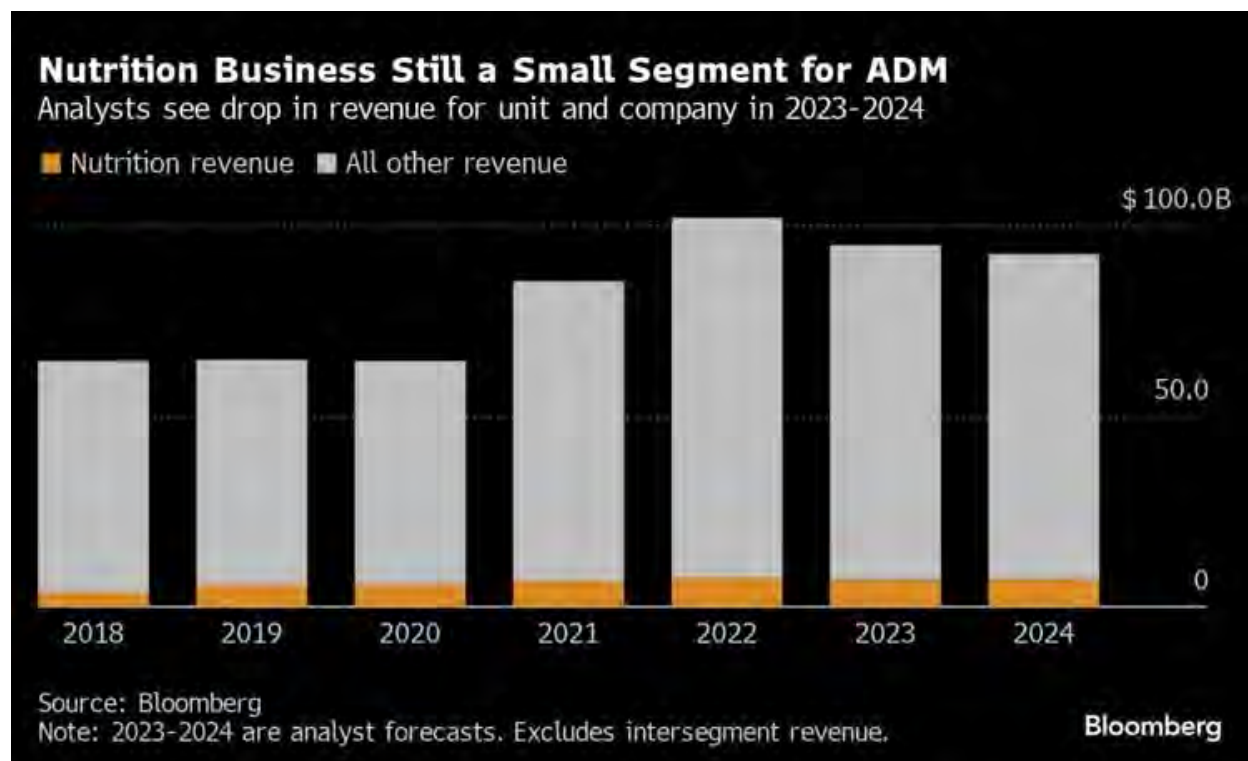
Read more: [Accounting Probe Centers on Dubious Footnote Investors Watch](#)

ADM's senior executives, like many peers at large public companies, receive a big part of their compensation in the form of stock awards. Roughly half of these awards, which are granted annually, vest after three years largely depending on how the company performs on a few specific key metrics. The other half vests after three years as long as the person remains on the job.

The portion that's linked to performance targets is now in focus. For awards like these, boards typically select metrics that reflect the company's broader financial goals, like adjusted earnings, return on invested capital or stock return relative to rivals. ADM's board for many years followed this principle.

But in 2020, it removed adjusted earnings before interest, taxes, depreciation and amortization as one of the key metrics for executive stock awards and added something much more specific: growth of average operating profit in the nutrition segment. The three-year average had to exceed 10% for executives to receive their target payout. If the unit's growth hit 20%, they stood to receive twice as many shares.

"Some of these changes were designed to emphasize our focus to significantly grow the nutrition segment of our business," the company said in a filing at the time. In the most recent quarterly report, the unit made up about 8% of total company revenue.



For the 2020-2022 period, average growth in the unit was 21.4%. Because the company also exceeded the top threshold for the second key metric – average adjusted return on invested capital across ADM – the company's seven top executives collectively received shares worth about \$72 million in January 2023, filings show.

It's not clear how much they stand to receive for the awards granted for the subsequent performance period, which also are partly tied to profit growth in the nutrition segment. But filings suggest that executives had the potential to reap payouts of a similar magnitude if targets were exceeded.

Seeing such a large weight on a narrow metric for equity incentives "is highly unusual," said **Kevin Murphy**, a finance professor at the University of Southern California's Marshall School of Business.

For awards set to run from 2022 to 2024, ADM's board replaced the nutrition unit metric with adjusted earnings per share, saying it is "one of the primary basis on which we set performance expectations for the year" and a widely used measure of corporate performance.



ADM and its rivals in the so-called ABCDs of major crop merchants – a group that also includes Bunge Global SA, Cargill Inc. and Louis Dreyfus Co. – have all been looking for ways to diversify beyond their main businesses. Although Chicago-based ADM is more than 100 years old, it only began to push into nutrition in earnest in 2014 with the \$3.1 billion acquisition of Wild Flavors GmbH, a European maker of food flavorings and colors.

Read More: [ADM Probe Highlights Struggle to Expand Beyond Crop Trading](#)

A US Securities and Exchange Commission request for information triggered the company's inquiry into accounting practices at its nutrition business. ADM has released few details since Sunday, when it announced placing Vikram Luthar, then CFO, on administrative leave. It hasn't said what quarters or years of results might be under review.

The company has a clawback provision, meaning it could choose to recover any payments in the event of misconduct or financial restatements, though that's often easier said than done.

"In general, it is difficult to recoup already-paid-out awards for executives who have already paid taxes on, and sometimes spent, the awards," Murphy said.

(Adds additional details in third to last paragraph)

--With assistance from **Rob Du Boff**.

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Boeing 757 Loses Wheel Before Delta Flight Takeoff, Sparking FAA Probe

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Jan. 24, 2024, 10:20 AM PST

By Andrew Jeong

(Washington Post) -- The Federal Aviation Administration is investigating how a Boeing aircraft operated by Delta Air Lines lost the tire on its nose while taxiing for takeoff at Hartsfield-Jackson International Airport in Atlanta, the agency said Tuesday.

The incident, which happened Saturday, involved a Boeing 757 plane that was headed to Bogotá, Colombia. "The passengers deplaned and were bused to the terminal," it said in a statement.

A preliminary FAA report posted Monday said the nose wheel had rolled down a nearby hill. There were no injuries, according to the report.

Delta said a nose gear tire and rim had come loose from the landing gear and passengers were transferred to a replacement aircraft. "We apologize to our customers for the inconvenience," it said in a statement.

The aircraft returned to service the next day, a Delta spokesman said via email.

A spokesperson for Boeing said the plane in question is 32 years old, adding that the company stopped building the 757 in 2004.

The incident comes amid intense scrutiny for Boeing and follows an accident earlier this month in which one of its 737 Max 9s, operated by Alaska Airlines, lost a chunk of its body midair, leaving a gaping hole beside a row of seats and endangering passengers. There were no fatalities, but federal officials grounded 171 of the Max 9s for inspections.

Alaska Airlines has checked its fleet of 65 Boeing 737 Max 9s since the Jan. 5 accident and said it found loose bolts on many of those jets, according to Ben Minicucci, the carrier's chief executive.

Lori Aratani contributed to this report.

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-0- Jan/24/2024 18:20 GMT

Opinion **Inside Business**

A crash test scandal is prompting changes at Toyota

World's biggest carmaker's plans for an overhaul at its subsidiary could extend into its broader governance structure

DAVID KEOHANE



A Daihatsu plant production line in Oyamazaki, Japan. Koji Sato, Toyota chief executive, promises plans will be revealed for an overhaul of Daihatsu next month © Bloomberg

David Keohane YESTERDAY



A scandal over safety testing at Japanese carmaker Daihatsu is shaping up as a pressure point for change at its parent Toyota.

After [Daihatsu](#) revealed last year widespread problems with crash safety testing dating back more than three decades, the world's biggest carmaker by sales has been scrambling to deal with the fallout.

Following a Transport ministry raid on Daihatsu headquarters late last year, the subsidiary suspended all worldwide vehicle shipments. And last week the government said it would revoke certification on three of the subsidiary's vehicles, essentially halting production of them until licences are regained.

Such is the concern over the repercussions for Daihatsu and its massive base of suppliers, that it was even raised in a Bank of Japan press conference. The BoJ's Osaka representative Takeshi Nakajima warned that the central bank needed to "carefully examine the impact on corporate profits and business sentiment".

Koji Sato, who only took over as Toyota chief executive in April, promises Toyota will reveal plans for an overhaul of Daihatsu next month, hinting it could potentially take in the governance structure of the broader group. The intriguing thing for [Toyota](#) watchers is how far that extends amid increasing questions over the underlying strategy that has underpinned the carmaker's growth.

Not only could the scandal force Daihatsu and Toyota to redesign the affected car platforms but it could also force changes to the group's sprawling web of affiliates and suppliers. After all, it is not the first scandal to hit a Toyota subsidiary. In 2022, truckmaker Hino [lost](#) some of its licences after admitting to falsifying emissions data.

One analyst, speaking on condition of anonymity, said that what was happening in Toyota's network was a function of capitalism rather than systemic governance failures. Essentially, the Toyota group is very big and therefore it will suffer problems. And the solutions proposed for Hino, where Toyota is a majority shareholder, are not going to be the same as at 100 per cent owned Daihatsu.

However, others, including perhaps Toyota, think there is more going on. Sato said changes to be outlined next month by Toyota chair Akio Toyoda would strengthen its group governance so its large network of subsidiaries could adopt the "Toyota group philosophy".

An investigation panel looking into the safety issues noted that pressures had been placed on Daihatsu employees as the company increased production of overseas compact cars for Toyota and other carmakers and wrestled with tight deadlines for delivery. A third-party investigation panel has discovered 174 safety irregularities, which affected a total of 64 models including 22 models sold by [Toyota](#).

"It's important for us to manage the group as a whole so that it can demonstrate its collective strength," Sato told reporters. "What's happening now shows that we are facing challenges" with the way the group is being governed.

What that means is unclear. It could involve smoothing out production pressures between companies more efficiently; or making sure Toyota has more oversight over the engineers and the factory floor at its subsidiaries; or something else entirely. But as with everything Japan's most valuable company does, it will be worth monitoring.

One of the main points of the current structure, and why companies like Mazda, Suzuki and Subaru joined the Toyota family, was to provide protection as the pressure of investment in electric vehicles mounted. But analysts are questioning how far that logic holds.

Toyota has already [unwound](#) some of its many cross shareholdings in an effort to mobilise resources that can be used to fund the shift away from combustion engines. And there is a sense among some analysts and investors that the move towards battery EVs will accelerate changes to the way the group operates.

“The scale of the group seems to be a strength at the moment. But if you go into battery EVs and if engines are no longer how you differentiate automakers and brand, then maybe this kind of large scale can be a bit of a liability and some kind of consolidation might be needed,” says James Hong, auto analyst at Macquarie.

Sato himself admitted last week that “what’s important is not that each of the members of the Toyota group is protected but that each demonstrate its expertise so that the group of firms can contribute to the car industry through their collective strength”.

The question Toyota can answer in February is whether its current structure allows those firms to do exactly that.

