

McKinsey's \$230M opioid settlement gets judicial OK

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Feb. 5, 2024

The settlements also include attorney fees of \$31 million for lawyers representing the government plaintiffs and \$2.3 million for those representing the school

The federal judge overseeing multidistrict litigation that claimed McKinsey & Co. had a role in the national opioid crisis gave final approval Friday to a \$207 million settlement with cities and counties and a \$23 million settlement with school districts.

U.S. District Judge Charles R. Breyer in San Francisco also signed off on the plaintiff counsel's request for attorney fees: \$31 million for lawyers representing the government plaintiffs and \$2.3 million for those representing the school districts.

McKinsey, represented by several law firms including Hogan Lovells and Goodwin Procter LLP, agreed to pay \$642 million last year to settle claims by state attorneys general that the consultant's work with Purdue Pharma and other drug companies fueled opioid addiction in the United States.

Robbins Geller Rudman & Dowd LLP partner Aelish M. Baig represented the government plaintiffs at the hearing and Cyrus Mehri of Mehri & Skalet PLLC spoke for the school districts. In re: McKinsey & Co. Inc. National Prescription Opiate Consultant Litigation, 3:21-md-02996-CRB (N.D. Cal., filed Jun. 8, 2021).

Last month, McKinsey agreed to pay an additional \$78 million to resolve allegations brought by insurers and third-party payers. The court rescheduled the motion for preliminary approval of the settlement after hearing objections by counsel on Friday that the structural aspects of the fund allocation plan made it impractical for most class members to exercise their opt-out rights and would result in uneven distribution.

Breyer told the parties to take some time to revisit the distribution terms. "I've never [given preliminary approval] before we've figured out the allocation," said the judge. "It just strikes me as doing 70% of the work and we're going to treat it like 100% ... it's not the right thing to do."

The judge also took under submission McKinsey's motion to dismiss tort claims on behalf of newborns with neonatal abstinence syndrome, which typically occurs in babies exposed to opioids and other substances while in the womb.

“When you get to the specifics, there is no chain of causation, period,” Goodwin Procter partner Mark David McPherson said, explaining that the named plaintiffs’ mothers were using drugs prescribed by providers unrelated to McKinsey. His client “simply cannot be held responsible for everything that happens concerning the opioid epidemic,” said McPherson.

#377012

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McKinsey's \$230M Opioid Settlement With Cities, Schools Approved

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A US judge greenlighted McKinsey & Co.'s proposal to pay \$230 million to settle claims that the consulting firm's marketing work turbocharged opioid sales and led municipal governments to divert public resources to stem painkiller addiction.

The settlement, which was approved Friday by Judge Charles Breyer of the US District Court for the Northern District of California, caps litigation in one of several cases brought by cities and states against more than a dozen drug manufacturers and distributors, retail pharmacies, and associated companies for their role in contributing to the explosive growth of opioid painkiller use throughout the US. The settlement is also the first to offer monetary restitution specifically for schools.

Public governments and school districts filed the class-action lawsuit in 2021, alleging that McKinsey strategized and acted with Purdue Pharma LP and various other opioid manufacturers to create and employ marketing and sales practices to maximize opioid revenues. McKinsey agreed to the \$230 million settlement in September.

The sales fueled a crisis of opioid addiction nationwide that required emergency responses to treat side effects and overdoses and other safety measures requiring significant public funding, such as educational resources for special needs children who were born to addicted women, the lawsuit said.

Companies have paid more than \$50 billion in settlements for making misleading marketing statements that underplayed the addictive quality of opioid pain killers, according to data compiled by Bloomberg News. The US Supreme Court is considering whether to reverse an appeals court's decision allowing Purdue's Sackler family owners to dedicate roughly \$6 billion to a trust for opioid victims in exchange for protection against civil liability from lawsuits related to opioid marketing.

McKinsey has previously agreed to pay \$600 million to settle state attorneys general lawsuits seeking to hold its work with the opioid industry accountable.

Under this latest settlement agreement, McKinsey will allocate \$207 million to the class-action's lead plaintiffs—the cities of Santa Cruz, Calif., and Pope County and Eddyville, Ill.—and \$23 million to school districts. The lead plaintiffs said they intend to also ask the court for 10% of the settlement payment to cover their attorneys' fees and costs, plus \$176,000 to reimburse other expenses.

Other members of the lawsuit will receive their portion of the settlement amount pursuant to an allocation formula that governed other multi-state settlements with pharmaceutical makers Janssen Pharmaceuticals Inc., McKesson Corp., Cardinal Health Inc., and AmerisourceBergen Corp.

The court was also set to approve on Friday a \$78 million settlement McKinsey agreed in December to pay health insurers and benefits providers, but it postponed a hearing for the decision until March after several parties raised objections.

The health insurers and benefits providers said in their lawsuit that they were misled into reimbursing prescription opioids over safer, non-addictive, and lower-cost drugs and ought to be compensated for financially supporting the opioid addiction-related treatment that followed.

Dinsmore & Shohl LLP, Todd and Weld LLP, Hogan Lovells US LLP, and Goodwin Procter LLP are lead counsel for McKinsey. Lieff Cabraser Heinmann & Bernstein LLP, Robbins Geller Rudman & Dowd LLP, Simmons Hanly Conroy LLC, Motley Rice LLC, and Browne Pelican PLLC are lead counsel represent plaintiffs.

The case is In re: McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation , N.D. Cal., No. 3:21-md-02996, hearing 2/2/24 .

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Banner Year for Securities Class Actions With \$5.8 Billion in Settlement Proceeds in U.S.

insights.issgovernance.com/posts/banner-year-for-securities-class-actions-with-5-8-billion-in-settlement-proceeds-in-u-s

February 5, 2024



Figure Represents Highest Total Over Past Five Years

ROCKVILLE, Md. (February 5, 2024) – In 2023, recorded settlement funds stemming from securities class actions in the U.S. surpassed the prior year's total by approximately \$600 million, making it a banner year for investor recoveries, according to a new report released today by Securities Class Action Services LLC (SCAS), part of the ISS STOXX group of companies.

While the annual ISS SCAS Top 100 report finds that the total number of approved monetary settlements in the U.S. decreased by 10 percent, the average value of these settlements increased significantly to \$45.4 million, representing an 18 percent increase over the prior year. The report also indicates a significant rise in the value of state court settlements in 2023. Cases that received judgment at the state court level provided for a total of \$1.9 billion in recoveries, representing the highest amount recorded by SCAS in a calendar year.

For the first time since 2020, there were four settlements in a calendar year that yielded sufficient dollar recoveries to be included in SCAS' annual report on the Top 100 largest U.S. settlements of all-time. Of the four settlements, two stemmed from cases filed against banking giant Wells Fargo, one of which resulted in a \$1 billion settlement and the other a \$300 million payout. The two others resolved allegations against Dell Technologies for \$1 billion, and Kraft Heinz for \$450 million, respectively. These top four settlements combined to represent 59 percent of the total value of all 127 U.S. class action settlements in 2023.

“2023 proved to be a banner year for recoveries and the pipeline for 2024 suggests another strong year ahead for investors,” said Ivar Eilertsen, Global Head of ISS Securities Class Action Services. “ISS SCAS has a long history of helping clients maximize recoveries through high-touch service and cutting-edge workflow solutions.”

In addition to the significant settlements, 2023 was a robust year for disbursements, meaning the funds were distributed to eligible investors. Class action settlements representing \$6.5 billion in aggregate value (\$4.9 billion in the US) made initial disbursements in 2023. These are highest totals recorded since 2019. Notable disbursements include the \$1.6 billion global Steinhoff settlement and the \$1.2 billion settlement with Valeant Pharmaceuticals.

To download a copy of the report and for further information on ISS’ Securities Class Action Services division, please visit us at: <https://www.issgovernance.com/library/the-top-100-us-class-action-settlements-of-all-time-as-of-december-2023/>.

Editors: Please note that any citation of statistics contained within the report should be attributed, in full, to “ISS Securities Class Action Services.”

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About ISS STOXX

ISS STOXX GmbH, through its group companies, is a leading provider of comprehensive and data-centric research and technology solutions that help capital market participants identify investment opportunities, detect qualitative and quantitative portfolio company risks, and meet evolving regulatory requirements. With roots dating back to 1985, we today deliver world-class benchmark and custom indices across asset classes and geographies and serve as a premier source of independent corporate governance, sustainability, cyber risk, and fund intelligence research, data, and related offerings. Our products and services give clients the scale and leverage they need to grow their business more effectively and efficiently. ISS STOXX, which is majority owned by Deutsche Börse Group, is comprised of more than 3,400 professionals operating across 33 global locations in 19 countries. Its approximately 6,400 clients include many of the world’s leading institutional investors who turn to ISS STOXX for its objective and varied offerings, as well as companies focused on ESG, cyber, and governance risk mitigation as a shareholder value enhancing measure. Clients rely on ISS STOXX’s expertise to help them make informed decisions to benefit their stakeholders.

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Texas Attorney General Secures \$350 Million Settlement with Publicis Health Over Role in Opioid Epidemic

 legalnewsline.com/stories/654099598-texas-attorney-general-secures-350-million-settlement-with-publicis-health-over-role-in-opioid-epidemic

February 2, 2024

Attorney General Ken Paxton | Attorney General Ken Paxton Office

Texas Attorney General Ken Paxton has announced a \$350 million settlement with global marketing and communications firm Publicis Health, resolving investigations into the company's involvement in the prescription opioid crisis. The State of Texas will receive approximately \$21 million as part of the settlement.

Publicis Health collaborated with major pharmaceutical corporations, including Purdue Pharma, to promote highly addictive opioids such as OxyContin. Their sales tactics included exploiting medical data obtained from recordings of discussions between doctors and patients. These actions significantly contributed to the opioid epidemic in Texas, which has resulted in over 22,600 deaths in the state since 2006.

Attorney General Paxton expressed his sympathy for the affected Texas families, stating, "My heart is with our Texas families who have suffered from the fallout of the opioid epidemic." He emphasized his determination to hold accountable the companies that collaborated with the pharmaceutical industry to unethically promote dangerously addictive prescription drugs. Paxton added, "I will continue to do everything in my power to bring these companies to justice for the harm they created."

This settlement marks another significant achievement for Attorney General Paxton in his efforts to combat the national prescription opioid crisis. He has already secured over \$2.98 billion in legal settlements from drug manufacturers and other entities involved in exacerbating the crisis. The funds obtained from statewide opioid settlements are dedicated to opioid abatement and are overseen by the Texas Opioid Council.

The settlement with Publicis Health represents a step toward holding the marketing and communications industry accountable for its role in the opioid epidemic. It sends a clear message that companies cannot profit at the expense of public health and safety. The Texas Attorney General's office continues to prioritize the well-being of its citizens and seeks to prevent further suffering caused by opioid abuse, addiction, and overdose.

For more information on the settlement and to access the filing, please [click here](#).

Opioid settlement funds in Mass. go unspent as deaths mount

 [bostonglobe.com/2024/02/04/metro/opioid-overdose-fentanyl-settlement-massachusetts/](https://www.bostonglobe.com/2024/02/04/metro/opioid-overdose-fentanyl-settlement-massachusetts/)

By Chris Serres Globe Staff, Updated February 4, 2024, 6:00 a.m. Email to a Friend Share on Facebook Share on Twitter Print this Article View Comments 97

One July afternoon, Steve Jesi was scouring the internet for updates on the more than \$50 billion in legal opioid settlement funds being delivered to state and local governments.

Jesi, who lost his 33-year-old daughter, Stephenie, to a heroin overdose in 2015, made a surprising discovery on a state website. The town where he lived, Middleton, had received nearly \$20,000 from drug companies accused of flooding communities with painkillers that left millions addicted or dead, yet had not spent any of the money on addiction treatment and overdose prevention programs.

Determined to get answers, Jesi immediately drove to Town Hall, where officials were unaware of the settlement payments. (Traci Mello, director of public health, said the money had gone unnoticed because she was new in her role.)

“I was dumbfounded,” said Jesi, a retired executive. “How do you let this money sit there in a bank while people are dying?”

The Middleton example is hardly an anomaly. Less than 5 percent of the \$50 million that Massachusetts communities received from the opioid settlements so far has been spent on addiction-related services and overdose prevention efforts, according to a Globe analysis of municipal spending reports.

More than 90 percent of the 247 communities that submitted financial reports to the state hadn’t spent a single penny in the fiscal year that ended June 30, 2023. That includes most of the largest cities, all hard hit by the overdose crisis: Boston, Cambridge, Springfield, and New Bedford, which each received more than \$1 million in settlement funds.



Steve Jesi pointed to a Narcan distribution box that was installed inside the Flint Public Library at his urging. Jessica Rinaldi/Globe Staff

The money has sat unused while the decades-long opioid epidemic has entered a perilous new phase — marked by the rapid spread of fentanyl and other toxic substances throughout the illicit drug supply. More than 3,500 people in Massachusetts have died from drug overdoses since municipalities began receiving payouts in July 2022 — the first of about \$400 million that drug companies will pay to cities and towns in the state over the next 18 years.

✿ A Flourish table

(Another 98 cities and towns were not required to submit reports because they received payments of less than \$35,000 a year.)

“It’s inexcusable,” said Senator John Velis, a Westfield Democrat and chair of the Senate’s Mental Health, Substance Use and Recovery committee. “This should be an ‘all-hands-on-deck’ moment. This is a public health crisis . . . and we need every dollar out there to minimize harm and save lives.”

Municipal officials and groups that monitor opioid settlements say the money is being held up by local disputes over competing priorities, accounting red tape, and protracted efforts to collect community input. While the legal settlements came with clear spending guidelines,

some town and city officials said they were still unsure of how to spend the money effectively and equitably, given the complexity and persistence of addiction. Others said they were moving cautiously to gather ideas from residents, including treatment specialists and those with experience living with addiction, to make sure they are making the best decisions on their behalf.

Boston, which received \$6 million as of December, announced plans late last month to use some of the money for supportive housing and for financial aid for residents who have lost loved ones to overdoses.

Dr. Bisola Ojikutu, executive director of the Boston Public Health Commission, said the city preferred a “very thoughtful, deliberative, and inclusive” approach that included a public survey and listening sessions in communities particularly hard hit by the opioid epidemic. The city expects to receive more than \$1 million annually in settlement money through 2038.

“We will move as quickly as possible, but we’ll also be deliberative and make sure that we’re doing the right things with the money,” Ojikutu said.

The influx of opioid settlement money has been described by some public health experts as a once-in-a-generation opportunity to change how local governments address substance abuse and possibly even reverse the scourge of overdose deaths.

Yet the sluggish pace of spending is frustrating some lawmakers and families who have lost loved ones to overdoses and are demanding faster action. Some of the grieving families played a pivotal role in the legal cases that led to the multibillion-dollar settlements, and they have emerged as the most outspoken voices for dispersing the money more quickly.

“Those of us serving a life sentence of grief over the loss of our loved ones do not want that money sitting in a bank account,” said Cheryl Juare, who lost two sons to fatal overdoses and lives in Marlborough, which has yet to spend more than \$160,000 in settlement money.

Marc McGovern, a city councilor and vice mayor of Cambridge, said administrators have only themselves to blame for why his city has failed to spend \$1.9 million in settlement funds. They spent too much time, he said, deliberating over whether to fund existing harm-reduction programs or to tackle broader issues such as the shortage of supportive housing for people with substance use disorder.

“There are a lot of ideas,” he said. “What we need is a sense of urgency.”

Cambridge so far has decided to use some of the money to buy a medical outreach van.

✶ A Flourish chart

New Bedford's Health Department has been meeting with public health officials across the state and is still working on "detailed, long-term action plans" for using the settlement funds to address the opioid crisis and its root causes, the city said. Lynn organized public focus groups and gave away gift cards to encourage residents to attend.

Not every city has been slow to act.

Worcester is among nearly a dozen that spent all their settlement money. Its initiatives include \$500,000 on mobile crisis teams to respond to emergency calls involving substance use and mental health. Teams of purple-shirted social workers are dispatched in vans to crisis calls to help steer people to treatment programs and other services.

Other programs in Worcester include a new office of maternal health, which will provide support to pregnant or postpartum mothers struggling with substance use, and recovery counseling for people who are homeless or incarcerated. "It's an awful epidemic . . . and we need programs in place that can be long-lasting and self-sustaining," said Dr. Matilde "Mattie" Castiel, Worcester's commissioner of health and human services.

✶ A Flourish chart

Policy makers are determined to avoid the mistakes of the Big Tobacco settlement of 25 years ago, when much of the billions in payments to states plugged budget holes and funded public infrastructure projects instead of nicotine-prevention programs. Under the statewide opioid settlements, cities and towns must use the dollars on substance abuse prevention, treatment, and recovery programs, as well as harm-reduction strategies that seek to mitigate the deadly risk of using drugs.

Massachusetts expects to receive almost \$1 billion over 18 years from settlements with opioid manufacturers and distributors. Of that, 40 percent is going to municipalities based on such factors as the number of opioid-related overdose deaths and US Drug Enforcement Agency data on the amount of opioids shipped into local communities. The remaining 60 percent goes into the state's Opioid Recovery and Remediation Fund.

The payments do not include the settlement with Purdue Pharma, producer of OxyContin, which is undergoing court review.

The state has been far more decisive with its share, about \$100 million thus far, funding three mobile programs for delivering methadone and addiction teams to consult at 15 hospitals, among other efforts.

The state Department of Public Health said it plans to sponsor a conference this spring to help municipalities better understand how to use the funds, including whether to team up with neighboring communities..



Steve Jesi visited the grave of his daughter Stephenie, who died of a heroin overdose. Jessica Rinaldi/Globe Staff

“Town government is picturesque and nice, but many towns are not large enough to have a public health function,” said David Rosenbloom, a professor of public health at Boston University and a member of a state advisory council on the Opioid Recovery and Remediation Fund. “Something like this [opioid epidemic] comes along and they don’t know how to respond.”

As for Jesi, the Middleton retiree turned his frustration over the unused settlement money into action. Since his visit to Town Hall, the retired executive organized a series of monthly meetings that involved the local Fire Department, public health nurses, and addiction treatment specialists. The town has since tapped about \$8,000 of its settlement money to install opioid overdose “rescue kits” equipped with free Narcan in dozens of local restaurants, Dunkin’ shops, and public buildings throughout Middleton.

“Every parent who’s lost a child . . . wants to see that money out there saving lives,” said Jesi, after stopping at Middleton’s public library to check on one of the kits. “If we can save one life, then it’s worth every cent.”

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Elon Musk

Can Elon Musk derail Delaware?

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Billionaire's threat to move company's legal home to Texas has revived debate over dominance of small, mid-Atlantic state

Sujeet Indap in New York and **Myles McCormick** in Houston YESTERDAY



“You’ve got a bunch of judges down in Wilmington who are threatening our future, who are depressing the standard of living for the US public.” Those words did not come from Elon Musk, who last week expressed his fury at the Delaware court that nullified his \$56bn pay package from Tesla.

Rather the rebuke came in 1989 from Marty Lipton, the godfather of modern M&A law who argued that the Delaware Court of Chancery had become too unkind to his corporate clients in that decade’s takeover wars.

Lipton at the time wondered out loud about blue-chips ditching their Delaware domiciles — where the majority of large, listed American companies choose to incorporate — for the likes of New Jersey and Pennsylvania, in order to find friendlier judges.

But an exodus never materialised. Lipton eventually became a leading evangelist for the “Delaware Way”. His law firm, Wachtell Lipton Rosen & Katz, later dominated the practice of representing corporate boards in Delaware disputes, even hiring multiple Delaware judges after they retired from the bench.

Musk is now reviving the debate about Delaware and the power its courts wield over corporate America. He has pledged to [let shareholders vote](#) on whether Tesla should shift its incorporation to Texas, which has touted its courts as a corporate sanctuary.

Musk's international following has brought unprecedented attention to the once-niche topic of incorporation. Most Delaware watchers are, however, unworried. Of the 470 public companies in the Fortune 500, 328 make their corporate home in the small, mid-Atlantic state best known for President Joe Biden and chemicals group DuPont, drawn in part to its stable and well-understood corporate law regime.

Delaware's chancery court is structured as a "court of equity", looking to legal principles to enforce ideals of fairness. Its cases are not heard by juries but rather judges themselves, known as chancellors or vice-chancellors. It traces its origin to 1792, and is modelled on the High Court of Chancery of Great Britain.



Chancellor Kathaleen McCormick issued the ruling that prompted Elon Musk's ire © Kathleen Flynn/Reuters

The decades of precedents that guide M&A dealmaking and proxy fights that it has produced, as well as the deep-seated Delaware legal community, would be nearly impossible to replicate elsewhere, said Joel Fleming, a longtime plaintiffs' litigator in Delaware.

A 2001 study found that companies with a Delaware incorporation enjoyed a premium on their valuations. "If we assume founders and managers have an incentive to minimise their cost of capital, they will prefer to incorporate in a state that ensures investor protection," said Stephen Bainbridge, a corporate law professor at UCLA.

Bainbridge said he believed Delaware's willingness to harness Musk would buttress the state's supremacy rather than threaten it.

As a general rule, Delaware prefers not to interfere with corporate decision-making. Its famed "business judgment rule" means independent directors cannot be held liable for the decisions they make on behalf of shareholders, so long as they acted with sufficient care and in good faith.

"After 'investment banker', 'independent director of a Delaware public company' is the safest job in M&A," Leo Strine, former chief justice of the Delaware Supreme Court, liked to quip.

Musk benefited from this reluctance to intervene when Delaware courts refused to sanction him over Tesla's 2016 buyout of SolarCity, after the carmaker's shareholders accused him using one part of his empire to bail out another.



The Delaware Court of Chancery building in Wilmington, Delaware © Sarah Silbiger/Bloomberg

But the deferential rule does not apply when the court sees enough evidence that directors were too close to the person behind a transaction. Musk found himself on the losing side of that doctrine when Tesla directors and management who brokered the pay agreement [were found by Chancellor Kathaleen McCormick](#) to be chummy with the tycoon.