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Jan. 23, 2024, 11:56 AM PST

IPO Investors Call for Rules to Keep Anchors From Selling Early

By Amy Or

- Backers want 180-day lock-up for cornerstones: KKR survey
- Choppy post-IPO trading in Arm, Birkenstock dampened sentiment

Bloomberg Law News 2024-01-24T10:40:21468887647-05:00

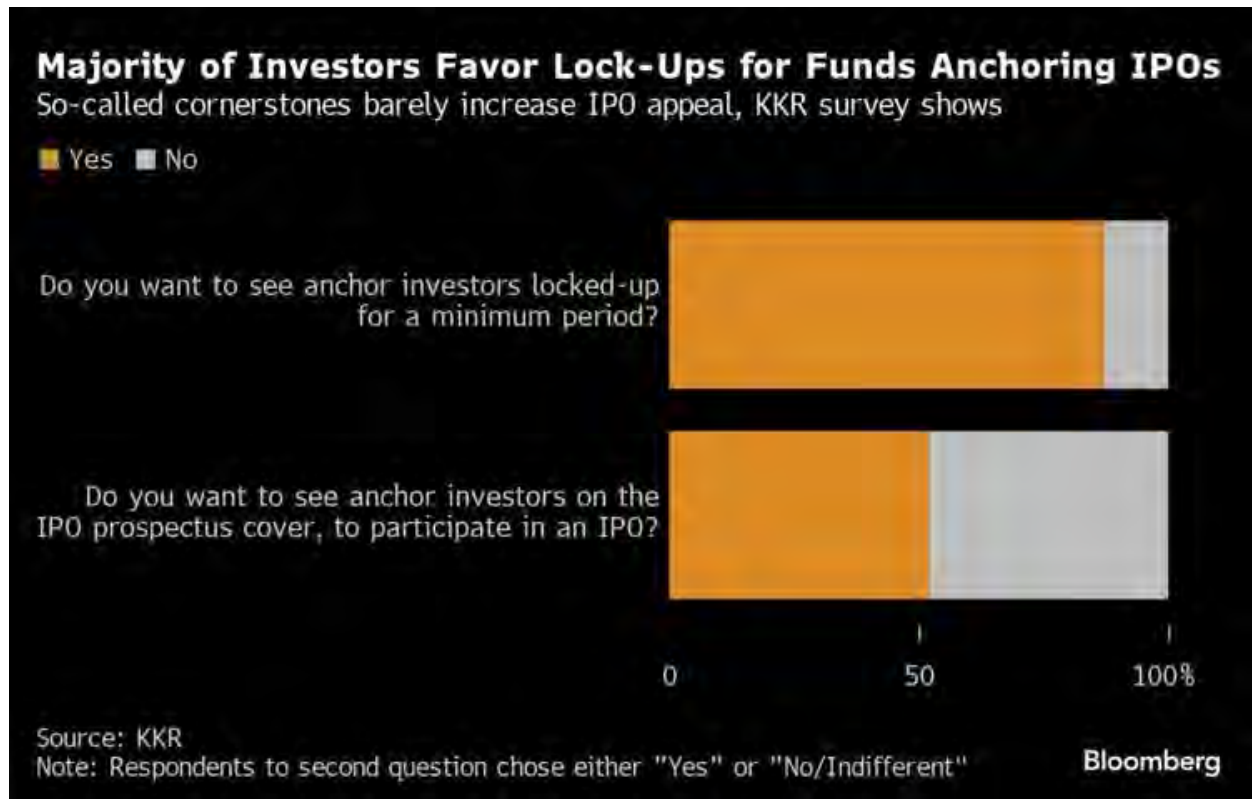
IPO Investors Call for Rules to Keep Anchors From Selling Early

By Amy Or2024-01-23T14:56:17369-05:00

- Backers want 180-day lock-up for cornerstones: KKR survey
- Choppy post-IPO trading in Arm, Birkenstock dampened sentiment

Some investors in US initial public offerings are demanding rules what they see as unequal treatment in the rules around how stock is allocated to so-called cornerstone investors in new listings.

An overwhelming 87% of 62 institutional investors said anchor investors — who agree to buy IPO shares before the offerings are sold to a broader group — should be required to hold onto their shares for a specified period after the listing, according to a KKR Capital Markets survey in December. In several prominent recent US listings where the companies chose to involve so-called cornerstones, no such restrictions on selling were imposed.



The polled investors, who collectively manage more than \$10 trillion in assets under management, were almost evenly split as to whether anchor investors should be introduced at all.

The survey comes after a group of sizeable IPOs in the second half of last year allocated as much as 90% of the available stock to a concentrated group of large, long-only investors. While bankers touted the benefits of having such investors on board as providing added confidence and stability for the deal, and there have been no indications that anchors sold down their stakes, companies such as Arm Holdings Plc and Birkenstock Holding Plc still saw choppy trading after their debuts. The slumps have weighed on sentiment for other potential issuers.

Read More: Investors Are Paying a Price as Bankers Get Cautious With IPOs

"For those companies that come to market with anchor investors, it will be important to see those anchors 'put their money where their mouth is', with a true lock-up structure in place to ensure alignment with new investors," said **David Bauer**, head of KKR's public equity capital markets business.

Nearly 70% of the investors polled by KKR think the lock-up duration should be 180 days, and another 11% believe it should be even longer, at 360 days.

Investors surveyed are generally upbeat about prospects of this year's IPOs, with 61% saying they don't expect the presidential election to reduce their appetite for new issues. Many respondents also expect the Federal Reserve to cut rates, with 59% of them forecasting the 10-year Treasury will end the year yielding between 4% and 4.5%, the survey showed.

Anchor Investors

Last year's fall class of new listings was characterized by prominent investors taking stakes in the new offerings, which had been relatively rare in the US before regulatory reforms in 2019.

Arm Holdings's \$5.3 billion September offering allocated as much as \$735 million worth of shares to its biggest customers, including Apple Inc. and Nvidia Corp. In the same vein, Birkenstock said it would sell up to \$300 million of its \$1.5 billion offering to the Norwegian sovereign fund, T. Rowe Price Group Inc. and veteran investor **Henry Ellenbogen's** Durable Capital Partners LP.

KKR is currently on the road marketing portfolio company BrightSpring Health Services Inc.'s IPO, which is set to raise as much as \$1.36 billion. The deal doesn't include a cornerstone allocation. Amer Sports Inc., which is in the market to raise up to \$1.8 billion in a new share offering, does have anchors, and stipulated a 180-day lock-up for share subscriptions from its three existing investors, according to a term sheet seen by Bloomberg News.

The risk with a concentrated allocation to the top dozen or so long-only funds is that smaller investors and hedge funds are left out in the cold. If the initial allocation is too small for the investment to matter in an investor's overall portfolio, they may not be inclined to further build their stake in the public market.

"Cornerstone investors are an important part of helping building momentum for the overall IPO market," said **West Riggs**, head of equity capital markets at Truist Securities. "It is also important that cornerstone investors do not take up too much of the overall allocation as the public float still needs to be large enough to work for the rest of the book."

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David Morris, Nina Trentmann

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SEC Imposes New Rules on Blank-Check Deals as SPACs Fizzle (2)

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Securities Law

Jan. 24, 2024, 8:15 AM PST

Lydia Beyoud

Bloomberg News

- Agency to vote Wednesday on conflicts-of-interest regulations
- Firms involved in deals could face increased legal threats

Wall Street's main regulator is demanding more investor protections for deals involving special purpose acquisition companies, tightening rules on a once-popular pathway for taking firms public.

After surging during the Covid-19 pandemic as an alternative to traditional initial public offerings, blank-check companies have fallen out of favor. In a move that could further reduce interest, the

approved new rules on Wednesday to make SPAC deals more like traditional IPOs — driving up legal risks and costs for those behind the transactions.

The US Securities and Exchange Commission

Photographer: Graeme Sloan/Bloomberg

Blank-check companies, which list on public stock exchanges to raise money so they can buy other companies, were touted as a faster and potentially cheaper way to do a public listing. But critics have long warned that deals can be rife with conflicts of interest and amount to an end-run of the traditional IPO process.

“Just because a company uses an alternative method to go public does not mean that its investors are any less deserving of time-tested investor protections,” SEC Chair Gary Gensler said ahead of a vote on the plan.

The regulations, which were first proposed in March 2022, revoke legal protections that shielded sponsors of the deals from getting sued by investors over embellished statements. They require the later part of the transaction, the so-called de-SPAC, to include more disclosures around forward-looking projections.

Even without the new rules in place, the once white-hot market for SPACs fizzled as the SEC's enforcement division stepped up scrutiny and interest-rate increases damped demand for risky investments. Just a few dozen blank-check companies went public last year after hundreds did so in the 2021 heyday, according to data from SPAC Research.

After the SEC proposed its rule changes, underwriters including Goldman Sachs Group Inc. and Bank of America Corp.

on their services for the market within a matter of months.

Read More:

The SEC is providing guidance on when it will consider firms to be underwriters, according to the agency. SPAC sponsors, frequently hedge funds, private equity firms and venture capital investors, also have to reveal more information about their identities, conflicts of interest, dilution and compensation under the new rules.

Mark Uyeda, one of the SEC's two Republican commissioners, said the new rules were simply intended to quash the SPAC market for good. "In order to achieve this desired outcome, the commission seeks to impose crushingly burdensome disclosure regulation on SPACs as a form of merit regulation in guise," he said in a statement for the meeting to vote on the plan.

A company that's targeted by a SPAC will also be required to register with the SEC before merging, and be subject to additional disclosure obligations. The rules will go into effect more than four months from now.

Accounting Tweaks

The agency is also adding new financial reporting and accounting requirements for SPAC deals. Companies looking to go public by merging with a blank-check firm will now be jointly liable legally for information shared with investors about the pending combination.

Those target companies also will have to provide financial statements audited by an independent accounting firm that follows US audit board rules, as is the case for traditional IPOs. The SEC will treat the merger as a sale to the blank-check company's public shareholders, clarifying who controls the newly created entity for accounting purposes.

(Updates with vote to adopt new rules throughout.)

--With assistance from **Bailey Lipschultz** and Amanda Iacone.

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<https://www.wsj.com/finance/regulation/sec-wants-to-make-sure-spac-investors-know-what-theyre-getting-into-510aca30>

FINANCE | REGULATION

SPAC Mania Is Dead. The SEC Wants to Keep It That Way.

New rules aim to make special-purpose acquisition company deals more like traditional IPOs

By [Paul Kiernan](#) [Follow](#)

Updated Jan. 24, 2024 12:41 pm ET



A looming regulatory push by the SEC under Gary Gensler is said to have contributed to the SPAC cool-down. PHOTO: MICHAEL BROCHSTEIN/ZUMA PRESS

WASHINGTON—The speculative bonanza in special-purpose acquisition companies, better known as SPACs, appears to be dead. Gary Gensler wants to make sure it doesn't come back to life.

The Securities and Exchange Commission, which Gensler chairs, voted 3-2 Wednesday to adopt rules that seek to make it clearer to SPAC investors if they are getting a raw bargain. Once the rules take effect in about five months, according to lawyers familiar with the deals, they will likely drive another nail into the coffin of a recent Wall Street fad fueled by market froth and regulatory arbitrage.

Also called a blank-check company, a SPAC is a shell firm that lists publicly with the sole intent of merging with a private company to take it public. After regulators approve the deal, the company going public replaces the SPAC in the stock market.

“Just because a company uses an alternative method to go public does not mean its investors are any less deserving of time-tested investor protections,” Gensler said Wednesday.

Voting against the SEC rule were Republican SEC commissioners Hester Peirce and Mark Uyeda, who accused their colleagues of seeking to regulate away a fundraising model that some companies find useful.

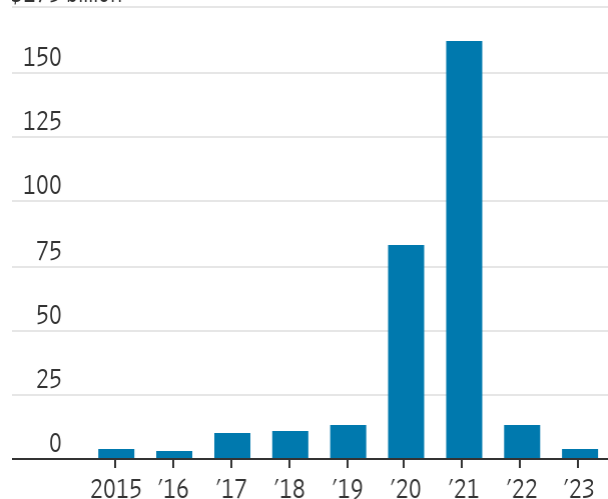
The American Securities Association, which represents small and midsize financial firms, criticized the SEC rules. “They will chill participation in the SPAC market and reduce the ability of private companies to access public capital markets,” ASA President Chris Iacovella said.

SPAC No More

Fundraising by blank-check companies has dried up after a short-lived frenzy.

Gross proceeds of SPAC IPOs

\$175 billion



Source: SPACInsider

More than 860 SPACs raised \$246 billion in 2020 and 2021, according to the data service SPACInsider, a period that also saw the rise of meme stocks and a cryptocurrency bubble. The blank-check entities bought companies with ideas ranging from flying taxis to small space rockets, essentially allowing them to sell stock to individual investors with few of the disclosures that accompany a traditional initial public offering.

Since 2022, SPAC fundraising has slowed to a trickle as regulators and courts questioned the model and financial markets sobered up amid

higher interest rates. Last year saw just 31 SPAC IPOs raise \$3.8 billion, SPACInsider data show.

“Things have changed forever,” said John Ablan, a partner at Mayer Brown who has advised clients on SPAC transactions.