Her detailed legal analysis — as well as an in-depth look at the financial plumbing of [Musk's unprecedented pay deal](#) — is the backbone of the specialised Delaware Court of Chancery.

Still, the court has not been immune from criticism, even before Musk's blow-up. What has been a largely technocratic court is grappling with the modern culture wars over ["stakeholder capitalism" and ESG](#), already drawing political or social players who want to use a business court to make broader point.

Delaware has cracked open the door for boards to be held accountable by shareholders for failing to prevent scandals. Boeing, for example, settled such charges over 737 Max planes for more than \$200mn. Separately, the Court of Chancery last year denied a customary "books and records" request from a shareholder probing how Disney had reacted to Florida's "Don't Say Gay" legislation.

Ironically, Texas, the object of Musk's affection, is embroiled in its own controversies, including an ESG backlash and abortion restrictions that have tarnished its reputation as a low-drama business hub.

For Texas, Musk's endorsement is coming at an opportune time. It is set to launch its own business court later this year that supporters believe can challenge the Delaware chancery. It is not obvious if its jurisprudence would prove more CEO-friendly. Companies will need shareholders' approval to relocate, regardless. Tesla has already moved its corporate headquarters from California to Texas.

"Delaware thinks: 'We're smarter than you are, and we're going to have judges up here in Wilmington look at the economics of your transaction,'" said Byron Egan, an elder statesman of the Texas corporate law bar, firmly taking a poke at Chancellor McCormick's conclusion that Musk's pay was way out of line.

"I would tell Elon what Davy Crockett [the legendary frontiersman] said: 'Some people were born in Texas, others came as soon as they could.'"

Stinging Musk Defeat Throws Spotlight on Role of Tesla GC Todd Maron

[law.com/2024/02/05/stinging-musk-defeat-throws-spotlight-on-role-of-tesla-gc-todd-maron](https://www.law.com/2024/02/05/stinging-musk-defeat-throws-spotlight-on-role-of-tesla-gc-todd-maron)



Todd Maron, general counsel of Tesla from 2014 to 2019. Courtesy photo

ANALYSIS

Chancellor Kathaleen McCormick found Maron was "totally beholden" to the billionaire and that three of Tesla's eight board members were as well.

February 05, 2024 at 08:26 AM

Corporate Governance

Greg Andrews [→](#)

The original version of this story was published on Corporate Counsel

Chancellor Kathaleen McCormick of the Delaware Court of Chancery referenced former Tesla General Counsel Todd Maron 74 times in her 200-page ruling last week voiding CEO Elon Musk's \$56 billion pay package.

She wrote that Musk in effect did not have to negotiate with anyone when the eight-person board in 2018 approved the package, the largest in U.S. history.

Maron, the primary intermediary between Musk and the board, was “totally beholden” to the billionaire, the judge said. Three board members also were, she wrote, as a result of business dealings, friendships or family ties.

In her ruling, she observed that Maron was “Musk’s former divorce attorney and whose admiration for Musk moved him to tears during his deposition.” In that deposition, she noted, Maron had said that “there wasn’t a conflict of interest. ... I think it was a cooperative, collaborative process.”

Then McCormick dropped this zinger: “To deal with a conflict, one must first recognize a conflict. ‘Conflict blindness and its lesser cousin, conflict denial, have long afflicted the financially sophisticated,’” referencing a 2013 Delaware Chancery Court opinion. “Maron could not perceive the conflict, much less help deal with it.”

Maron, Tesla’s general counsel from 2014 to 2019 and now chief legal officer of the health care apparel maker Figs, declined to comment when contacted by Law.com.

In court filings, attorneys representing the Tesla shareholder who brought the case, former rock band drummer Richard Tornetta, also challenged Maron’s independence, noting that Musk had recruited him for the job, “notwithstanding Maron’s lack of corporate, securities or regulatory experience.”

In a filing, Tornetta’s legal team—from Bernstein Litowitz Berger & Grossman, Andrews & Springer and Friedman Oster & Tejtel—quoted from a portion of Maron’s deposition in which he said he cared about Musk “a tremendous amount” and “wanted him to have ... success in life.”

In her ruling, McCormick did acknowledge that “Maron neither socialized with Musk nor considered himself a friend of Musk when he worked at Tesla.” Even so, she added, “he owed his career to and had genuine affection for Musk.”

A review of Maron’s deposition transcript paints a more nuanced picture of Maron’s relationship with the billionaire and how he viewed his duties as general counsel.

For example, McCormick wrote in her opinion that “it is unclear on whose side Maron viewed himself” during the negotiations on the pay package, which envisioned a series of stock-based grants. In fact, Maron had stated unequivocally in his deposition that he was representing the company and the board.

When asked, “Did you consider [Musk] as your client in connection with the 2018 stock grant?” he responded, “No, no, I didn’t.”

And while McCormick twice wrote that Maron's "admiration for Musk moved him to tears during his deposition," her footnote supporting the statement doesn't document that level of adulation.

Rather, McCormick cites this comment by Maron: "Unfortunately I lost my cool earlier and cried because I love the company so much, and I loved my teammates and my colleagues and the people on the executive team." The footnote also quotes Maron as saying he had an "incredible experience" at Tesla and that his decision to leave was "very emotional."

In his deposition transcript, Maron said his emotion reflected his love for both the company and his family.

"I had been ... sprinting a marathon for six years," Maron said, starting as deputy general counsel in 2013 and becoming general counsel a year later.

"I really missed my family. I felt I wasn't as actively involved with my kids as I wanted to be. So I had these two things that I felt a real pull between, my family and the job that I loved. And I just finally reached the conclusion ... that I really needed to be more with my family."

Jeroen van Kwawegen, a partner at Bernstein Litowitz representing the plaintiff, said the fact that Maron became tearful during his deposition "is just a vivid illustration of his emotional attachment, which essentially blinded him to the situation that not everything that was good for Elon was necessarily good for Tesla and its shareholders."

But he also acknowledged that transactions such as arranging Musk's compensation package put general counsel and other senior executives in a difficult spot.

On the one hand, the CEO is their boss, but on the other they have a fiduciary duty to the company and its shareholders.

"It is difficult being the general counsel of a publicly traded company. It is important for general counsel to be mindful of their own fiduciary duty," he said.

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The Money and Drugs That Tie Elon Musk to Some Tesla Directors

Board members have reaped hundreds of millions from stock awards and separate investments, even as some have done drugs with Musk; former Tesla director Larry Ellison offered him a chance to dry out

By *Kirsten Grind* [Follow](#), *Emily Glazer* [Follow](#), *Rebecca Elliott* [Follow](#) and *Coulter Jones* [Follow](#)

Feb. 3, 2024 9:00 pm ET

Board members at Elon Musk's electric-car maker, Tesla **TSLA -3.18% ▼**, were facing a dilemma.

One longtime director, the venture capitalist Steve Jurvetson, had left his firm after an internal investigation found he had slept with multiple women in the tech industry and used illegal drugs.

Some of the details had been splashed across the press in 2017, and Tesla directors informally discussed how they should handle it, according to people familiar with the situation. Some urged him to resign.

Luckily, Jurvetson, even though the company designated him an independent director, had a good friend with whom he had deep financial ties and also attended parties, using ecstasy and LSD: Musk.

Musk pushed directors in private conversations to allow Jurvetson to take an unusual leave of absence from the board of the public company, and then step down on his own accord in 2020, the people said. Jurvetson remains a director at Musk's privately held rocket company, SpaceX.

"The answer was do nothing and see what happens," said another former independent Tesla director and good friend of Musk's, Antonio Gracias, in a 2021 court deposition, when asked

how the board handled the Jurvetson situation. Gracias and his venture-capital firm held investments recently valued at about \$1.5 billion in Musk companies.

Multiple other directors of Musk companies have deep personal and financial ties to the billionaire entrepreneur, and have profited enormously from the relationship. The connections are an extreme blurring of friendship and fortune and raise questions among some shareholders about the independence of the board members charged with overseeing the chief executive. Such conflicts could run afoul of the loose rules governing what qualifies as independence at publicly traded companies.

On Tuesday, a Delaware judge struck down Musk's multibillion-dollar pay package at Tesla, saying board members who signed off on it in 2018 were beholden to Musk.

Several current or former directors at Tesla and SpaceX attend parties with him, go on exotic vacations and hang out at Burning Man, the Nevada arts and music festival.

Musk and these directors, including venture capitalists Gracias and Ira Ehrenpreis, tech mogul Larry Ellison, former media executive James Murdoch, as well as Musk's brother, Kimbal Musk, have invested tens of millions of dollars in each other's companies—Ellison held billions of dollars in Tesla shares with about a 1.5% holding in 2022. Some also received career support and help from Elon Musk.

Most members of Tesla's current eight-person board have amassed shares worth hundreds of millions of dollars from their seats over the years, significantly more than what board members at other companies make for their service.

Tesla pays its directors mostly in stock options, and the current board, not including Musk himself, collectively has made more than \$650 million selling shares from those options. They hold additional options valued at nearly \$1 billion. Some directors agreed to return a portion of that compensation to Tesla to resolve a shareholder lawsuit about their compensation while denying any wrongdoing. A judge has yet to approve the settlement.

Some current and former Tesla and SpaceX directors have knowledge of Musk's illegal drug use but haven't taken public action, according to people who have witnessed the drug use or were briefed on it.

The Wall Street Journal reported in January that Musk has used drugs including cocaine, ecstasy, LSD and magic mushrooms, and that leaders at Tesla and SpaceX were concerned about it, particularly his recreational use of ketamine, for which Musk has said he has a

prescription. The illegal drugs violate strict antidrug policies at Musk's companies and could put SpaceX's federal contracts and Musk's security clearance at risk.

At the upscale Austin Proper Hotel, Musk has attended social gatherings in recent years with Tesla board member Joe Gebbia, the Airbnb co-founder and a friend of his, where Musk took ketamine recreationally through a nasal spray bottle multiple times, according to people familiar with the drug use and the parties.

Other directors, Gracias, Jurvetson and Kimbal Musk, have consumed drugs with him, according to people who have witnessed the drug use and others with knowledge of it.

Musk and some people close to him, including Kimbal Musk, attend parties at Hotel El Ganzo, a boutique hotel in San José del Cabo, Mexico, known for its art and music scene as well as drug-fueled events, according to people familiar with the parties.



The Hotel El Ganzo in San José del Cabo, Mexico. PHOTO: ALAMY

The volume of drug use by Musk and with board members has become concerning, some of these people said.

In the culture Musk has created around him, some friends, including directors, feel there is an expectation to consume drugs with him because they think refraining could upset the billionaire, who has made them a lot of money, some of the people said. More so, they don't

want to risk losing the social capital that comes from being close to Musk, which for some feels akin to having proximity to a king.

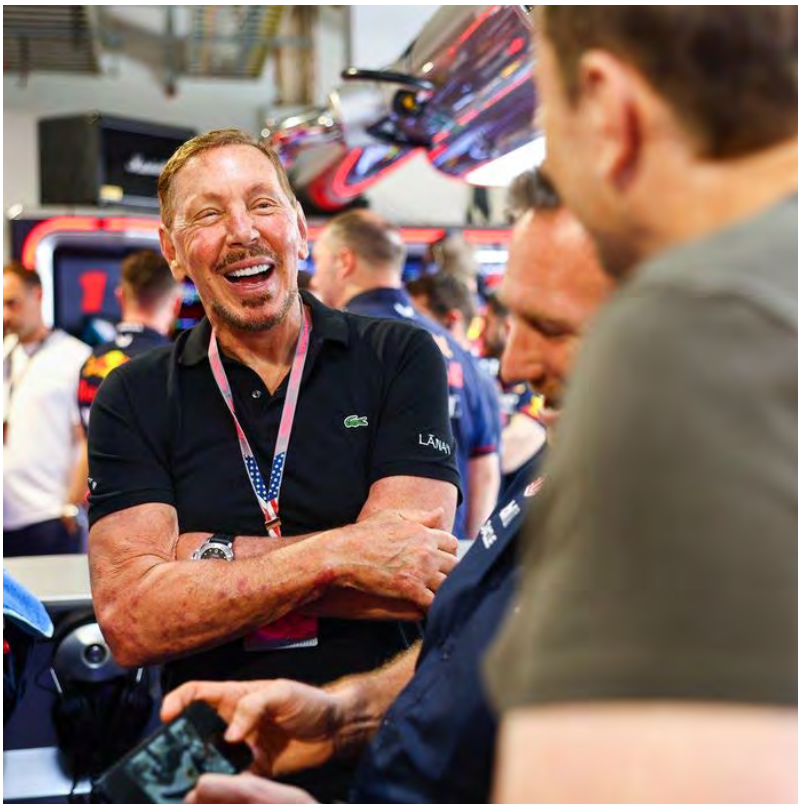
Musk and his lawyer, Alex Spiro, didn't respond to requests for comment.

In response to the Journal article in January about Musk's illegal drug use, Spiro said Musk is "regularly and randomly drug tested at SpaceX and has never failed a test."

After that article, Musk tweeted that in three years of undergoing random drug testing after a pot-smoking incident in 2018, "Not even trace quantities were found of any drugs or alcohol. @WSJ is not fit to line a parrot cage for bird [poop emoji]." He later tweeted: "If drugs actually helped improve my net productivity over time, I would definitely take them!"

Tesla's general counsel and a SpaceX spokesman didn't respond to requests for comment.

Ellison offer



Larry Ellison spoke to Elon Musk, in olive T-shirt, at an auto racing event in Miami last year. PHOTO: MARK THOMPSON/GETTY IMAGES

Some board members worry about the negative effects of Musk's behavior on the six companies he oversees and the roughly \$800 billion in assets held by investors, according to people close to Musk.

Despite the concerns, the Tesla board hasn't investigated his drug use or recorded their worries into official board minutes, which could become public.

Around the winter of 2022, Musk's good friend and former Tesla board member, Ellison, urged him to come to his Hawaiian island to relax from work and dry out from the drugs, according to people familiar with the offer.

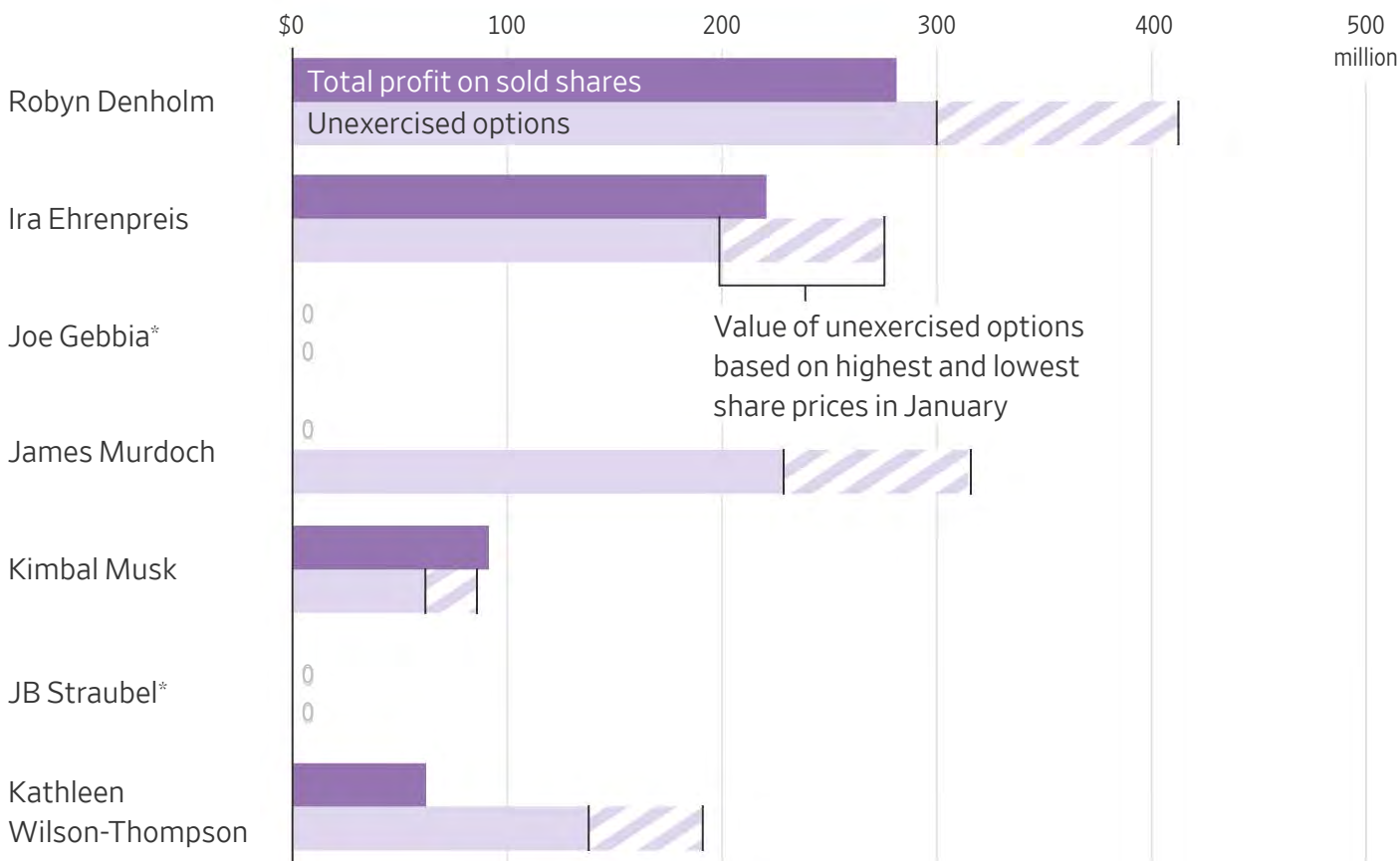
The outreach came as friends and others close to Musk worried that his drug use was getting worse, and some asked him to go to rehab, some of the people said.

Around the same time as the Ellison offer, Musk attended a party in the Hollywood Hills where he consumed a liquid form of ecstasy from a water bottle, according to a person who was there. Musk's security guards asked people to leave the floor of the house for privacy before Musk took the drug.

Across Silicon Valley, executives sometimes invest in each others' companies and ventures, and might have one or two personal friendships on a company board, especially before it goes public.

Musk, because of the extent of his personal and professional board ties and the enormous amount of money involved, is the most prominent example of a chief executive who is intertwined with directors. The Journal traced connections by reviewing hundreds of pages of court documents and depositions, Securities and Exchange Commission filings and other public records.

Members of Tesla's board, who are mostly paid in stock options, have made hundreds of millions of dollars from their seats over the years, significantly more than the typical director at a public company.



*Hasn't earned options from board service

Source: Wall Street Journal analysis of SEC filings

Stephanie Stamm/THE WALL STREET JOURNAL

The amount Tesla pays its directors is far more than the average compensation for boards at most U.S. companies. The average total compensation for board members in the largest 200 U.S. companies was \$329,351 in 2023, according to a new report from the National Association of Corporate Directors and compensation consultant Pearl Meyer. By comparison, current Alphabet board members hold stock valued at about \$8 million, and received an average annual compensation for board service of about \$475,000 since 2015.

Beyond board pay, some Tesla and SpaceX directors have tens of millions of dollars in additional investments in Musk's companies, including his brain implant startup, Neuralink, and his tunneling venture, The Boring Co.

Musk, in turn, invests in some directors' companies. Board members also have invested in Kimbal Musk's Kitchen Restaurant Group and in SolarCity, a company run by Musk's cousins that was acquired by Tesla.

Governance experts, such as longtime board members and advisers to boards, say the personal and financial ties could muddy directors' views, and that it is highly unusual at U.S. public companies.

According to the rules of Nasdaq, where Tesla trades, an independent director can't be an employee, a family member or someone whose relationship "would interfere with the exercise of independent judgment." Nasdaq requires a majority independent board.

While rules governing independent directors across the country are murky, financial entanglement is one area where courts have sometimes found public companies at fault for claiming directors' independence while they hold investments tied to one another.

Amalgamated Bank, which managed around \$180 million of investments in Tesla as of September, signed a shareholder letter last year asking Tesla board members to step up their "meager oversight" of Musk.

The investors expressed concern that the close ties between Musk and several Tesla directors make the board ill-equipped to act in the best interest of shareholders.

CEO with leeway



Elon Musk and his brother, Kimbal Musk, at a SpaceX launch in Cape Canaveral, Fla., in 2020. PHOTO: JONATHAN ERNST/REUTERS

Some directors view Musk as a once-in-a-generation genius, with a brilliant mind and unusual methods. In depositions and courtroom testimony, directors have said they think Musk's leadership is crucial to both Tesla and SpaceX, and believe in his long-held mission to colonize Mars. He is seen as the soul of his companies and intertwined with their success. Tesla's stock

is up more than 300% in the past four years, but has dropped about 25% since the beginning of January.

When striking down Musk's pay package on Tuesday, the Delaware Court of Chancery judge called the process for approving it "deeply flawed" and cited Musk's "extensive ties" to some of the directors who negotiated it. A Tesla shareholder had sued, alleging Musk played too big a role in deciding his own pay.

Musk "enjoyed thick ties with the directors tasked with negotiating on behalf of Tesla, and dominated the process that led to board approval of his compensation plan," wrote Chancellor Kathaleen McCormick in the opinion. She described board Chair Robyn Denholm's approach to her oversight obligations as "lackadaisical."

Tesla board members can appeal the decision to the Delaware Supreme Court. After the ruling, Musk posted on X saying, "Never incorporate your company in the state of Delaware" and said Tesla would hold a shareholder vote about incorporating in Texas.

Board members had signed off on the pay deal in 2018, with Tesla valuing it at a maximum of \$55.8 billion. It was the biggest pay package ever to the chief executive of a U.S. public company, according to governance-data firm Equilar.

While negotiating the pay package, Musk emailed the company's top lawyer explaining how he would use the additional compensation. "The added comp is just so that I can put as much as possible towards minimizing existential risk by putting the money towards Mars," Musk wrote. Ehrenpreis, a yearslong friend, was head of the board's compensation committee.