One reason for the cool-down, he said, was the looming regulatory push by the SEC. The agency proposed Wednesday’s rule change in early 2022. Its goal is to give SPAC investors the same protections that investors in traditional IPOs receive, mainly by requiring more disclosures from companies and making executives liable for them.

Investors can also pull their money out before the transactions close—and often do if share prices are low. That can leave the newly public company with even less cash to grow. It also means there are very few shares available for trading after a deal is completed, a force that often drives the stocks haywire.

This recently occurred with Vietnamese electric-car startup VinFast, which was briefly valued at \$190 billion shortly after closing its SPAC deal. That is twice the combined value of Ford and General Motors, despite the company just starting to increase production. Its shares then tumbled.

Ahead of a normal IPO, companies have to be careful about any projections they make regarding their future performance. But SPAC targets—some of which had yet to begin operations—often made wildly optimistic forecasts about their revenue or market share. Regulators worry this encouraged SPAC shareholders to go along with acquisitions without understanding them.

SPAC deals typically include favorable terms for their creators, known as sponsors. They initially put up a small amount to cover expenses before the SPAC goes public and then get a 20% stake at a deep discount if the SPAC combines with another company. This makes it possible to earn returns several times the original investment—even if the acquisition is a bad deal for other investors.

During the boom, a group of hedge funds known on Wall Street as the SPAC Mafia cashed in by negotiating unique rights given to early investors.

For smaller investors, who were sometimes drawn in by participation from celebrities including Shaquille O’Neal, Jay-Z and Peyton Manning, the returns have been dour. Of 401 SPACs that have closed acquisitions since the beginning of 2021, only 27 have seen their share prices rise, according to SPACInsider.

“These vehicles were a road to nowhere for investors,” said Michael Klausner, a law professor at Stanford University who has sued several SPAC sponsors on behalf of investors. “They’re not going to come back—at least in their current structure.”

One reason most SPAC shares have performed so poorly is that their cash is heavily diluted by the time a merger takes place. After the sponsor’s cut, bankers’ and lawyers’ fees, and warrants held by early investors, a SPAC might only have 50 cents to invest in the target company for every dollar that its shareholders contributed, Klausner said.

Information about dilution in existing securities filings can be confusing and often scattered in different places. That makes it hard for SPAC investors to determine whether they should go through with a merger or redeem their shares beforehand, according to SEC staff.

The rules adopted Wednesday require additional disclosure about the potential for dilution in SPACs. The information will have to appear in standardized tables on the cover page of key filings.

In addition, SPAC acquisition targets that make forward-looking statements will generally have to show the bases for those projections and will be legally liable for their disclosures. SPACs will also have to disclose any conflicts of interest between a sponsor or its affiliates and ordinary shareholders.

Lawyers say warning statements from the SEC and uncertainty about the timing of Wednesday’s rules contributed to the die-down in SPACs because few sponsors wanted to raise money from investors and then face restrictions on how they could use it. Investment banks, which rode the SPAC wave as underwriters, also pulled back starting in 2022.

“Nearly two years after the commission proposed this rulemaking, the SPAC market is a shell of its former self,” said Uyeda, one of the SEC’s GOP commissioners. “The commission intends to never let them return.”

—*Amrith Ramkumar contributed to this article.*

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Banking Law News

Jan. 24, 2024, 2:00 AM PST

SPAC Industry Fears SEC's Rules Could Finish Off Ailing Market

By Bailey Lipschultz

- Investors, bankers waited nearly two years for final version
- SPAC market may be "grievously" wounded by decision: professor

Bloomberg Law News 2024-01-24T10:48:44801818661-05:00

SPAC Industry Fears SEC's Rules Could Finish Off Ailing Market

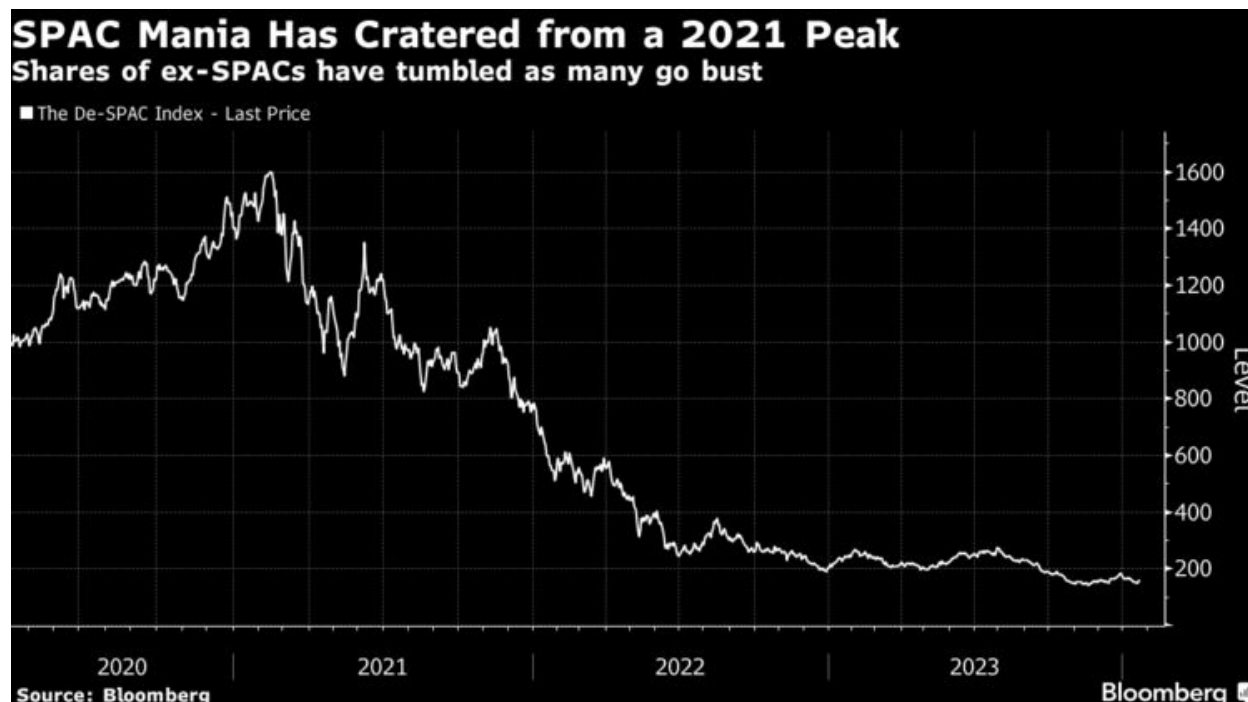
By Bailey Lipschultz2024-01-24T05:00:00002-05:00

- Investors, bankers waited nearly two years for final version
- SPAC market may be "grievously" wounded by decision: professor

Regulators are set to end a nearly two-year wait for the final rules around US special-purpose acquisition companies, and observers are warning that the battered industry could be effectively shuttered after having wiped out billions for investors.

The Securities and Exchange Commission will vote on the proposals in a meeting today, potentially capping the fallout from the pandemic-era deal spree by imposing more scrutiny and higher costs on deals.

The decision will likely add to the woes dogging potential issuers and advisers, along with higher interest rates and an oversupply of vehicles seeking private companies to merge with. It's a long way from the boom, which has since descended into spiraling share prices, companies thrust into bankruptcy, SPAC backers sued and dozens of others simply walking away.



If the final rules are similar to the proposals, the SPAC market will be “grievously” wounded, said **Usha Rodrigues**, a professor of corporate law at the University of Georgia School of Law.

The threat of increased regulation only addresses one of the drivers in the downturn of SPACs, according to Rodrigues. SPAC merger candidates have faced increasing skepticism from investors after a series of disappointing deals.

That said, “SPACs are a fluid corporate form — they can evolve quickly, and the great thing about them is we get to see that evolution in real-time,” Rodrigues said. The SEC could risk facing a lawsuit around its rulemaking authority, she said.

For some on Wall Street, the tighter rules are likely to be beneficial in the long-run as blank-check companies may be able to shake their negative reputation. **David Koch**, co-head of capital markets at Brown Gibbons Lang & Co., says the new rules will likely dent the number of SPACs in the near-term but may ensure that better-quality companies go public through the vehicle in the future.

“SPACs are a good alternative listing product to IPOs, but should be treated as such and not as a short cut,” Koch said. “Too many bad actors and poor execution came out of the loose regulation and quick-money heyday.”

The proposals, and waning euphoria, have already dented the market. More than 300 SPACs have liquidated since the start of 2022, with 120 still searching for deals, according to SPAC Research data. That’s on top of the fact that the median company to go public via blank check since the start of last year has plunged roughly 80% as bankruptcies pile up.

The SEC scrutiny will “continue to exacerbate the cooling of SPAC issuance, as well as raise costs and potentially increase liability for sponsors and underwriters,” according to Bloomberg Intelligence’s **Nathan R Dean**.

“We ascertain a 90% chance that it’s finalized when the SEC meets on Jan. 24,” he wrote in a note last week. “Given the industry has shrunk since 2021, we expect there will be minimal changes to the proposed version.”

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US SEC set to require more transparency from 'blank check' companies

 [reuters.com/legal/government/us-sec-votes-3-2-require-more-transparency-blank-check-companies-2024-01-24](https://www.reuters.com/legal/government/us-sec-votes-3-2-require-more-transparency-blank-check-companies-2024-01-24)

Reuters

Signage is seen at the headquarters of the U.S. Securities and Exchange Commission (SEC) in Washington, D.C., U.S., May 12, 2021. Picture taken May 12, 2021.

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Jan 24 (Reuters) - U.S. blank-check companies and their acquisition targets will take on more legal liability for disclosures about projected earnings and other material information under new rules adopted by the U.S. Securities and Exchange Commission on Wednesday.

The changes target deals involving "special-purpose acquisition companies" (SPACs), shell companies that raise funds through a listing with the intention of acquiring a private company and taking it public. Critics say the vehicles allow targets to sidestep the stiffer regulatory scrutiny of a traditional initial public offering (IPO), putting investors at risk.

A divided five-member Commission voted 3-2 to adopt the proposal, with Republican members saying it would likely further inhibit the use of a potentially valuable investing tool that has since largely fallen out of favor among equity investors.

The SEC began scrutinizing SPACs after a gold rush of such deals in 2020 and 2021 sparked worries that target company financial projections were frequently wildly optimistic or misleading. It first proposed the rule in March 2022.

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SEC Chair Gary Gensler said at the start of Wednesday's meeting that the rules aimed to bring SPACs more closely in line with IPO rules.

"Whether you are doing a traditional IPO or a SPAC target IPO, SPAC investors are no less deserving of our time-tested investor protections," he said.

The new rule will also in some cases require that target companies register with the SEC and therefore also take responsibility for investor disclosures about the deal, SEC officials said in advance of the vote.

It will also require that companies provide stricter disclosures about compensation for SPAC sponsors, conflicts of interest and the potential for the dilution of share value.

Democratic Senator Elizabeth Warren, a prominent financial reform advocate who in 2022 published research on the alleged misuse of SPACs, hailed the SEC's move on Wednesday.

"I commend the SEC for responding to my call for action," she said in a statement, adding that the rules would help crack down on rampant "fraud, self-dealing and abuse."

SEC officials said they had changed the proposal in light of public comments.

The final rule drops a proposed 18-to-24-month window for SPACs to complete mergers or lose safe-harbor legal protections and a proposed requirement that would have automatically deemed some SPAC IPO participants to be underwriters in the subsequent mergers.

Instead, the agency will issue guidance on related questions, officials said.

The new regulations will take effect 125 days after they are published in the federal register. SPACs already listed are subject to the prior regulations if they conclude the acquisition in that 125-day transition period.

The rules come as investors have cooled on SPAC deals.

As a of last year, SPAC IPO value had fallen 98% to just \$4 billion from a peak in 2021 while the performance of SPAC-launched stocks has tumbled more than 90%, according to figures from SPAC Research and the financial data firm Solactive.

Reporting by Douglas Gillison, additional reporting by Lance Tupper and Echo Wang in New York, Editing by Michelle Price, Deepa Babington and Nick Zieminski

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BUSINESS | AUTOS

Tesla's Growth Outlook, Musk's Commitment in Focus During Earnings Report

Wall Street expects Tesla's growth rate to slow in 2024. The question is how much.

By [Rebecca Elliott](#) [Follow](#)

Jan. 24, 2024 11:00 am ET



Tesla's stock price is down 16% in the first few weeks of this year. PHOTO: BLOOMBERG NEWS

As Tesla **TSLA 0.01% ▲** closes the books on 2023, the focus for investors will be what the company and Chief Executive Elon Musk have to say about the challenges already emerging this year.