Company directors frequently allowed Musk an unusual amount of leeway on issues big and small.

After he bought Twitter in 2022, for example, Musk tapped Tesla employees to review the social-media platform's engineering talent. Also around that time, SpaceX signed off on an unusual \$1 billion loan to its chief executive, the Journal has reported.

A 2018 settlement with the SEC, following Musk's tweet about plans to take Tesla private, required Tesla to establish more controls and form a new committee of independent board members to oversee Musk's communications. But according to court documents, Denholm said Musk "does self-regulate" compliance, and some directors said they don't review his tweets.

Tesla disclosed in 2022 that it had received a subpoena from the SEC seeking information about how the company was complying with the settlement.

Musk's freewheeling commentary on Twitter, now X, and in interviews has injected volatility into Tesla's share price and affected his other companies. In 2020, Tesla's stock closed down more than 7% for the day after Musk tweeted, "Tesla stock price is too high imo." Last year, major companies stopped advertising on X after he described an antisemitic post on X as "the actual truth."



The SpaceX Starbase in Brownsville, Texas, last year. PHOTO: VERONICA CARDENAS/REUTERS

Investors have for decades pressed for independent directors, especially at public companies, because it allows them to push back against management and closely monitor what is happening inside the business.

The sweeping set of rules known as Sarbanes-Oxley in 2002 mandated that public companies have independent directors, including on the audit committee. The rules came after the collapse of energy trading giant Enron, which later was found to have hidden its financials amid improper board oversight.

Stock exchanges generally spell out how they define independence on boards and other expectations. At private companies, there are no requirements for the number of independent directors, or what constitutes one. At Nasdaq, if a company doesn't comply with its majority independent board rule, it gives the company one year or until its next shareholder meeting to make a change; if not, it may be delisted.

Questions about a public director's independence have gone to the courts, with judges sometimes finding problems with deep financial ties.

The Delaware Supreme Court in 2016 ruled that the majority of videogame developer Zynga's board weren't independent. Among the reasons was that a venture-capital firm two directors worked for had invested in a startup the CEO's wife co-founded and that another director and her husband co-owned a private plane with the CEO.

Following the court's decision, Zynga expanded its board and formed a special litigation committee to investigate insider trading allegations. Zynga settled the suit in 2019 for \$11 million.

"To me, it's really: Are you capable of making a disinterested, objective decision uninfluenced by the relationship?" said Lawrence Hamermesh, former director of the Widener Institute of Delaware Corporate and Business Law, who has also served as senior special counsel in the SEC's corporate finance division.

Surrounded by friends



Tesla board member JB Straubel, center, with Musk when he was a Tesla executive in 2016. PHOTO: TROY HARVEY/BLOOMBERG NEWS

When Tesla was looking to replace a departing director, it turned to a familiar face in JB Straubel. The board believed the company's former chief technology officer, whom Tesla considers a co-founder, was someone Musk would listen to, could fill Ellison's shoes and had technical expertise, according to people with knowledge of the board's thinking.

Last year, ahead of a vote to approve Straubel, some shareholders pushed back over his close ties to the company, saying if he were added to the board then at least five of the eight members would lack independence. Straubel was elected anyway. A Nasdaq spokesman said it doesn't comment on specific companies and referred a Journal question on how Straubel can be classified as an independent director to Tesla.

Musk has long surrounded himself with close friends as he built his business empire. He has turned to them for advice on new business ventures and on daily operational help.

In addition to Musk on the Tesla board, his brother, Kimbal Musk, is a member. He previously served on the SpaceX board and has counseled Musk on numerous ventures, including whether to start OpenAI and Neuralink. He and Musk are also close personally, often attending the same events and parties.

Ehrenpreis, who chairs two of four committees on the Tesla board, is designated independent by the company and has been close to Musk for years.

The venture capitalist held the right to buy the first Tesla Model 3—which some covet for bragging rights. Around Musk's 46th birthday in 2017, he gave it to Musk, tweeting, "Much love and respect for everything you do."

Ehrenpreis has personally or through his venture-capital firm, DBL Partners, invested in many of Musk's ventures, totaling about \$70 million.



Tesla board member Ira Ehrenpreis, who has been friends with Musk for years, with the billionaire in 2015. PHOTO: MARCIO JOSE SANCHEZ/ASSOCIATED PRESS

On the Tesla board, he has made more than \$220 million on stock sales earned through board service and has additional options worth more than \$200 million at recent prices.

James Murdoch, former chief executive of 21st Century Fox, also is classified independent by Tesla. His friendship with Musk dates back to around 2006, and he has vacationed with Musk and their families, including on trips to Israel and Mexico.

In court testimony in 2022, Musk said he didn't know Murdoch well, though Murdoch in an earlier deposition affirmed his friendship with Musk.

Murdoch, who is the younger son of Rupert Murdoch, chairman emeritus of News Corp, which owns The Wall Street Journal, has said in court testimony he considers himself independent and has described a director as "having an ability to exercise independence of thought in governance and oversight as a member of a public company."

Murdoch poured \$20 million into SpaceX, and a company controlled by him invested about \$50 million in the space company, court records show.

Denholm, who is designated independent, is based in Australia and doesn't socialize with Musk. She has said in court testimony she doesn't have personal investments in Musk's other companies.

Her decadelong position on the Tesla board has been lucrative, earning her more than \$625 million in the company's equity. Denholm has exercised about half her options, profiting more than \$280 million from the sales.



Tesla board member James Murdoch and a company controlled by him have invested around \$70 million in SpaceX. PHOTO: DAVID PAUL MORRIS/BLOOMBERG NEWS



Tesla board Chair Robyn Denholm has profited more than \$280 million from the sale of stock she earned in board pay. PHOTO: DAVID PAUL MORRIS/BLOOMBERG NEWS

Denholm runs Tesla board meetings as informal, family-style occasions. Directors sometimes ask softball questions of Musk, such as future Tesla product colors, according to people familiar with the board.

Musk, meanwhile, would sometimes arrive two hours late, or hours early, and then blame his staff for not getting him there at the appropriate time, according to one of the people.

Musk said he handpicked Denholm, who replaced him as board chair in 2018 under an agreement with the SEC, according to an interview on “60 Minutes” that year.

The idea Denholm would watch over him was “not realistic” given his status as the company’s largest shareholder, he said in the interview, adding: “I can just call for a shareholder vote and get anything done that I want.” Musk later tweeted that the show had edited the interview in a misleading way. A “60 Minutes” spokeswoman said the show stands by its reporting.

Gebbia, the Airbnb co-founder and friend of Musk’s, joined the Tesla board in 2022, lives in Texas and is designated an independent director.

Former Walgreens Boots Alliance executive Kathleen Wilson-Thompson, who joined the board in 2018, is designated independent and doesn’t have public ties to Musk.

Deal with ex-girlfriend

Three current and former Tesla and SpaceX board members have been among Musk’s closest personal and financial partners.

Ellison, the co-founder and current chief technology officer of Oracle, was designated independent during his board tenure at Tesla between 2018 and 2022. He has said “I’m very close friends” with Musk and has hosted him multiple times at his Hawaiian island, Lanai.

When Musk revealed his plans to buy Twitter, Ellison committed \$1 billion in 2022, while still on the Tesla board, to help fund it, surpassing the investments of many of the venture-capital firms involved in the deal.

Gracias, whom Tesla classified as the company’s lead independent director from 2010 until 2019, has been close friends with Musk for more than two decades. Musk turned to Gracias for support after his baby son died in the early 2000s, according to a 2021 court deposition.

He is also one of the friends who attends private parties around the world and sometimes consumes illegal drugs with Musk.

In court testimony in 2022, he called Musk “extraordinary,” “an amazing engineer” and “a product genius.”

For his work on the Tesla board, he has made more than \$100 million by selling shares he earned.



Tesla board member Antonio Gracias and his venture-capital firm held investments recently valued at about \$1.5 billion in Musk companies. PHOTO: DAVID PAUL MORRIS/BLOOMBERG NEWS



Former Tesla and current SpaceX board member Steve Jurvetson, shown in 2016, is among the directors who have used drugs with Musk, according to people who have witnessed it and others with knowledge of it. PHOTO: NIKKI RITCHER FOR THE WALL STREET JOURNAL

When Musk needed cash, Gracias lent him \$1 million, Gracias said in a court deposition, though it is unclear when he gave the money or what it was for. Musk has also personally invested about \$10 million in Gracias's Valor Equity Partners.

When asked in a court deposition whether his close friendship and business relationships with Musk affected his ability to act as an independent director at Tesla, particularly related to Musk's 2018 pay package, Gracias said it didn't. "Otherwise, I wouldn't have done it," he said.

Gracias stepped down from the Tesla board after more than a decade in 2021 in response to the pressure to improve its corporate governance. He remains a SpaceX director.

Jurvetson is one of Musk's closest friends, and the two have mixed friendship and business for years. Jurvetson was an early investor in SpaceX, and the two have used LSD and ecstasy together.

Jurvetson, who is an amateur rocket enthusiast, often hosts Elon and Kimbal Musk for parties at his house at Half Moon Bay, a small beachside city south of San Francisco.

One episode, soon after the 2017 scandal that led to Musk and Jurvetson working to keep his Tesla board seat, shows the extreme intertwining of personal and business relationships around Musk.

Tesla's general counsel at the time, Todd Maron—who had been a divorce lawyer for Musk—helped negotiate an understanding with one of Jurvetson's ex-girlfriends, Keri Kukral, according to emails between the company and Kukral reviewed by the Journal.

As part of the 2018 arrangement, Kukral was given permission by Maron to review and approve public messaging, such as press releases, related to Jurvetson and his Tesla board seat, the emails show. After Maron left Tesla, his successor general counsel, Jonathan Chang, continued to communicate with her, the emails show.

In return, Kukral wrote a professional recommendation of Jurvetson to Tesla as he campaigned to keep his board seat.

It is highly unusual for a company's general counsel to get involved in such personal matters of board members, or to give an outside person the power to review company messaging, corporate governance experts said.

Musk also tried to persuade board members to let Jurvetson vote while he was on a leave of absence, people familiar with the conversations said. Kimbal Musk, Murdoch and Denholm pushed back, the people said.

Jurvetson made more than \$9 million selling Tesla shares received as a director before leaving the board in 2020, according to the documents reviewed by the Journal.

At least two former board members have bristled at the company's lack of corporate governance and deference to Musk.

Former Tesla board member Linda Johnson Rice wasn't close with Musk or other directors outside of work, although she sometimes saw fellow director Gracias at work events in Chicago, where they are both based.

She didn't stand for re-election to the board in 2019 after serving less than two years over frustration with Musk's volatile behavior, including his drug use, the Journal reported. She informally asked whether the board should investigate and was brushed off.

"She served her term and that was it," Musk tweeted about Rice, following the Journal's January article about his drug use. "No negativity at all with Linda!"



Linda Johnson Rice didn't stand for re-election to the Tesla board. PHOTO: PABLO MARTINEZ MONSIVAIS/ASSOCIATED PRESS

Similarly, Hiromichi Mizuno, a former chief investment officer of Japan's Government Pension Investment Fund, left the Tesla board in 2023 after three years in part because of the lack of ability he felt he had to work on improving the company's governance-related practices. At issue was the board's deference to Musk, who had different priorities for Tesla, according to people familiar with the board.

Mizuno found the board to operate more like a family company with fiefdoms, rather than a public company with stringent rules and regulations, even if it did usually perform well. He has made a practice of avoiding close relationships with others in the workplace to remain objective. While Mizuno was

sometimes invited for a drink with Musk, he never attended his private parties or events, according to the people.



Elon Musk attended the opening ceremony of a Tesla factory in Gruenheide, Germany, in 2022. PHOTO: PATRICK PLEUL/POOL/REUTERS

Musk has been recently pushing for even greater control over Tesla. He currently owns around 13% of the company.

In mid-January, before the Delaware court ruling on his pay package, he wrote in a post on X that he was uncomfortable transforming the electric vehicle giant into a leader in artificial

intelligence and robotics without voting control over roughly 25% of the company.

“Unless that is the case, I would prefer to build products outside of Tesla,” Musk wrote.

The tweet was effectively an ultimatum for Tesla board members to revisit his compensation. The board so far hasn’t acted.

—Berber Jin, Lisa Schwartz and Jim Oberman contributed to this article.

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Appeared in the February 5, 2024, print edition as ‘Money and Drugs Entwine Musk With Tesla Directors’.

 @annmlipton@esq.social reposted



@ProfEricTalley@lor.sh   
@ProfEricTalley

Answer: TSLA doesn't have a COW in either its charter or bylaws; Nueralink & TBC don't have COWS in their (nearly identical) charters--tho I have not seen their bylaws. SpaceX's charter, however, DOES explicitly allow enumerated fiduciaries to pillage corporate opportunities.



 @ProfEricTalley@lor.sh    @ProfEricTalley · Feb 3

COW Quiz 🎲: Which Musk-affiliated company has a corporate opportunity waiver (COW), permitting fiduciaries (officers/directors/SHs) to appropriate new business prospects in the company's line of business for themselves, without first giving the company a right of first refusal?

[Show this poll](#)

3:56 AM · Feb 4, 2024 · 3,074 Views



Professor Eric Rasmusen  @erasmuse · Feb 4

Interesting. Usually, a company wouldn't want to have a waiver. But if the founder is a serial entrepreneur, maybe it would. He's an idea man, and it's unclear how many ideas he will have, or knows he is likely to have. Asymmetric info. Has this been analyzed?



83



@ProfEricTalley@lor.sh    @ProfEricTalley · Feb 4

... hmmm... let me think... (1)

scholarship.law.columbia.edu/faculty_scholarship/; (2)

scholarship.law.columbia.edu/faculty_scholarship/. (You'll find the first one more interesting, @erasmuse; most non-theorists would prefer the second...!)



scholarship.law.columbia.edu

Contracting Out of the Fiduciary Duty of Loyalty: An Essay
For centuries, the duty of loyalty has been the hallowed centerpiece of fiduciary obligation, widely ...



57



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Michael Kwun @michaelkwun · 23h

who was the majority Series G holder?



43



@ProfEricTalley@lor.sh    @ProfEricTalley · 23h

A little tricky to tell, but Series G seems to have been created in early 2105, about same time as a \$10B+ investment by (inter alia) Google, Fidelity, DFJ, Founders Fund, Valor, Capricorn, and a few others. The COW was added to the charter at about that time too.



94



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@ProfEricTalley@lor.sh    @ProfEricTalley · 23h

That's also the first point at which both Google and Fidelity had invested, as far as I can tell.



84



Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/02/on-texas.html

Saturday, February 3, 2024

On Texas

By Ann Lipton

Given all the news about Governor Abbott's pitch to create a business law infrastructure that will compete with Delaware, and Musk's threat to decamp there, it's worth pointing out that this is an amendment that was recently proposed to the Texas Business Organizations Code:

BURDEN OF PROOF IN CERTAIN DERIVATIVE PROCEEDINGS. Notwithstanding any other law, in a derivative proceeding by a shareholder that alleges an act or omission related to the improper consideration of environmental, social, and governance criteria in the performance of the act or omission, the burden of proof is on the corporation to prove the act or omission was in the best interest of the corporation.

In 2022, Texas legislators proposed amending its law to permit shareholders to bring a fiduciary duty claim against the managers of any public company that provided women employees with travel benefits for abortion care (though, to be fair, in that case, the proposal would have applied even to non-Texas organized companies).

Texas Attorney General Ken Paxton has been very vocal about his objections to ESG - he is among those suing to block a Department of Labor rule, among other things - and as Attorney General, he would, as I understand it, have the power to seek involuntary dissolution of Texas entities.

We can also throw in Texas's refusal to do business with financial institutions it perceives as "boycotting" oil companies, with "boycott" defined both capaciously and idiosyncratically.

I think it would be very difficult for Governor Abbott to assure companies that if they organize in Texas, their business decisions will not be second-guessed on political grounds.

Skechers CEO, Board Win Lawsuit Over Personal Use of Company Jet

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XF5UQ920000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XF5UQ920000000)

Top Skechers USA Inc. executives prevailed in litigation over claims they cost the footwear maker millions by flying its corporate jets to lavish vacation spots such as Fiji, Bora Bora, and Hawaii.

A Delaware judge, Vice Chancellor Morgan T. Zurn, rejected allegations that the Skechers board made no effort to police excessive personal use of its two planes—at a cost of more than \$4,000 an hour—by CEO Robert Greenberg, his two sons, or chief operating officer David Weinberg.

The lawsuit failed to show that the aircraft use “was of such a scope, magnitude, or questionable legality that the only good faith response was to create a policy,” Zurn said in a 42-page ruling Feb. 2. “The committee’s decision not to implement a formal policy curtailing personal airplane use was not extreme by any metric.”

The shareholder suit, filed in 2022, said the frequent personal jaunts taken by the four executives were the sole reason the company had to bear the cost of owning a second twin-engine eight-seat Bombardier Global Express jet. They sometimes took “paramours and friends” along on trips to the Riviera, the Seychelles, Los Cabos, and the Bahamas, the suit said.

The Skechers board, meanwhile, engaged in virtually no oversight while the Greenbergs and Weinberg abused the perk, according to court filings by the investor leading the litigation in Delaware’s Chancery Court, where the lawsuit also targeted other current and former corporate directors.

Zurn’s decision, ending the case without a trial, cited the company’s executive compensation plan authorizing “reasonable” personal use of the jets. Under those circumstances, it wouldn’t be proper to second-guess the board, which has said the executives are coloring within the lines, the judge said.

The litigation involved shareholder derivative claims, which are technically brought on a corporation’s behalf against its leaders. Damages awarded in derivative cases are typically paid into a company’s coffers by its officers and directors or their insurers.

The Greenbergs and Weinberg were represented by Morris, Nichols, Arsht & Tunnell LLP and O’Melveny & Myers LLP. The other current and former board members were represented by Abrams & Bayliss LLP and Munger, Tolles & Olson LLP. The investor leading

the case, Michael Conte, was represented by McCollom D’Emilio Smith Uebler LLC, Kahn Swick & Foti LLC, Newman Ferrara LLP, and Labaton Sucharow LLP.

The case is Conte v. Greenberg , Del. Ch., No. 2022-0633, 2/2/24 .

—With assistance from Jef Feeley.

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Coinbase Insiders Lose Bid to Escape Investor's Stock Dump Suit

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- Suit alleges trades saved officers, directors over \$1 billion
- Pre-suit demand requirement excused, Delaware court says

Several Coinbase Global Inc. officers and directors—including CEO Brian Armstrong and board member Marc Andreessen—must face a lawsuit alleging they avoided huge losses by selling stock based on inside information before share prices took a nosedive.

The investor, Adam Grabski, is excused from a requirement that he demand Coinbase's board pursue legal action before filing the derivative suit because such a demand would've been "futile," Chancellor Kathaleen St. J. McCormick said in a Thursday opinion.

Coinbase insiders are alleged to have sold a combined \$2.9 billion worth of stock in connection with the company's 2021 public listing. Given the "staggering amounts of their sales," it's conceivable that their ability to impartially consider a litigation demand was compromised, said McCormick, chief judge of Delaware's Chancery Court.

The judge rejected the defendants' arguments that, under Delaware case law, selling stock can't create a "personal benefit" that would prevent directors from fairly considering a demand.

"In the real world, the billions of dollars made by the Director Defendants constitutes a material personal benefit that would render a director incapable of impartially considering a demand attacking those sales," McCormick said in denying the defendants' motion to dismiss. "Demand is excused on this basis."

Sliding Prices

Coinbase in April 2021 went public through a so-called direct listing. Unlike a more traditional initial public offering, a direct listing involves the sale of existing company shares directly to the public.

Armstrong sold \$291 million of Coinbase stock, while Andreessen's venture capital firm, Andreessen Horowitz, unloaded \$118 million of the stock. Fred Wilson's Union Square Ventures also sold \$1.8 billion of stock.

Other insiders sold amounts ranging from \$43 million to \$223 million, according to the complaint.

The next month, after Coinbase announced disappointing earnings, share prices slid. The complaint alleges the insiders avoided about \$1.09 billion in losses by selling their stock. It seeks an order that the defendants return “the ill-gotten gains” to the company.

Even if stock sales couldn’t make demand futile, each of the directors “face a substantial likelihood of liability” on claims they made trades based on material, nonpublic information, McCormick said.

Prior to the direct listing, Andersen Tax LLC prepared for Coinbase a valuation report that set a fair value for Coinbase stock at \$303.75 per share. Coinbase’s stock opened at \$380 in its listing, rising as high as \$429 on the first day of trading.

Andersen’s valuation and related information “would have had actual significance to persons who purchased stock from Defendants in the Direct Listing in the \$300s and \$400s,” McCormick said.

Latham & Watkins LLP represents the defendants. Bernstein Litowitz Berger & Grossmann LLP, Bishop Partnoy LLP, and The Schall Law Firm represent the plaintiff.

The case is *Grabski v. Andreessen*, Del. Ch., No. 2023-0464, 2/1/24 .

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Aon, Centerra Sign \$7.5 Million Settlement in 401(k) Class Suit

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Class Action

Getty Images

- Suit challenges Centerra 401(k) plan's move to Aon funds
- Judge rejected earlier settlement attempt by Aon, workers

Centerra Group LLC and an Aon PLC unit will together pay \$7.5 million to settle a class action challenging a redesign of Centerra's 401(k) plan that favored allegedly underperforming trusts from Aon.

The Feb. 2 deal requires Aon to pay \$4.5 million to a settlement fund benefiting thousands of participants in Centerra's 401(k) plan, with Centerra to pay the remaining \$3 million. It comes one month before the case was scheduled to go to trial in the US District Court for the District of South Carolina and one month after Judge Sherri A. Lydon declined to approve an earlier proposed settlement that would have resolved the participants' claims against Aon for \$4.5 million while leaving their claims against Centerra pending.