The company's stock price is down 16% in the first few weeks of 2024. And Wall Street will be looking for details on Tesla's outlook for this year as the world's most valuable automaker confronts the prospect of moderating sales growth, shrinking margins and intensifying competition from rivals, such as China's BYD.

Tesla, due to release financial results after the market closes, is expected to report a steep drop in fourth-quarter net income over the prior year as it continues to lean on price cuts to stimulate demand for its models.

Analysts are also forecasting slimmer growth this year, with Musk warning in October of difficulties ramping up factory production of the company's new Cybertruck.



A Tesla Cybertruck prototype that was used in bulletproof testing. PHOTO: ALLISON DINNER/SHUTTERSTOCK

Those polled by FactSet estimate deliveries will rise about 16% this year to 2.1 million vehicles. That figure is down from a 38% increase in 2023, when Tesla delivered 1.81 million vehicles to customers, and far below the company's target rate of 50% annual growth on average.

Tesla's closely watched automotive gross margin, excluding regulatory credits, is also expected to have shrunk again in the fourth quarter to 15.7%, down from 24.3% the year prior, according to FactSet. On an operating basis, Tesla's once industry-leading margins have fallen more in line with those of traditional automakers in the past year.

Tesla's valuation, currently around \$665 billion, has long been underpinned by its sales momentum and Musk's promises to transform the carmaker into a leader in robotics and artificial intelligence. But last week, the CEO stunned Wall Street by offering what amounted to an ultimatum: He wrote on X that unless he controls around 25% of Tesla, he would prefer to build products elsewhere.

Musk currently owns 13% of the company, making him the largest shareholder, and his stake could reach nearly 21% if he exercised his vested stock options.

His comments followed Hertz's disclosure that it was selling off about one-third of its EV fleet and news that BYD had overtaken Tesla in the fourth quarter to become the world's top seller of EVs for the first time.



Hertz's EV selloff is a reversal for a company that bet big on the technology. PHOTO: BRENDAN MCDERMID/REUTERS

Meanwhile, Tesla initiated new price cuts in China and Europe this month and said it planned to suspend nearly all production in Germany for two weeks beginning in late January because of parts shortages caused by the conflict in the Red Sea. Tesla makes its Model Y crossover outside of Berlin.

Tesla's stock, which roughly doubled in value in 2023, has gotten off to a rocky start in 2024, closing Tuesday at \$209.14. The decline in its share price has erased around \$125 billion in market value since the beginning of the year.

On Monday, Morgan Stanley cut its price target for Tesla to \$345 per share, from \$380, citing factors including expectations of lower growth and slimmer profit margins.

"There is continually growing evidence that the global EV market is in an unfavorable balance of supply (growing) vs. demand (slowing)," analyst Adam Jonas, a longtime Tesla enthusiast, wrote in a note to investors.

The gathering headwinds fall against the backdrop of waning enthusiasm for EVs. Rival automakers are delaying investments, and executives are striking a more cautious tone about the level of consumer demand.

Buyers are also expressing reservations about going fully electric. High prices for EVs and concerns about charging and range continue to weigh on purchase decisions.

Hertz said it planned to sell about 20,000 EVs after confronting expensive repair costs and disappointing resale values on its fleet of battery-powered vehicles. The move was a reversal for a company that bet big on the technology. Hertz's commitment in 2021 to purchase 100,000 Tesla EVs helped send the electric-car maker's valuation above \$1 trillion for the first time.

To juice sales, Tesla last year enacted a series of price cuts that took a toll on profit margins.

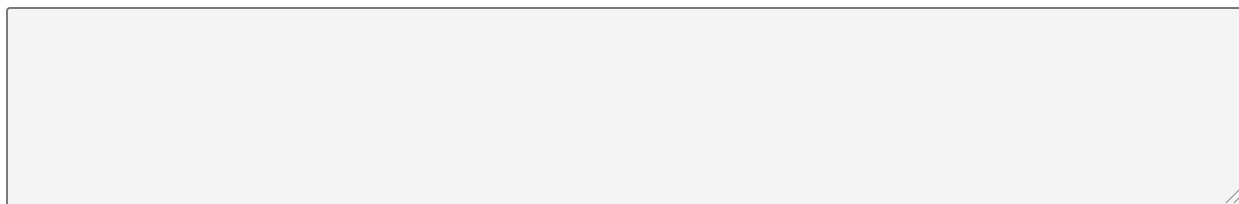
While the car company aims to halve production costs for its next generation of vehicles, it faces cost pressures in the near term.

Musk warned in October that the Cybertruck pickup—the company's first new passenger model in more than three years—would be challenging to produce at higher volumes and likely wouldn't generate significant cash flow for a year to 18 months.

Tesla hasn't disclosed how many trucks it has sold.

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Opinion **Donald Trump**

Wall Street's bargain with Trump

Many corporate leaders are misguided in playing down the risks of a second term for the Republican former president

EDWARD LUCE



President Donald Trump with Jamie Dimon, JPMorgan's chief executive, at the White House in Washington, DC, in 2017. Dimon praised Trump at Davos last week for his positions on the economy, taxes and immigration © Andrew Harrer/Bloomberg

Edward Luce 4 HOURS AGO



The Financial Times had only nice things to say about Benito Mussolini in a June 1933 supplement entitled “The Renaissance of Italy: Fascism’s gift of order and progress”. Trains were running on time, investment was humming and friction between capital and labour was a thing of the past. “The country has been remodelled, rather than remade, under the vigorous architecture of its illustrious prime minister, Signor Mussolini,” wrote the FT’s special correspondent.

The 1930s ought to have buried the idea that business is a bulwark against autocracy. Today's America offers a reminder. After Donald Trump's attempted putsch on January 6 2021, US business leaders lined up to condemn the storming of Capitol Hill. Jamie Dimon, the chief executive of JPMorgan, [issued a statement](#) calling for a peaceful transition of power. "This is not who we are as a people or a country," he said. In Davos last week, Dimon had [changed his tune](#). Trump did many good things when he was in office, Dimon said. Business was ready for either Joe Biden or Trump: "My company will survive and thrive in both."

The US Chamber of Commerce has undergone a similar evolution. "There are some members who, by their actions, will have forfeited the support of the US Chamber of Commerce. Period. Full stop," [said](#) its vice-president, Neil Bradley, in January 2021. The chamber's ban on giving money to lawmakers who had voted against certifying Biden's election win was quietly dropped a couple of months later.

In her state of American business speech one year ago, [Suzanne Clark](#), the chamber's chief executive, did not mention US democracy. Battling "unprecedented regulatory over-reach" by the Federal Trade Commission, the Securities and Exchange Commission and other agencies would be the chamber's top priority.

To be fair to Dimon, Clark and other business leaders, they are paid to hedge bets. Were Trump to return to power, they should preserve the option of getting along with him — Wall Street's "Trump put". Their duty is to shareholders. If the American people want Trump, who are they to quibble? That argument loses its salience when business leaders start donating to Trump's campaign, as many are now doing. Some, such as Harold Hamm, the Oklahoma oil tycoon, or Robert Bigelow, owner of Budget Suites of America, invested their money in Florida's governor, Ron DeSantis. He has quit the race and endorsed Trump. Some of his former donors are doing the same.

Their reasoning is twofold. First, for all his faults, Trump would be better for business than Biden. Trump cut the top tax rate and improved their bottom lines. He is promising to do the same again. Trump's railing against corporatism is just red meat for the base. He would also boost the fossil fuel industry and commercial real estate. The assumption of business leaders that Trump will fulfil these promises is almost certainly right. The fact that he vows to slap 10 per cent tariffs on all imports should be weighed against Biden's continued regulatory creep. To many corporate chiefs, less globalisation is a price worth paying for lower taxes. It seems that almost anything is.

The second reason is many business leaders argue that Trump's bark is worse than his bite. People warned about Trump's threat to democracy in 2017 but the republic is still alive and kicking. I have heard variations on this line from many inside and outside business. It suffers from a fatal flaw: America's system remains intact because Trump was blocked from overturning it. He still claims the 2020 election was stolen and is running on the promise of jailing those who helped block him — among them Biden and Mark Milley, the then chairman of the US joint chiefs of staff. It is conceivable that Trump would be too chaotic to redeem that promise. On the other hand, he would claim a mandate to do so. Perhaps the courts would stop him. US business would be powerless.

We learn from history that we do not learn from history, as Hegel said. His point applied to our species, not just to business. But it is worth stressing that capitalism goes hand in glove with the rule of law. It thrives on transparency of rules and the sanctity of the contract. Monopolists, on the other hand, hate the level playing field — the one that requires a competent state to uphold. America's 2024 election will be a battle between liberal democracy and the strongman. It could also be seen as a contest between capitalism and capitalists. Which is better: the system or the aspiring monopolist? No prizes for guessing where Trump's instincts lie.

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W.Va. County To Face Off With Opioid Distributors At 4th Circ.

By **Emily Field**

Law360 (January 23, 2024, 7:55 PM EST) -- A Fourth Circuit panel will hear oral arguments Thursday morning in an appeal brought by a West Virginia county that lost the first bench trial in multidistrict litigation over the opioid epidemic, kicking off the first appellate arguments this year over verdicts in the MDL.

Cabell County and its seat, Huntington, are appealing the verdict by U.S. District Judge David A. Faber, who after nearly a year of deliberations found on **July 4, 2022**, that the county and its seat had failed to prove that the nation's three largest drug distributors did little to stem a flood of deadly opioids into the region and created a public nuisance under state law.

Cases brought by local governments around the country have been testing whether the public nuisance theory can be applied to the opioid crisis, to mixed results and billions of dollars in settlements.

The tsunami of cases against players in the opioid supply chain — which also include drugmakers and pharmacy chains — were consolidated in Ohio federal court in 2017. The largest companies have agreed to multibillion-dollar settlements, one for \$21 billion with the distributors announced in February 2022.

Now the issue of whether the public nuisance theories, which vary by state, can be used in opioid cases is starting to hit appeals courts.

One state high court has weighed in on the issue: The Oklahoma Supreme Court in 2021 **overturned** a \$465 million opioid verdict against Johnson & Johnson in the nation's first opioid trial. The Ohio Supreme Court is also hearing an appeal after the Sixth Circuit last year asked it to answer the question of whether the opioid epidemic can be considered a public nuisance under state law.

In the West Virginia case, at stake for Cabell County — among the hardest hit in the U.S. by the opioid crisis — is whether the panel will side with their argument that AmerisourceBergen Corp., Cardinal Health Inc. and McKesson Corp. should have flagged that 80 million doses of opioids were being shipped to a county where only 100,000 people lived. At trial, the county argued that the companies should be on the hook for \$2.5 billion.

The panel's ruling on the issue could shape product liability litigation in the state against sellers of products — from alcohol to unhealthy food — that affect public health, as the distributors have argued.

While there is limited precedent for the use of the public nuisance theory in the context of opioids, appellate courts have considered the question in other areas, such as in suits over lead paint and firearms — and have ruled against it, Phil Goldberg of Shook Hardy & Bacon LLP told Law360.

"The state supreme courts have rejected these theories and said that's not what public nuisance theory is — which is all about protecting public rights of way, protecting public roads, protecting public order from unlawful interference," said Goldberg, who has represented companies in other opioid cases. "The appellate courts, by and large, are tamping down when trial judges allow claims that they really shouldn't be allowing."

The county is expected to argue that the distributors have legal obligations to detect and report outrageously large orders. In Judge Faber's nearly 200-page opinion, he concluded that those large numbers were the result of legal prescriptions written by medical professionals.

While the opioid epidemic can be considered the result of a regulatory breakdown on all levels, the drug distributors arguably had the most data about what drugs were going to where from the beginning, according to Adam Zimmerman of the University of Southern California's Gould School of Law.

"We don't normally think of the middleman as the locus of a product liability lawsuit or a nuisance suit, but when it comes to a controlled substance like this, leading to such serious, serious public health outcomes, these cases have forced us to rethink that," said Zimmerman, an expert in mass torts. "I see that as being kind of like the central question that's been raised with respect to the distributors."

Another argument the county has raised in its appeal is the West Virginia Mass Litigation Panel's **rejection** of Judge Faber's ruling. The panel, which oversees a large number of opioid suits, wasn't swayed by Judge Faber's conclusion that applying public nuisance theory to opioid sales would be incompatible with the history of the theory, and that Judge Faber placed an "artificial external constraint" on the public nuisance cause of action.

The panel said the West Virginia Supreme Court has recognized that public nuisance is a "flexible" area of the law. The county has also argued that the Mountain State's high court has previously allowed government suits to go forward when it ruled in 2021 that they should be heard by a jury.