The class action says Centerra moved most of its 401(k) plan assets into funds offered by Aon, which served as the plan's discretionary investment manager. These untested funds underperformed their benchmarks and allowed Aon to earn substantial revenue at the expense of workers' retirement savings, according to the lawsuit, which largely survived dismissal in 2021.

Several recent lawsuits have challenged retirement plans that moved assets into Aon funds. A case targeting Schneider Electric Holdings Inc.'s 401(k) plan largely failed last year, but a case involving Astellas US LLC's retirement plan recently settled for \$9.5 million.

Centerra is a subsidiary of security and risk management company Constellis Group. The Centerra plan was merged into the Constellis 401(k) plan in 2019, causing the Aon funds to be liquidated and ending the company's tenure as investment manager, according to the lawsuit.

The Centerra plan participants are represented by Schlichter Bogard LLP and Robinson Gray Stepp & Laffitte LLC, which stand to receive up to \$2.5 million in attorneys' fees if the deal is approved.

Jackson Lewis PC represents Centerra. Parker Poe Adams & Bernstein LLP and O'Melveny & Myers LLP represent Aon.

The case is Williams v. Centerra Grp., LLC , D.S.C., No. 1:20-cv-04220, settlement motion 2/2/24 .

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Arguing Class Actions: Who Has Home-Field Advantage Post Bristol-Meyers Squibb?

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By Alexander Lugo

Adam J. Levitt founding partner of DiCello Levitt. Courtesy photo

Arguing Class Actions is a monthly column for the National Law Journal written by DiCello Levitt's Adam J. Levitt.

February 05, 2024 at 06:00 AM

Expert Columns

By Adam J. Levitt | February 05, 2024 at 06:00 AM

At the outset of many class actions, the plaintiff must first clear the personal jurisdiction threshold. Stated more directly, the plaintiff needs to establish that the defendant has “minimum contacts” with the forum in which the court sits, so that the court has the power to make decisions with respect to that defendant. There are two principal means by which to establish personal jurisdiction. First, through the easier of the two, general jurisdiction, a defendant’s contacts with the jurisdiction are so systematic and continuous that they are effectively “at home” in the jurisdiction. *Goodyear Dunlop Tires Operations, S.A., v. Brown*, 564 U.S. 915, 919 (2011). But often plaintiffs don’t wish to play on the defendant’s home turf; rather, plaintiffs want to be the home team. Insofar as the defendant is not “at home” in that jurisdiction, plaintiffs often turn to the second means—specific jurisdiction, or claims-based personal jurisdiction—where personal jurisdiction hinges on “an affiliation between the forum and the underlying controversy.” *Id.* (cleaned up).

The Supreme Court applied the specific jurisdiction rule to a mass action involving an alleged defect in Plavix, a blood-thinner sold by Bristol-Myers. In *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 582 U.S. 255, 259–60 (2017), a group of plaintiffs—most of whom were not California residents—sued Bristol-Myers in California Superior Court. Although none of the non-resident plaintiffs were prescribed Plavix from California physicians or were injured or treated in California, they argued that California was linked to their injuries through a distribution agreement between Bristol-Myers and the drug wholesaler McKesson. *Id.* at 259–60. The Supreme Court held the link insufficient because “it is not alleged that BMS engaged in relevant acts together with McKesson in California.” *Id.* at 268. Given the lack of any perceived nexus between Bristol-

Myers' Plavix-related activities in California and the nonresidents' alleged injuries, the majority concluded that California state court lacked personal jurisdiction over the non-resident plaintiffs' claims.

In dissent, Justice Sotomayor lamented the practical effects of the majority's decision: "The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone." *Id.* at 269. She also noted that the decision would result in "piecemeal litigation and bifurcation of claims." *Id.* On this point, Justice Sotomayor noted that "[a]fter this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are 'at home,' and so no State in which the suit can proceed." *Id.* at 278.

Beyond Justice Sotomayor's dissent, the Court's *Bristol-Myers* decision, at a minimum, endorses significant paper shuffling. Consider this fact pattern: plaintiffs bring class claims under multiple state antitrust laws in the Southern District of New York against several nonresident defendants alleging that they overpaid for a prescription drug. If some of those plaintiffs are nonresidents, defendants can move to dismiss the state law claims under *Bristol-Myers*. Yet, the case would not end for the defendants. Rather, it would simply encourage those nonresident plaintiffs to refile their claims in other jurisdictions and then move to have them transferred to and coordinated or consolidated in the defendant's home jurisdiction under 28 U.S.C. § 1404 (the transfer statute), or in the JPML-assigned transferee venue under 28 U.S.C. § 1407 (the multidistrict litigation statute). *Bristol-Myers*, as applied here, wastes time and judicial resources.

Since *Bristol-Myers*, federal courts have attempted to ferret out the contours and boundaries of the Court's decision, none of which creates a one-size-fits-all approach to avoiding a *Bristol-Myers* trap.

Some courts have held that *Bristol-Myers* does not categorically apply to class actions, given that the named plaintiffs are the only real parties in interest, unlike in a mass action where every plaintiff is a real party in interest. See *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017) ("Yet the Supreme Court did not extend its reasoning to bar the nonresident plaintiffs' claims here, and *Bristol-Myers* is meaningfully distinguishable based on that case concerning a mass tort action, in which each plaintiff was a named plaintiff."); *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 125 (D.D.C. 2018) (denying motion to dismiss based on differences between class actions and mass tort actions); *Lugones v. Pete & Gerry's Organic, LLC*, 440 F. Supp. 3d 226, 235–36 (S.D.N.Y. 2020) ("[t]he overwhelming majority of federal courts have held that *Bristol-Myers* applies to claims brought by named plaintiffs in class actions"); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020) ("the named representatives must be able to

demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so.”). However, this remains a minority view; most courts have applied *Bristol-Myers* to class actions in some capacity.

Other courts have reasoned that, when a class action is based on federal question jurisdiction, *Bristol-Myers* is inapplicable. See *Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 859 (N.D. Cal. 2018) (“[W]here a federal court presides over litigation involving a federal question, the due process analysis does not incorporate the interstate sovereignty concerns that animated *Bristol-Myers* and which may be ‘decisive’ in a state court’s analysis.”); see also, e.g., *Mussat*, 953 F.3d at 441 (finding that, to support class certification, the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so). This outcome makes sense, particularly when the federal claim at issue provides for nationwide service of process or broad venue provisions. E.g., 15 U.S.C. § 22; 7 U.S.C. § 25(c). But it leaves federal cases involving state law claims (or state court actions asserting federal claims) subject to decentralization under *Bristol-Myers*.

Finally, some courts have endorsed a “pendent personal jurisdiction” approach, where a court may nonetheless exercise pendent jurisdiction over state law claims asserted by nonresident plaintiffs. E.g., *In re Takata Airbag Prod. Liab. Litig.*, 524 F. Supp. 3d 1266, 1277 (S.D. Fla. 2021). But pendent personal jurisdiction is somewhat controversial, with some courts having questioned its propriety and survival post *Bristol-Myers*. E.g., *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870, 874–75 (N.D. Ill. 2017) (“[E]ven if the doctrine [of pendent personal jurisdiction] at one time permitted the court to exercise personal jurisdiction over a claim like [the plaintiff’s] it no longer does in light of *Bristol-Myers*.”).

Yet, the closest solution to *Bristol-Myers* may be from the Supreme Court itself. Last year, in *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023), the Court held that an out-of-state company’s registration with a state’s secretary of state to do business amounted to that company’s consent to the state’s jurisdiction. As the Court observed, “Our precedents have recognized, too, that ‘express or implied consent’ can continue to ground personal jurisdiction—and consent may be manifested in various ways by word or deed.” *Id.* at 2039. Indeed, *Mallory* distinguished *Bristol-Myers*’ due process concerns “when an out-of-state defendant submits to suit in the forum State.” *Id.* at 2043. Put simply, companies should not be able to have it both ways. Companies cannot, on the one hand, benefit from the public trust of citizens of a given state to peddle their defective wares, devices, services, while, on the other, seek to evade jurisdiction in that very state when those citizens seek recompense for those companies’ bad acts.

Other states also have registration statutes similar to the one at issue in *Mallory*—as well as states that do not—and now have clarity from the Court that such laws would be enforced if they were enacted. As a result, *Mallory* appears at least to temper Justice Sotomayor’s

concern that post *Bristol-Myers* large corporations would steer litigation to their home turf or fracture collective litigation (mass or class) across multiple fora. So, at least for now, plaintiffs have more control over where they file and secure home-court advantage than one might have imagined shortly after *Bristol-Myers*. Obviously, however, with the high stakes of the jurisdictional decision in class action cases in the post *Bristol-Myers Squibb* world in which we live, this will continue to be a developing question and an ongoing debate well into the foreseeable future, as litigants on both sides of the fence attempt to have courts better define the contours of the analysis—since the consequences for each side, depending on the situational outcome, are potentially momentous.

Thank you to DiCello Levitt partner Matt Perez for contributing to this column.

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Judge in 3M PFAS Settlement Urges Rigor by Utilities Opting Out

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The federal judge overseeing a proposed multibillion-dollar PFAS contamination settlement urged water utilities on Friday to exercise due diligence before opting out, lest they lose their chance at securing funds to help comply with regulations and protect public health.

Judge Richard M. Gergel, of the US District Court for the District of South Carolina, held the final fairness hearing Feb. 2 for a settlement through which the 3M Co. would offer between \$10.5 billion to \$12.5 billion to resolve current and future claims by drinking water utilities that the company's per-and polyfluoroalkyl substances (PFAS) made their way into their systems.

The settlement would relieve 3M of uncertainty about its liability for the 12,000 public drinking water systems estimated to meet the class definition.

Only a small percentage of water utilities have raised objections or chosen to opt out, said plaintiffs' attorney Gary J. Douglas of Douglas & London PC.

Litigation risks ahead include that 3M and other defendants could win immunity as government contractors, because they made the chemicals and PFAS-enabled firefighting foams for the military, he said. The US Department of Defense, which used those foams for decades and has contaminated water systems, also could be deemed immune, Douglas said.

Gergel denied in 2022 defendants' motion for a summary judgment awarding them contractor immunity. It's possible defendants still would win on that issue, his opinion said. But factual disputes remain concerning the timing of some manufacturers' disclosures of health-related information and whether the Department of Defense had full knowledge of the products' risks, he ruled.

The court has yet to rule on whether the federal government is immune. The Federal Tort Claims Act often exempts the government from liability for actions or duties that involve discretionary functions.

The lack of regulations and other mandatory controls over DoD's use of aqueous film forming foam (AFFF), a type of specialized fire retardant that has contained PFAS for decades, and the military's limited knowledge of PFAS' harms make it immune, the federal government maintains.

‘Borders on Reckless’

If utilities opt out of the settlement following due diligence, that’s their right, Gergel said.

Yet it’s hard to understand why utilities that already know they’re dealing with PFAS contamination would choose to do so and risk getting nothing, he said. “That borders on reckless.”

Gergel urged plaintiffs’ attorneys to reach out and make sure those utilities have made an informed decision.