But beyond Thursday's arguments, this may not be the only time the case goes before the appellate court, given the high-profile and novel nature of the public nuisance opioid issue, University of Richmond School of Law professor Carl Tobias said.

"A majority of judges in active service [may] give it another look. The court is not reluctant to do that," Tobias said. "In fact, they've done that recently, especially if it's something like this is cutting-edge [and] just piques their interest, which I think it probably would."

--Additional reporting by Jeff Overley. Editing by Alanna Weissman and Emily Kokoll.



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Estée Lauder Too Reliant On China Resellers, Investors Claim

By **Sydney Price**

Law360 (January 23, 2024, 4:51 PM EST) -- Luxury cosmetics company Estée Lauder was hit with a proposed class action alleging it concealed that stricter regulations on resellers in China were causing them to purchase fewer Estée Lauder products, which resulted in excess inventory throughout the supply chain and slowing sales at the company.

Asian cosmetic resellers in the travel retail market regularly purchase large quantities of goods from The Estée Lauder Co. Inc.'s brands from duty-free stores and then resell them back home, often in mainland China, according to the suit filed Monday in New York federal court. After COVID-19 lockdowns hurt demand in travel retail markets, resellers became even more critical to Estée Lauder's sales growth because end consumers were traveling less, the suit states.

Then in 2022, Asian governments began amping up their regulatory oversight of resellers, further changing the resale landscape, according to the suit.

"This crackdown caused the resellers to significantly reduce their purchases of Estée products during the class period," the suit states. "As the company lost the ability to sell a large volume of its products through resellers in Asia, inventory levels of Estée cosmetics increased throughout the supply chain."

The suit from the West Virginia Laborers Pension Trust Fund seeks to represent a class of those who purchased or otherwise acquired Estée Lauder securities between Feb. 3, 2022, and Oct. 31, 2023. In addition to Estée Lauder, its CEO Fabrizio Freda and Chief Financial Officer Tracey Thomas Travis are individual defendants in the suit.

The class period begins the day Estée Lauder held an earnings call in February 2022, during which the defendants claimed that they were "excited about the long-term growth opportunity in the vibrant Asia/Pacific region and, most notably, in China," the suit says.

The defendants continued to tout similar claims about its confidence in the Chinese market over the next several months, but the truth began to emerge on Nov. 2, 2022, when the suit alleges Estée Lauder announced it had reduced its full-year outlook for 2023 "primarily to reflect tighter inventory management in Asia travel retail."

The news resulted in Estée Lauder's shares declining \$16.80, or over 8%, to close at \$189.96 on Nov. 2, 2022, according to the suit.

After this, the defendants continued to mislead investors about potential in the Chinese market, the suit claims. The truth was further revealed in the next quarter's earnings release, according to the suit, when Estée Lauder again lowered its 2023 outlook due to inventory issues and issues in its travel retail markets.

The news resulted in Estée Lauder's shares declining \$19.63, or about 7%, to close at \$261.17 on Feb. 6, 2023, according to the suit.

The company lowered guidance again in the next quarter, blaming slow recovery in Asia travel retail markets, the suit states.

The news resulted in Estée Lauder's shares declining \$42.52, or about 17%, to close at \$202.70 on May 3, 2023, according to the suit.

A few months later, on Aug. 18, the company announced a "substantial" decrease in sales from the travel retail markets in China and Korea.

Following the announcement, Estée Lauder shares declined \$5.37, or about 3%, to close at \$156.69 on Aug. 18, 2023, according to the suit.

The suit alleges the truth was fully revealed on Nov. 1 when Estée Lauder announced a decline in sales driven by slow recovery in its Asian travel retail businesses and China markets. The company also announced it was launching a recovery plan to improve margins and lower operating expenses, and that it would cut its net sales estimate for fiscal year 2024.

On this news, Estée Lauder shares declined \$24.36, or about 19%, to close at \$104.51 on Nov. 1, according to the suit.

The suit claims Estée Lauder and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act. The plaintiff seeks damages with prejudgment and post-judgment interest.

Counsel for West Virginia Laborers Pension Trust Fund and a representative of Estée Lauder did not immediately respond to requests for comment on Tuesday.

West Virginia Laborers Pension Trust Fund is represented by Eric J. Belfi and Francis P. McConville of Labaton Keller Sucharow LLP.

Counsel information for Estée Lauder was not immediately available on Tuesday.

The case is West Virginia Laborers Pension Trust Fund v. The Estée Lauder Co. Inc. et al., case number 1:24-cv-00468, in the U.S. District Court for the Southern District of New York.

--Editing by Vaqas Asghar.



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Atlassian Beats Investor Suit Over Subscriber Base Slowdown

By **Katryna Perera**

Law360 (January 23, 2024, 7:36 PM EST) -- A California federal judge has granted Atlassian Corp.'s motion to dismiss a proposed class action from a group of public pension funds alleging the Australian software company misled investors by concealing trends in its conversion from free to paid users that showed slowed growth, saying the suit's claims were not strong enough to survive dismissal.

U.S. District Judge William H. Orrick issued an **order** on Monday tossing the class action suit filed last year on behalf of a proposed class of those who bought or sold Atlassian stock between Aug. 5 and Nov. 3, 2022.

Lead plaintiffs the City of Hollywood Firefighters Pension Fund and the Oklahoma Firefighters Pension and Retirement Systems alleged that Atlassian and its top brass knew of the slowdown of the conversion of free to paid users by mid-July 2022 but hid it from the investing public, which in turn caused an alleged \$7 billion loss in shareholder value once the truth was revealed.

However, Judge Orrick said Monday that the pension funds have failed to plausibly allege that any of the nine challenged statements in the complaint were actually false or misleading.

According to the order, among other things, the plaintiffs claimed that a statement made in Atlassian's annual report for fiscal year 2022 was misleading because it said the company had not seen any trends for the current fiscal year.

Judge Orrick said there is some dispute as to which fiscal year the statement refers to, but that regardless, the pension funds still fail to allege that the defendants knew of any trend by the time the report was published on Aug. 19, 2022.

"The [amended complaint] and the exhibits show that the paid user expansion slowdown trend began mid-quarter, so about Aug. 16 at the earliest. The plaintiffs do not plead that any slowdown between Aug. 16 and Aug. 19 was a trend or that the defendants could plausibly have added it to the published materials so quickly," the order states.

"This statement did not 'directly contradict' anything the defendants knew, nor did affirmatively represent the state of Atlassian that materially differed from the one that 'actually exist[ed]' ... it was therefore not false or misleading," the order further states.

The judge also dismissed the suit's claims that Atlassian's chief operating officer, Anu Bharadwaj, made three misleading statements at a conference in September 2022.

Judge Orrick said the pension funds have failed to plausibly allege that Bharadwaj's statements "did not fully convey the slowdown" of the conversion of free to paid users.

However, the judge stated that when Bharadwaj's comments are viewed together, there is a degree of misrepresentation because she did not comment on the paid user expansion slowdown that began in mid-August.

The judge also dismissed the suit's scienter claims on Monday, saying the pension funds failed to establish that Bharadwaj knew of the slowdown of free to paid user conversions and was purposefully

withholding that information. Additionally, the pension funds failed to plead a logical motive on the part of the individual defendants, according to the order.

"The most that the plaintiffs allege regarding motive is that two other defendants sold stocks during the putative class period and 'collectively reap[ed] more than \$222 million,' but in the same breath the plaintiffs concede this was 'not dramatically out of line with these defendants' prior trading practices,'" the order states.

The judge granted the pension funds 21 days to amend their claims.

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

The pension funds are represented by Maya Saxena, Lester R. Hooker, Dianne M. Pitre, Jonathan D. Lamet, Steven B. Singer, Marisa N. DeMato and David R. Kaplan of Saxena White PA and by Robert D. Klausner and Stuart A. Kaufman of Klausner Kaufman Jensen & Levinson.

Atlassian and the individual defendants are represented by Michele Johnson, Colleen Smith, Susan Engel and Daniel Gherardi of Latham & Watkins LLP.

The case is City of Hollywood Firefighters Pension Fund v. Atlassian Corporation et al., case number 3:23-cv-00519, in the U.S. District Court for the Northern District of California.

--Editing by Jeremy Abrams.

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Pharma Co. Must Face Investor Suit Over Cancer Drug Study

By **Sydney Price**

Law360 (January 23, 2024, 9:38 PM EST) -- Spectrum Pharmaceuticals must face a consolidated proposed securities class action alleging it misled investors about a lung cancer treatment drug study after a New York federal judge decided Tuesday that the suit adequately alleged the defendants "consciously or recklessly" made false or misleading statements.

U.S. District Judge Valerie Caproni said the suit sufficiently claims Spectrum and some of its executives misled the public about the U.S. Food and Drug Administration's concerns regarding its clinical trials for a lung cancer treatment known as "pozi." The suit alleges the defendants were motivated to rush the drug's study and misrepresent its progress because Spectrum was financially distressed and needed cash, and its executives wanted to sell shares at inflated prices.

According to the most recent version of the complaint, from May 2023, Spectrum needed to launch an additional clinical trial known as the "Pinnacle Study" in order for the FDA to grant accelerated approval of pozi. In late 2021 and early 2022, the FDA expressed its concerns to Spectrum regarding dosage and safety issues, according to the suit.

The truth publicly emerged on Sept. 20, 2022, when the FDA released a report disclosing that agency officials had repeatedly expressed concerns to the defendants about pozi's safety profile, delayed enrollment in the Pinnacle Study and Spectrum's inadequate dosage data, according to the suit. The report also revealed that no patients had been enrolled in the study, and that initial results were not anticipated for another four to five years.

That day, Spectrum share prices declined by 40 cents, or over 37%, according to the suit.

Previously, Spectrum and the suit's individual defendants — CEO Thomas Riga, CFO Nora E. Brennan and former Chief Medical Officer Francois J. Lebel — represented that the study was headed in the right direction, the suit claims. Between May and August 2022, Spectrum told investors it was "aligned with the FDA" on dosage requirements in the study, the suit says, and said the study was "underway" even though it had not yet started.

Most of the statements in question about enrollment in the suit are actionable, Judge Caproni said Tuesday.

"Spectrum's repeated statements in May and August 2022 that patients were 'being randomized' in the Pinnacle Study, see, are actionable at this stage because a reasonable investor could have construed these statements as indicating that at least some patients had been enrolled in the Pinnacle Study when, in fact, none had," Judge Caproni said.

Judge Caproni did say, however, that certain statements regarding dosing and risk warnings are inactionable. For example, the plaintiffs say that in March 2022, Spectrum told investors it was reasonable the FDA "could" have additional questions about dosing. The investors say this is misleading because the FDA had already addressed Spectrum about dosing concerns at that time.

But Spectrum's statements did not trigger an "affirmative duty" to disclose the FDA's concerns about the study's data, Judge Caproni said.

"Spectrum's statement that it had only partially achieved dosage optimization and that the FDA

would surely have more questions about dosage as pozi's development progressed did not conflict with the FDA's view that there was work to be done before the drug's dosage could be deemed optimized," Judge Caproni said.

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

The proposed class is represented by Robert N. Kaplan, Brandon Fox, Jeffrey P. Campisi and Kathleen A. Herkenhoff of Kaplan Fox & Kilsheimer LLP.

Spectrum Pharmaceuticals and the individual defendants are represented by Kevin P. Broughel, James L. Ferguson and Christopher H. McGrath of Paul Hastings LLP.

The case is Christiansen et al. v. Spectrum Pharmaceuticals Inc. et al., case number 1:22-cv-10292, in the U.S. District Court for the Southern District of New York.

--Editing by Caitlin Wolper.

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Bitcoin Miner Rhodium Seeks Toss Of Chancery Rollup Suit

By **Leslie A. Pappas**

Law360, Wilmington, Del. (January 23, 2024, 6:25 PM EST) -- Three investors in Texas-based bitcoin mining venture Rhodium Enterprises Inc. can't sue the company's top officers over an allegedly unfair business consolidation in 2021 because the investors already agreed to arbitrate all claims related to the deal, the officers' attorney told Delaware's Court of Chancery on Tuesday.

The investors also have no standing to file a derivative suit on behalf of Rhodium Enterprises because the terms of the roll-up transaction in dispute were already fixed before the investors became shareholders, Jordan D. Peterson of Kirkland & Ellis LLP, counsel for nominal defendant Rhodium Enterprises, the bitcoin miner's owner Imperium Investment Holdings LLC, and the Rhodium officers, said at a hearing in Wilmington.

"Plaintiffs knew all the material terms of the roll-up transaction and they agreed to those terms," Peterson argued during the defendants' motion to dismiss the case. "Plaintiffs cannot now turn around and challenge the agreement and claim they were misled."

Rhodium Enterprises Inc., referred to during the hearing as simply "Enterprise," is a Texas-based technology company that mines bitcoin.

The three investors — Trine Mining LLC, Cross the River LLC and Elysium Mining LLC — filed the suit **in November 2022**, alleging that the roll-up transaction siphoned off 6.5% of the company's business and reduced their overall stake in the venture from 44.5% to 38%.

The investors sued Imperium Investments Holdings LLC, a Wyoming limited liability that controls Rhodium Enterprises, and four of Rhodium's top officers at the time of the roll-up: President and CEO Nathan Nichols, Chief Operating Officer Chase Blackmon, Chief Technology Officer Cameron Blackmon and Chief Financial Officer Nicholas Cerasuolo.

"Defendants stood on both sides of that transaction," an attorney for the shareholders, Brandon V. Lewis of Reid Collins & Tsai LLP, argued Tuesday. "Plaintiffs lost 6.5% of what they previously owned, and defendants took that 6.5%"

First announced in April 2021, the stated purpose of the roll-up was to consolidate operations at Rhodium, which was then made up of five separate bitcoin mining companies, into a single entity called Rhodium Technologies LLC.

Imperium controlled the five operating companies and owned about 55.6% of their total value at the time, the complaint says.

The roll-up transaction first required investors in the mining companies to turn over their shares in the operating companies in exchange for Class A shares in Rhodium Enterprises. Rhodium Enterprises then turned over its interests in the operating companies to Rhodium Technologies.

Investors now say they were cheated in the second step: After the exchange, their 44.5% interest in Rhodium Enterprises dropped to 38% — while Imperium's increased from 55.6% to 62%.

"Nothing disclosed that Enterprise was sending a 44.5% economic stake in return for a 38% stake," Lewis said Tuesday. "Nowhere did they disclose that the roll-up would increase Imperium's share."

Vice Chancellor Paul A. Fioravanti, overseeing the case, asked Lewis why the complaint didn't make direct claims in response to the alleged misrepresentation.

"I must say, it's strange that I haven't seen a fraud or misrepresentation claim if you believe that your client was owed a fiduciary duty," the vice chancellor said. "You're arguing that there was a misrepresentation made to your client. But you have not brought a misrepresentation claim."

Lewis said his clients hadn't made direct claims because they got a "fair deal" in the sense that their shares were exchanged "dollar for dollar." Rhodium Enterprises, however, lost equity in the transaction.

"The claims we have brought here are made solely on behalf of Enterprise," he said.

Peterson argued that the investors have no standing to file a derivative suit because they didn't actually acquire their shares in Rhodium Enterprises until July 1, 2021, when Imperium completed the roll-up transaction by countersigning the exchange agreement.

Also, the exchange agreement includes an arbitration provision that requires the investors to arbitrate all claims related to the rollup transaction, Peterson said.

Lewis insisted that his clients technically acquired their interest in Rhodium Enterprises on May 8, 2021, when they signed the exchange agreement and turned over their shares in the operating companies. He said the company's charter, not the exchange agreement, thus governed the dispute.

The vice chancellor asked Lewis how he should reconcile the fact that Imperium didn't sign off on the roll-up transaction until July 1.

Lewis said that the exchange agreement stipulated that stock ownership would take effect retroactively, on the date the investors signed.

"If these claims were deemed to be direct and not derivative claims, would you agree with me that they would be subject to the arbitration provision in the exchange agreement?" the vice chancellor asked Lewis.

Lewis agreed that they would.

Vice Chancellor Fioravanti took the matter under advisement and did not say when he would rule.

Plaintiffs are represented by Brandon V. Lewis, Michael Yoder, William T. Reid IV, Joshua J. Bruckerhoff, Aaron A. Brown, Norman M. Monhait and Jonathan M. Kass of Reid Collins & Tsai LLP.

Defendants are represented by Stefan Atkinson, Jordan D. Peterson, Jacob M. Rae and Julia D. Harper of Kirkland & Ellis LLP and Michael A. Pittenger, Aaron R. Sims and Reece G. Barker of Potter Anderson & Corroon LLP.

The case is Trine Mining LLC et al. v Nathan Nichols et al., case number 2022-1029, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Kelly Duncan.



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Crypto VC Investors Want Conn. Securities Suit Kept Alive

By Jonathan Romeo

Law360 (January 23, 2024, 8:58 PM EST) -- Digital Currency Group noteholders who accused it in Connecticut federal court of misleading them through a "sham transaction" with a subsidiary argued this week that the crypto venture capital firm's motion to have their case dismissed overlooked crucial allegations, misrepresented facts and relied on inapplicable legal precedents.

Digital Currency Group Inc. and its founder Barry Silbert asked a judge in December to **dismiss the lawsuit** alleging they set up a fake deal to conceal an impending \$1.1 billion financial crisis, saying they were not to blame for its subsidiary Genesis Global Holdco LLC's **bankruptcy**.

In a **memorandum** filed Monday, the noteholders said DCG and its leaders are attempting to sidestep accountability for actions deemed wrongful by the U.S. Securities and Exchange Commission, the New York attorney general and a special committee in the Genesis Chapter 11 case. The plaintiffs, who lent to Genesis via Gemini's Earn program, include William McGreevy from Kansas, Ashwin Gowda from Texas, Christopher Battenham from Nevada, Alex Sopinka from Texas and the Texas company Translunar Crypto LP.

"Defendants' motions, in essence, seek to evade liability for conduct that the U.S. Securities and Exchange Commission ("SEC"), the attorney general for the state of New York ("NYAG"), and a special committee in the Genesis bankruptcy have asserted (with the benefit of discovery) constitutes serious wrongful acts," the investors wrote.

The suit, filed in January 2023, asserts that Genesis offered high returns for investments in its crypto lending business and used risky methods to do so. The investors accused Genesis of excessively lending about 30% of its investments to Three Arrows Capital, a move that the lenders argue was excessive and benefited another of Silbert's ventures, the Grayscale Bitcoin Trust, by boosting its fees.

According to a complaint, these risky practices led to a financial disaster when Three Arrows couldn't pay back a \$1.1 billion debt to Genesis. The DCG lending subsidiary tried to transfer this bad debt to its parent through a 10-year note that had no real financial backing, the investors told the court. This move, which the suit calls a "sham," was an attempt to make Genesis appear solvent when it wasn't, they said. Genesis filed for Chapter 11 protection in the Southern District of New York in January 2023.

DCG, however, contended there was not a clear link to the fraud the investors alleged and that the crypto investment firm were not responsible for its subsidiary's insolvency. The parent company also said the agreements in question were not legally considered securities, adding that the documents contained clauses that freed them from liability. What's more, the complaint was filed too late, beyond the legal deadline, the company told the court.

The noteholders said Monday that Genesis's yield investment agreements qualify as securities and are indeed "investment contracts" and "notes" under established legal standards, a stance which they argue is bolstered by Genesis' internal documents.

The investors also contested DCG's claim that the Genesis agreements contain waivers of liability, saying such waivers are null under the Securities Act and the Exchange Act. Their allegations under federal securities laws meet all necessary pleading requirements, challenging the defendants' position

on the statute of limitations, the noteholders added.

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

The noteholders are represented by Ian W. Sloss, Steven L. Bloch and Zachary A. Rynar of Silver Golub & Teitell LLP.

DCG is represented by Jennifer M. Palmer and Thomas D. Goldberg of Day Pitney LLP, and Jonathan D. Polkes, Stefania Di Trollo Venezia, Caroline Zalka, and Joshua M. Wesneski of Weil Gotshal & Manges LLP.

The case is McGreevy et al. v. Digital Currency Group Inc. et al., case number 3:23-cv-00082, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Sydney Price and Aaron Keller. Editing by Covey Son.

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3 Generic-Drug Cos. Reach Settlements In Price-Fixing MDL

By **Hailey Konnath**

Law360 (January 23, 2024, 11:28 PM EST) -- Generic-drug makers Apotex Corp., Heritage Pharmaceuticals Ltd. and Breckenridge Pharmaceutical Inc. have each agreed to shell out a combined \$45 million to settle allegations they colluded to fix the prices of many medications, according to a trio of motions filed Tuesday in multidistrict litigation in Pennsylvania federal court.

Under the agreements — reached with direct purchaser plaintiffs — Apotex agreed to pay roughly \$30 million, Heritage agreed to pay \$10 million and Breckenridge agreed to fork over \$5 million. The settlements could be higher or lower depending on how many settlement class members submit settlement claims or opt out of the deals, per the filings.

For instance, Apotex's payment could be as much as \$37 million, according to plaintiffs César Castillo LLC, FWK Holdings LLC, Rochester Drug Cooperative Inc. and Kinney Drugs Inc. They asked the court to preliminarily approve the proposed deals.

Apotex, Heritage and Breckenridge have also agreed to provide information that "will help in the continued prosecution of the litigation against non-settling defendants," the plaintiffs said.

"The settlement ensures that the settlement class will receive substantial benefits, while avoiding the risks and delays of continued litigation" against the companies, they said in the motions.

The settlement classes will include "all persons or entities ... that directly purchased one or more of the named generic drugs" from Apotex, Heritage or Breckenridge between May 2009 and December 2019, per the filings. That's an estimated 500 settlement class members, the plaintiffs said.

The sprawling multidistrict litigation dates back to 2016. Since then, direct buyers, resellers, consumers and state attorneys general have accused a slew of generic-drug makers — including Pfizer Inc., Mylan NV, Actavis PLC, Sandoz Inc. and Teva Pharmaceuticals USA Inc. — of colluding to fix the prices of many medications. In some cases, the anti-competitive behavior drove up drug prices tenfold, according to the plaintiffs.

The direct purchasers' attorneys with NastLaw LLC, Hagens Berman Sobol Shapiro LLP, Nussbaum Law Group PC, Berger Montague, Kaplan Fox & Kilsheimer LLP and Roberts Law Firm PA plan to seek fees representing up to one-third of the settlement amount, after expenses and service awards are deducted.

They also intend to request service awards totaling \$80,000 — or \$20,000 per each named plaintiff, they said.

Apotex, Heritage, Breckenridge and counsel for the direct purchasers didn't immediately respond to requests for comment late Tuesday.

Last week, the drugmakers **asked the district court** to issue an order enforcing a monthsold deadline for documents that they said most states have ignored. The original documents request landed on the desks of most U.S. states and some territories nearly 2½ years ago, and sought materials relevant to the respective attorneys' general accusations. While it has been amended since then, parties usually have 30 days to produce the requested items, the defending drug companies said.

However, it's been more than three months since documents were due, and only eight states have come up with the requested materials, which were "woefully inadequate," according to the memo. Meanwhile, other states said they would comply but have let the deadline come and go, and the remainder have simply refused to comply at all, the companies said.

The direct purchasers are represented by Dianne M. Nast of NastLaw LLC, Thomas M. Sobol of Hagens Berman Sobol Shapiro LLP, Linda P. Nussbaum of Nussbaum Law Group PC, David F. Sorensen of Berger Montague, Robert N. Kaplan of Kaplan Fox & Kilsheimer LLP and Michael L. Roberts of Roberts Law Firm PA.

The drugmakers are represented by Hogan Lovells, Wilson Sonsini Goodrich & Rosati PC, Troutman Pepper, Latham & Watkins LLP, Norton Rose Fulbright, Morgan Lewis & Bockius LLP, Greenberg Traurig LLP, Fox Rothschild LLP, Dechert LLP, Proskauer Rose LLP, DLA Piper, Kelley Drye & Warren LLP, Kirkland & Ellis LLP, Buchanan Ingersoll & Rooney PC, Law Office of Robert Connolly LLC, Petrillo Klein & Boxer LLP, Cozen O'Connor, Cole Schotz PC and Faegre Drinker Biddle & Reath LLP.

The case is In re: Generic Pharmaceuticals Pricing Antitrust Litigation, case number 2:16-md-02724, in the U.S. District Court for the Eastern District of Pennsylvania.

--Additional reporting by Kaitlin Gebby, Theresa Schliep, Kelly Lienhard and Matthew Perlman. Editing by Michael Watanabe.

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Auto Dealerships Get Last Of \$385M In Car Parts MDL

By **Danielle Ferguson**

Law360 (January 23, 2024, 7:57 PM EST) -- A Michigan federal judge on Tuesday gave the final go-ahead to a roughly \$1 million deal between car sellers and brake manufacturers, in what the dealerships said was the final round of \$385 million in settlements to end allegations of a conspiracy to manipulate prices for a host of auto parts across the U.S.

U.S. District Judge Sean F. Cox approved the fifth round of settlements in the case, this time between auto dealerships and Robert Bosch LLC, Robert Bosch GmbH, ZF TRW Automotive Holding Corp.; ZF Friedrichshafen AG; and Lucas Automotive GmbH during a remote hearing Tuesday. The settlement will send about \$948,000 to auto dealers and put an end to their bid-rigging and price-fixing claims against the hydraulic and electronic brake manufacturers.

The earlier rounds of settlements with automotive dealers totaled \$385,649,220, according to the motion to approve the fifth round of settlements.

The overall multidistrict litigation case stems from a U.S. Department of Justice probe **launched in 2010** that uncovered a series of cartels to rig bids and fix prices for a broad range of automotive parts. According to the auto dealers' motion to approve the fifth round of settlements, there were 45 separately filed auto dealer class cases within the MDL. The litigation involved at least 45 automotive parts and 188 domestic and foreign defendants. The larger multidistrict litigation included allegations of price-fixing and bid-rigging of other automotive parts such as bearings, alternators, windshield wipers, radiators, air conditioning systems and more.

The first round of settlements in the wider dealer litigation sent out about \$59 million; round two was \$124.7 million; round three was \$115 million and round four was \$86 million, according to the motion to approve the latest round of settlements for the dealerships.

Judge Cox on Tuesday also approved the dealerships' motion for about \$250,000 in attorney fees for this last round. The last time attorneys received fees was in 2019, getting about \$1.7 million, dealership attorney Shawn Raiter of Larson King LLP said in the hearing Tuesday. The total amount of attorney fees received over the settlements was not immediately available Tuesday.

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

According to the dealerships' motion for attorney fees, some attorneys have worked full-time on this litigation for more than 10 years.

The auto dealers shouldered a disproportionate burden throughout the litigation, the dealers said, as they had to respond to discovery regarding their own claims and antitrust injuries, but also for injuries claimed by end-payors involved in the MDL.

The settlements provide cash to automobile dealerships that bought certain parts or new vehicles that had the brakes in Arizona, Arkansas, California, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia and Wisconsin, according to the motion.

Car buyers have reached settlements with other auto part makers in the last decade, including an **\$11 million settlement** in 2018 with Calsonic Kansei Corp over price fixing for vehicle air conditioning systems. Tokai Rika asked a court to approve a **\$34 million deal** in 2018 to end its

involvement in a putative class action brought by car buyers.

Japanese tire and rubber products company Toyo Tire & Rubber Co. Ltd. was **one of the companies involved** in the multidistrict litigation and agreed in 2017 to pay auto dealerships \$11.4 million. The settlement covered the dealers' antitrust claims related to anti-vibration rubber parts and constant-velocity joint boot products.

The automobile dealer plaintiffs are represented by Gerard V. Mantese and Kathryn Einstein of Mantese Honigman PC, Don Barrett of Barrett Law Group PA, Shawn M. Raiter of Larson King LLP, and Cuneo Gilbert & Laduca LLP.

Robert Bosch LLC is represented by John Roberti of Cohen & Gresser LLP.

ZF TRW Automotive Holdings Corp, ZF Friedrichshafen AG and Lucas Automotive GmbH are represented by Howard B. Iwrey of Dykema Gossett.

The case In re Hydraulic Braking - Dealership Actions, case numbers 21-cv-12002 and 21-cv-4502, and re Electronic Braking Systems - Dealership Actions, case numbers 21-cv-12000 and 21-cv-4402, in the U.S. District Court for the Eastern District of Michigan. The MDL is In re: Automotive Parts Antitrust Litigation, case number 12-md-02311, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Christopher Cole and Dave Simpson. Editing by Alex Hubbard.

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'More Than Enough' Amex Evidence For Visa, Mastercard Trial

By **Bryan Koenig**

Law360 (January 23, 2024, 9:39 PM EST) -- Visa and Mastercard appear bound for trial on antitrust claims over network rules forcing merchants to accept the companies' cards without the ability to steer consumers to cheaper swipe fee options, under a New York federal judge's ruling unsealed Monday finding sufficient evidence under a key high court precedent.

U.S. District Judge Margo K. Brodie's ruling, first issued under seal Jan. 8, sided almost entirely against arguments from Visa, Mastercard and bank defendants that the various merchants suing them failed the tests to look at both sides of the market in an instantaneous transaction, under the U.S. Supreme Court's landmark 2018 decision [Ohio v. American Express Co](#) .

In rejecting the most important parts of Visa and Mastercard's bid for summary judgment to nix the antitrust allegations, Judge Brodie said it doesn't matter that the high court found in Amex, which similarly targeted high transaction fees charged to merchants, that there was an increase in output, meaning the frequency of contested transactions.

"Output increasing over time does not address whether output would have increased at a greater rate in the absence of the network restraints. Similarly, the Supreme Court's factual finding in Amex has no bearing on the record before the court," Judge Brodie said. "There is more than enough evidence in support of plaintiffs' case that jurors would not be compelled to return a verdict in favor of defendants."

Judge Brodie granted the credit card giants summary judgment only against one small part of the consolidated case that's been kicking around for almost 20 years. Under Amex, the judge summarily agreed to toss "one-sided claims" that failed to account for the impact on the two different sides of a credit card transaction recognized by the high court, which are consumers making purchases on one side and merchants accepting payment on the other.

"Defendants argue that the Supreme Court made clear in Amex that credit-card and debit-card networks are two-sided transaction platforms and, therefore, one-sided claims cannot be the basis of an antitrust challenge to two-sided transaction platforms," Judge Brodie said. Plaintiffs, she continued, "have conceded that they can no longer proceed with one-sided claims."

Merchants like Home Depot, Target and others continue to move forward after voluntarily dropping out of **a settlement class**. The plaintiffs target allegedly anti-competitive rules that have allowed Visa and Mastercard to charge excessive transaction fees by forcing merchants to accept all their cards and imposing "anti-steering" rules under which merchants are blocked from trying to incentivize consumers to use a different payment method.

Weighing those allegations in the partially-redacted 79-page ruling, Judge Brodie's decision hinged heavily on the Amex precedent and its holding that looking only at a single side of the market isn't enough.

Looking at the allegations under the rule of reason standard, which weighs allegedly anti-competitive conduct against potentially procompetitive justifications, Judge Brodie found sufficient evidence to make the allegations at least contestable enough to go to a jury. The judge rejected defense arguments that the merchants needed to show that prices went up or output went down after the challenged restrictions went into effect, a difficult prospect in a case where many of the rules were

implemented from the very beginning.

Judge Brodie credited evidence of market power — rejecting a claim made only by Mastercard that it lacks power to control prices — along with showings of anti-competitively high prices. And she rejected defense assertions that at this stage, the plaintiffs need to show how high prices would be in the "but-for world" lacking the contested restrictions.

"First, Amex requires only that plaintiffs prove that prices would have been lower or output would have been higher in the world without the defendants' challenged conduct. Amex is not so stringent as to demand an exact number — either in terms of price or output," the judge said. "This conclusion is supported by the Supreme Court's inclusion of impaired quality as a basis to find an antitrust violation."

Judge Brodie found sufficient "empirical evidence" on which a jury could find "supracompetitive" two-sided prices for debit and credit card transactions, based on the costs of transactions, profitability and more.

"In short, plaintiffs have satisfied their burden by demonstrating direct evidence that defendants controlled prices or excluded competition. In addition, plaintiffs have offered sufficient indirect evidence, assuming defendants possess market power, to satisfy their prima facie burden at this stage," the judge said.

Counsel for Home Depot and the equitable relief class declined comment. Counsel for the remaining parties did not immediately respond Tuesday to press inquiries.

The equitable relief class is represented by Hilliard & Shadowen LLP, Grant & Eisenhofer PA, Nussbaum Law Group PC and Freed Kanner London & Millen LLC.

Home Depot is represented by Quinn Emanuel Urquhart & Sullivan LLP and Bondurant Mixson & Elmore LLP.

Target is represented by Vorys Sater Seymour and Pease LLP and Gibbs & Bruns LLP.

Visa is represented by Arnold & Porter Kaye Scholer LLP and Holwell Shuster & Goldberg LLP.

Mastercard is represented by Paul Weiss Rifkind Wharton & Garrison LLP.

The case is *In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, case number 1:05-md-01720, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Emilie Ruscoe and Aaron West. Editing by Jay Jackson Jr.

Update: This story has been updated to include additional counsel information.



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Tesla Eyes Exit From Revised 'Full Self-Driving' Defect Suit

By **Linda Chiem**

Law360 (January 23, 2024, 10:06 PM EST) -- Tesla asked a California federal judge to dump an amended proposed class action alleging it deceived consumers into falsely believing that its cars can fully drive themselves, saying the lead plaintiff's claims are on their "last legs, and should go no further."

Tesla Inc. filed a **reply brief** Monday urging U.S. District Judge Rita F. Lin. to grant its motion to dismiss plaintiff Thomas LoSavio's consolidated second amended complaint accusing the company of overhyping its electric vehicles' autonomous or self-driving capabilities.

Tesla has fleeced individual customers out of thousands of dollars for add-on features known as "Enhanced Autopilot" or "Full Self-Driving Capability" — which are largely experimental and potentially dangerous — while failing to deliver on its repeated promises of a fully self-driving car, LoSavio alleges in the consolidated second amended complaint.

Tesla has countered that LoSavio bought his Tesla Model S in January 2017, but waited more than five years to file suit in September 2022 — well past the applicable statutes of limitations, which range from two to four years. U.S. District Judge Haywood S. Gilliam Jr., who oversaw the case before it was reassigned to Judge Lin in November, already dismissed LoSavio's claims in October as time-barred. Four other named plaintiffs in the dispute were **ordered to arbitrate** their claims against Tesla.

While the judge gave LoSavio another chance to amend his claims, his consolidated second amended complaint is full of vague or nonsensical claims, according to Tesla.

For example, the plaintiff alleges that while he knew his car was not fully autonomous, he expected his car to become such "within a year or two, or some other reasonably short time, after his purchase," or "drive itself in at least some circumstances" "within a year or two after his purchase" and that "Tesla's self-driving technology would only continue to expand and improve over the life of his car," according to Tesla's reply brief.

Tesla also said the plaintiff cannot circumvent the court's previous dismissal order by now claiming that he only "pre-purchased" the "Full Self-Driving Capability" package in January 2017, and that "the FSD software" was not delivered as of April 2022, a few months before he filed this lawsuit.

"Among other deficiencies, this new 'pre-purchase' theory makes no sense because LoSavio would have no warranty claims if he did not possess the product he is complaining about," Tesla said.

LoSavio alleges that Tesla CEO Elon Musk boldly promised as early as 2016 that a fully self-driving, fully autonomous Tesla vehicle was "just around the corner" and when that didn't come to fruition, continued to proclaim in 2019 that such a car "would be available by the end of that year."

LoSavio fired back at Tesla's "alternative facts" in its latest dismissal bid. He contends he paid an extra \$8,000 to pre-purchase Tesla's Full Self-Driving software on his new Tesla Model S, "reasonably believing Tesla's projections that software development would be complete in the next 1-2 years," only to get strung along.

"Tesla repeatedly cites Judge Gilliam's mistaken assumption that LoSavio was able to use and assess

Tesla's FSD software since 2017, which is directly contrary to LoSavio's new allegations," LoSavio said in a Jan. 8 opposition brief. "Tesla repeatedly states that LoSavio's claims arise from the purchase of his 'vehicle' and that his alleged injury is he 'overpaid for his car,' whereas the [second amended complaint] makes clear that LoSavio's claims arise from his purchase of software that Tesla promised would make his car self-driving."

Cotchett Pitre & McCarthy LLP partner Andrew F. Kirtley, an attorney for LoSavio and the proposed class, said in a statement to Law360 on Tuesday that the "court's ruling on the last motion to dismiss was based on a lack of sufficient detail in the prior complaint relevant to statute of limitations issues as to one named plaintiff."

"We took that ruling to heart and added detailed new allegations on that issue in the second amended complaint," Kirtley said. "As stated in our opposition brief, Tesla's motion ignores many of the new allegations in the second amended complaint, often in favor of its own alternative facts. Plaintiffs look forward to the court hearing and ruling on the motion to dismiss."

But Tesla contends the revamped suit still **hits a dead end** because LoSavio is unable to identify any purportedly fraudulent statement on which he relied to purchase his car with the added feature.

"As Tesla explained, the only two statements that LoSavio allegedly saw in January 2017 did not promise any timeline toward a fully autonomous car and instead stated the exact opposite," the company countered Monday.

The consolidated **proposed class action** accuses Tesla of privately admitting to regulators that its advanced driver assistance, or ADAS, technology was nowhere near the lofty promises publicly touted by Musk. Tesla has effectively been using its customers as untrained testers of largely experimental ADAS features, even amid increasing reports of drivers being injured and killed in accidents during which the features were deployed, according to the consolidated second amended complaint.

The National Highway Traffic Safety Administration, carmakers and developers of autonomous vehicle technology follow standards set by the engineering organization SAE International defining six tiers of vehicle automation. They range from Level 0, with no automation, to Level 5, with full vehicle autonomy.

Currently, the highest level of vehicle automation available for sale directly to U.S. consumers is Level 2 advanced driver assistance systems. With Level 2, the car can steer, brake or accelerate by itself when the ADAS is engaged, but the human driver still has to be alert and able to take control of driving tasks at any time. Tesla's Autopilot, considered a Level 2 ADAS, is a package that includes features known as Autosteer and Traffic-Aware Cruise Control.

Since August 2021, NHTSA has been **investigating** how Tesla markets Autopilot after a series of crashes with emergency or first-responder vehicles. Tesla in February 2023 agreed to voluntarily **recall nearly 363,000 vehicles** in the U.S. equipped with its beta "Full Self-Driving" feature, with the company offering a software update in response to crash-risk concerns tied to how the vehicles operate in intersections and with yellow lights.

Tesla in December voluntarily recalled more than **2 million vehicles** — all of its vehicles in the U.S. — over concerns its cars didn't adequately monitor drivers or encourage them to keep their hands on the steering wheel and to pay attention to the roadway when the vehicle's Autosteer function was engaged. Tesla offered a software update to incorporate additional controls and alerts into the system.

Counsel for Tesla could not be immediately reached for additional comment Tuesday.

The drivers are represented by Frank M. Pitre, Julie L. Fieber, Nabilah A. Hossain and Andrew F. Kirtley of Cotchett Pitre & McCarthy LLP, Francis A. Bottini Jr. and Nicholas H. Woltering of Bottini & Bottini Inc. and David S. Casey Jr., Gayle M. Blatt, Jeremy Robinson, P. Camille Guerra and Michael J. Morpew of Casey Gerry Schenk Francavilla Blatt & Penfield LLP.

Tesla is represented by Alan Schoenfeld, David C. Marcus and Allison Bingxue Que of WilmerHale.

The case is In Re Tesla Advanced Driver Assistance Systems Litigation, case number 3:22-cv-05240, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger and Mike Curley. Editing by Linda Voorhis.

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Teva Can't Escape Insurers' Copaxone Generic Delay Case

By **Matthew Perlman**

Law360 (January 23, 2024, 8:11 PM EST) -- A Vermont federal court has refused to toss a proposed class action from insurers accusing Teva Pharmaceuticals of delaying generic versions of multiple sclerosis treatment Copaxone but trimmed several claims under various state laws.

U.S. District Judge Geoffrey W. Crawford **issued a 114-page order** Monday partially granting and partially denying Teva's bid to dismiss the proposed class action from Blue Cross and Blue Shield of Vermont seeking to recover alleged overcharges on purchases of the drug.

The suit accuses Teva of using sham patent litigation and citizen petitions to the U.S. Food and Drug Administration to delay the entry of generic versions of Copaxone and working to limit competition from generics once they entered the market.

Judge Crawford's Monday order tossed claims being brought under the local antitrust laws of several states but refused to dismiss claims under federal antitrust law after ruling that it's too early in the litigation for Teva to seek dismissal based on the Noerr-Pennington doctrine, which provides antitrust immunity for lawsuits and other efforts to influence the government.

"While it might be possible in some cases to confer Noerr-Pennington immunity at the [motion to dismiss] stage, this is not such a case," the judge said. "And at this stage of the litigation — given the 'delicate task' of applying the sham-litigation standard in a case like this one — the court is not evaluating whether the parties have identified disputed facts."

As proof that its patent claims were not a sham, Teva had argued that one of its patent infringement suits in particular was litigated vigorously, with a seven-day bench trial and **an appeal** to the Federal Circuit.

But Judge Crawford said while he can believe the infringement case was "hard-fought," none of the decisions in the litigation suggested it was a "close case." The Patent Trial and Appeal Board, a district court judge and a Federal Circuit panel all concluded that the "claims were invalid as obvious," he added.

An attorney for the insurers, Michael Donofrio of Stris & Maher LLP, told Law360 on Tuesday they welcome the ruling and look forward to moving the case ahead.

"We appreciate the court's careful attention to this critical case and look forward to litigating on behalf of our client Blue Cross Blue Shield of Vermont and payers across the nation to address the harms to the healthcare system flowing from the defendants' anti-competitive conduct," Donofrio said.

Blue Cross and Blue Shield of Vermont lodged the suit in August 2022, accusing Teva of using a multipronged scheme to inflate the price of Copaxone, the brand name for glatiramer acetate. The suit includes allegations that Teva artificially extended the drug's patent exclusivity by abusing patent litigation and the FDA's regulatory process, as well as claims that Teva used a "product-hop" to switch patients to a reformulated version with longer patent protections.

Judge Crawford denied a bid in November 2022 to transfer the case to federal court in New Jersey, where several **similar cases** had been previously pending, including a case from Mylan

Pharmaceuticals Inc., one of the generic **competitors**. King County and the city of Tacoma, Washington, also have similar **claims pending** in the Western District of Washington.

The U.S. Department of Justice also has a **pending case** accusing Teva of using patient assistance programs to pay kickbacks to Medicare recipients for Copaxone purchases, allegations that are also included in the Vermont suit from insurers.

In addition to denying Teva's bid for immunity, the judge's order on Monday also rejected contentions that the citizen petitions and patent lawsuits did not delay the FDA's approval of applications from two generic rivals. Teva argued there was no "litigation-based barrier" to the FDA's approvals for a year or more when they were issued.

But the court said the efforts could have diverted the regulator's resources and still caused a delay.

"It is plausible to infer that the [abbreviated new drug application] would have been approved earlier if Teva had not filed the lawsuits alleging infringement of the patents," Judge Crawford said.

When evaluating the product hop allegations, the judge noted Teva is not being accused of removing the original version of Copaxone from the market after launching its new formulation, but he said that's not essential to the antitrust claims. The judge also credited allegations that Teva charged less for the new version, even though it had twice the active ingredient, and supposed efforts to pressure prescribers into excluding generics.

"The court is satisfied that considered together, the allegations about Teva's bare-knuckled defense of its monopoly position may be sufficient to support a factual determination at trial that patients were subjected to coercion in choosing between the brand and the generic versions of the drug," the judge said.

The order did toss claims being brought under Puerto Rico's antitrust law, after finding it does not allow claims from indirect buyers, along with unjust enrichment claims being brought under several state laws with similar requirements. The order tossed claims under Utah's antitrust law with leave to amend to include a Utah citizen.

The judge also tossed claims under the antitrust laws of California and Kansas that targeted Teva for unilateral conduct, or conduct it undertook on its own, saying the statutes only bar certain concerted actions. The buyers contend that Teva worked with the patient groups, pharmacies and others to effectuate its scheme.

Representatives for Teva did not respond to a request for comment Tuesday.

The proposed class is represented by Lynn Lincoln Sarko, Gretchen Freeman Cappio, Matthew M. Gerend, Natida Sribhibhadh, Sydney Read and Alison E. Chase of Keller Rohrback LLP, and Michael N. Donofrio, Bridget Asay, Peter K. Stris and Elizabeth R. Brannen of Stris & Maher LLP.

Teva is represented by Matthew S. Borick of Downs Rachlin Martin PLLC, and Christopher T. Holding, Daryl L. Wiesen, Alicia Rubio-Spring and Brian T. Burgess of Goodwin Procter LLP.

The case is Blue Cross and Blue Shield of Vermont et al. v. Teva Pharmaceutical Industries Ltd. et al., case number 5:22-cv-00159, in the U.S. District Court for the District of Vermont.

--Additional reporting by Ryan Davis, Hailey Konnath, Greg Lamm and Brian Dowling. Editing by Lakshna Mehta.



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'Two-Step' Bankruptcies Abuse Law, AGs Tell Justices

By **Vince Sullivan**

Law360 (January 23, 2024, 6:34 PM EST) --

Attorneys general from 24 states and the District of Columbia told the U.S. Supreme Court on Monday that divisional mergers that manufacture jurisdiction for bankruptcy purposes shouldn't be allowed, writing in an amicus brief that Georgia-Pacific asbestos unit Bestwall employed the tactic to shield the parent from liability.

In their **brief**, the attorneys general said the pre-bankruptcy corporate maneuvers — known pejoratively as the "Texas Two-Step" — enable solvent corporations like Georgia-Pacific to access bankruptcy tools that otherwise wouldn't be available to them, like channeling injunctions and releases.

"It allows them to enjoin litigation against their solvent corporate affiliates for years while states are unable to stop violations of their laws and victims receive nothing," the filing read. "This delay in turn allows them to unjustly limit their liability for the harms they have caused the states and their people."

As one of the first Chapter 11 cases to incorporate the strategy, Bestwall's bankruptcy began in 2017 as a way to separate billions in asbestos injury liability from Georgia-Pacific's assets. The parent used a unique Texas state law that permits divisional mergers — a transaction that takes an existing company and splits it into two new entities, each with different assets and liabilities.

This leaves one of the new entities, usually dubbed a BadCo, with staggering liabilities and very little in the way of assets. A Chapter 11 filing follows shortly after the split.

The attorneys general say the blueprint created by Georgia-Pacific and Bestwall has already been mimicked by other corporations facing mass tort liability, including Johnson & Johnson, one of the nation's most profitable corporations.

The official committee of asbestos claimants in Bestwall's case has appealed the debtor's ability to manufacture jurisdiction to file its Chapter 11 case in North Carolina, where Bestwall incorporated after the two-step maneuver. However, lower courts have upheld the bankruptcy court's decision allowing the case to continue.

The amici attorneys general represent North Carolina, which took the lead on the brief because Bestwall's case is pending there, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, Wisconsin and the District of Columbia.

"Wealthy companies that engage in wrongdoing should not be able to get off the hook by cheating the legal system," North Carolina Attorney General Josh Stein said in a statement issued Tuesday. "We ask that the Supreme Court take up this case and put an end to this abusive practice."

The committee filed a petition for a writ of certiorari to the Supreme Court in December, and the attorneys general were joined Monday by members of Congress who filed their own **amicus brief**.

U.S. Sens. Richard Durbin, D-Ill., Sheldon Whitehouse, D-R.I., and Josh Hawley, R-Mo. — all members of the Senate Judiciary Committee — told the justices they have grave concerns regarding the "manipulation and misuse of the bankruptcy system" posed by continued allowance of the two-

step strategy.

"Amici are troubled by the increasing prevalence of bankruptcy abuse by wealthy, solvent corporations," the senators wrote. "In recent years, multiple profitable corporations have sought non-debtor injunctions to immunize themselves from liability while denying thousands of injured claimants — including amici's constituents — their day in court."

If upheld, the decision of the Fourth Circuit permitting the practice would encourage other corporations to deploy the strategy and would perpetuate the alleged misuse of the bankruptcy system, according to the senators' brief.

Aside from the questions surrounding the manufacturing of jurisdiction, the committee's petition also doubts the bankruptcy court's authority to grant releases of third-party liability to nondebtor entities, the relief which forms the crux of the strategy at issue. The high court is considering the same question as it relates to the bankruptcy plan of drugmaker Purdue Pharma, which is facing seemingly unlimited liability for its role in the nationwide opioid crisis.

Representatives of the debtor could not immediately be reached late Tuesday for comment.

The Supreme Court has set a March 22 deadline for respondents to file briefs in response to the committee's petition.

The official committee of asbestos tort claimants, as petitioner, is represented by Natalie D. Ramsey, Thomas J. Donlon and Davis Lee Wright of Robinson & Cole LLP, and David C. Frederick, Joshua D. Branson, Katherine C. Cooper, Ana Nikolic Paul and Eden M. Bernstein of Kellogg Hansen Todd Figel & Frederick PLLC.

The attorneys general are represented by Ryan Y. Park, James W. Doggett and Daniel Mosteller of the North Carolina Department of Justice.

The senators are represented by Deepak Gupta and Gregory A. Beck of Gupta Wessler LLP.

Respondent Bestwall is represented by Noel John Francisco of Jones Day LLP.

The appellate case is Official Committee of Asbestos Claimants v. Bestwall LLC, case number 23-675, in the U.S. Supreme Court.

The underlying bankruptcy case is In re: Bestwall LLC, case number 3:17-bk-31795, in the U.S. Bankruptcy Court for the Western District of North Carolina.

--Editing by Covey Son.