The settlement that would be divided among the class members could help them comply with national drinking water limits the Environmental Protection Agency plans to issue this year along with state regulations that may be stricter than the EPA’s, Scott Summy, the plaintiffs’ co-lead counsel, told the court.

Utilities also would receive money to help them test more parts of their water systems than the EPA’s fifth Unregulated Contaminant Monitoring Rule (UCMR 5) requires, said Summy, who leads Baron & Budd PC’s Environmental Litigation Group. The 2021 rule requires utilities serving more than 3,300 people to monitor for 29 PFAS between 2023 and 2025.

The additional tests the settlement would pay for could reveal contamination the water systems otherwise wouldn’t have known about, he said.

A recent court order extended the deadline until March 1 for utilities to change their mind if they previously opted out, Summy said in an interview after the hearing.

The settlement’s beneficiaries are people whose health will be impacted, Summy told the court. And that public health benefit “will go on for generations.”

The case is In Re Aqueous Film-Forming Foams Prod. Liab. Litig. MDL 2873 , D.S.C., No. 18-mn-02873, Final Fairness Hearing, 2/2/24 .

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Monsanto loses bid to end Seattle lawsuit over PCB contamination

 [courthousenews.com/monsanto-loses-bid-to-end-seattle-lawsuit-over-pcb-contamination](https://www.courthousenews.com/monsanto-loses-bid-to-end-seattle-lawsuit-over-pcb-contamination)

Edvard Pettersson

(CN) — A federal judge on Friday rebuffed Monsanto's attempt to end a lawsuit by Seattle that seeks hundreds of millions of dollars in damages to mitigate the contamination of the Duwamish River and the city's stormwater and drainage system by polychlorinated biphenyls.

U.S. District Judge Richard Jones denied Monsanto's motion for summary judgment on the city's claim that the agrochemical giant, now owned by Bayer AG, created a public nuisance by manufacturing, marketing and distributing toxic chemicals that have contaminated the lower river and Seattle's drainage lines.

"The parties have taken 59 depositions, exchanged over 5 million pages of document discovery and offered 58 expert reports," Jones noted. "There is admissible evidence and expert testimony to create an issue of fact as to each element of the city's public nuisance claim. Viewed in the light most favorable to the city, this evidence requires the court to deny defendants' motion."

The ruling clears the way for Seattle to take Monsanto to trial, which is currently scheduled for September.

Among the arguments Monsanto put forth in its attempt to defeat Seattle's claim as a matter of law was that the city cannot prove that the company manufactured and sold PCBs with the intent to cause the alleged public nuisance.

This, the judge said, was too exacting a standard because under Washington law, if a person or entity knows that the consequences of their action are certain, or substantially certain, and still goes ahead, they are treated by the law as if they had in fact desired to produce the result.

"Indeed, the city provides evidence that Monsanto knew for a fact that widespread use of the PCBs it manufactured was contaminating the environment," Jones said. "Even with the knowledge of the pollution issue related to certain PCB products, Monsanto instructed its salespeople to avoid returns from its customers, noting 'we cannot afford to lose one dollar of business.'"

Monsanto said in a statement that it respectfully disagrees with the court's decision and that it is confident that the full evidentiary record will demonstrate that the company should not be liable for city's claims, which it still has to prove at trial. In addition, Monsanto noted, the

scope of Seattle's claims have been narrowed to focus solely on fish consumption advisories issued for the Lower Duwamish Waterway, and the court cut the damages at issue by more than \$180 million.

"The undisputed evidence shows that PCB-containing finished materials, manufactured by other companies, ended up in the Lower Duwamish Waterway through dozens of intervening third-party actors over whom Monsanto had no control, including the city, its stormwater and wastewater conveyance system, and other private and governmental entities," the company said.

According to Monsanto's motion for summary judgment, filed in August of 2022, Seattle seeks more than \$700 million in damages from PCB contamination.

Jones last year rejected Monsanto's argument that Seattle's claims were covered by the company's \$95 million settlement with Washington in 2020. The judge in that decision endorsed the recommendations of U.S. Magistrate Judge Michelle Peterson that the state's settlement did not release Monsanto from public nuisance claims by Seattle, and that the state suit did not bar Seattle's claim.

Peterson highlighted ambiguities in the state's settlement agreement with Monsanto regarding the release of state agencies. Though Monsanto argued that this language included King County and Seattle, the city reasoned that state and county agencies are separate entities.

Although use and production of PCBs have been banned since 1979, ill effects still linger, often due to poorly managed waste systems and landfills where the chemicals leach off products that use them and persist in the environment. Humans can be exposed to PCBs through ingestion, inhalation and even just direct contact.

Seattle brought the lawsuit in 2016, saying that Monsanto knew for decades of the potential dangers of PCBs but concealed this. When PCBs leached into Seattle's stormwater and wastewater, they became the most widespread contaminant discharged into the Duwamish, which runs straight through the city.

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Navy attempts to fend off dual jet fuel contamination lawsuits

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Candace Cheung

A U.S. naval ship can be seen from Pearl Harbor National Memorial Wednesday, Dec. 4, 2019, in Honolulu. (AP Photo/Caleb Jones)

HONOLULU (CN) — A federal judge heard on Friday a pair of motions to dismiss two cases involving the U.S. Navy's 2021 jet fuel leak that infiltrated a Honolulu military base's water system.

U.S. District Judge Leslie Kobayashi heard from attorneys in two cases challenging the contamination from two angles. Wai Ola Alliance, an environmental nonprofit, sued the government in June 2022 claiming the Navy had compromised the ecosystem when it discharged petroleum jet fuel into Pearl Harbor and lands near its Red Hill Bulk Fuel Storage Facility.

Another suit, brought in September 2022 by the families of military members who had lived along the Navy's water line, charged the Navy not only with the contamination and subsequent health issues, but also accuse the government of telling its doctors to downplay the medical effects and to deny proper treatment.

In both cases, the government pushed on Friday to dismiss, citing various jurisdictional issues and highlighting the Navy's current efforts to shut down the Red Hill facility.

Responding to the complaint from the military families, the government argued claims the military failed to test contaminated water samples and that it did not remediate the families' homes should be dismissed.

Marianne Kies, a Department of Justice attorney, said there was no federal directive requiring the Navy to either test water samples or remediate homes. Kies also emphasized the complex combination of policy and agency action that the Navy needed to juggle in handling the water crisis at the same time Covid-19 pandemic protocols were in full swing.

"The plaintiff's allegations are that the Navy should have done things differently. But the Federal Tort Claims Act discretionary function exception exists to prevent the judicial second-guessing that plaintiff's position requires," Kies said.

Honolulu attorney Lyle Hosoda argued for the plaintiffs, saying the context of the Navy's response shouldn't disqualify it from analysis of each action taken, and if those actions were ultimately negligent.

“There is a discretion up to a point, but when they undertake to act, and this is where the Good Samaritan rule comes in as well, they must act to meet the standard of care,” he said.

Kobayashi had dismissed a failure to warn element from the families’ negligence claims in January that referred to the lessor/lessee relationship between the Navy and military families living on base.

In Wai Ola’s case, which emphasizes the environmental impact of the leak, the government asked Kobayashi to defer primary jurisdiction to the Hawaii Department of Health and the U.S. Environmental Protection Agency, which are currently leading the ongoing defueling and environmental remediation process.

Since the cases were filed in 2022, the Navy has made strides to shut down and defuel the facility. At the end of 2023, a Red Hill task force reported the facility had been almost entirely defueled and attorneys at Friday’s hearings indicated that shutdown was imminent.

Attorneys for the government worried at the Friday hearing that Wai Ola’s case would conflict with those current efforts and would interfere with the efficiency and practicality of state and federal agencies’ work, which the attorneys characterized as “extremely complex.”

“They have essentially asked the court to become a third project manager ... and they have provided no justification for doing so,” Lucy Brown, attorney for the government said. “The potential for conflict here is extremely high under these circumstances.”

Department of Justice attorney Paul Cirino also added that Hawaii state law should be predominant in this case because much of Wai Ola’s contamination fears involve Honolulu’s aquifer, which lies directly below the Red Hill facility and supplies water to a majority of the island of Oahu.

Representing the alliance and its members — who indicated misgivings about the Department of Health and emphasized the necessity of citizen oversight in their original complaint — Daniel Cooper of San Francisco’s Sycamore Law, echoed Kobayashi’s question and acknowledged the Navy’s efforts so far.

“But that’s not comprehensive. It doesn’t deal with the resolution at the site, the ultimate soil cleanup, the aquifer and previous spills. Our case would address things not reached by DOH ... I think we’re sophisticated enough to avoid the kind of mass confusion the Navy seems to think would result from proceeding with this case.”

Brown countered that Wai Ola had never specified any of the purported holes in the Navy’s current plans.

Kobayashi did not indicate when she might rule in either case, though she said she was inclined to deny both motions in each case before each hearing and may consider a stay in Wai Ola's case.

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Judge certifies Apple app store class action

 [reuters.com/legal/judge-certifies-apple-app-store-class-action-2024-02-02](https://www.reuters.com/legal/judge-certifies-apple-app-store-class-action-2024-02-02)

Jonathan Stempel

The Apple logo is seen hanging at the entrance to the Apple store on 5th Avenue in Manhattan, New York, U.S., October 16, 2019. REUTERS/Mike Segar/File Photo Acquire Licensing Rights , opens new tab

Feb 2 (Reuters) - A federal judge on Friday said tens of millions of Apple (AAPL.O) , opens new tab customers can pursue a class action accusing the company of monopolizing the market for iPhone apps by banning purchases outside its App Store, leading to higher prices. U.S. District Judge Yvonne Gonzalez Rogers had in March 2022 refused to certify a class action, but changed her mind after the class was narrowed to include only Apple account holders who spent \$10 or more on app or in-app content.

While remaining "concerned" that the narrowed class might include more than 10 million accounts that suffered no harm, or 7.9% of the total, Rogers said that number could be reduced and there was no fixed "cutoff" for denying certification.

The Oakland, California-based judge also rejected Apple's bid to exclude testimony it considered unreliable from two expert witnesses, including Nobel Prize-winning economist Daniel McFadden, about how it may have harmed consumers.

Apple, based in Cupertino, California, did not immediately respond to requests for comment.

Mark Rifkin, a lawyer for the consumers, said he was "extremely pleased" and looked forward to the next phase of the 12-year-old antitrust case. He estimated that the class incurred "billions of dollars in damages."

Class actions can result in greater recoveries at less cost than if plaintiffs are forced to sue individually.

Rogers has also overseen "Fortnite" videogame creator Epic Games' antitrust case against Apple.

In Sept. 2021 she ordered Apple to loosen restrictions on where developers can seek payment from customers for their apps, but stopped short of requiring Apple to allow downloads to iPhones outside its App Store.

A federal appeals court upheld much of that ruling in April 2023, and the U.S. Supreme Court refused to get involved last month.

The case is In re Apple iPhone Antitrust Litigation, U.S. District Court, Northern District of California, No. 11-06714.

Ozempic side effects lawsuits centralized in Pennsylvania court

 [reuters.com/legal/litigation/ozempic-side-effects-lawsuits-centralized-pennsylvania-court-2024-02-02](https://www.reuters.com/legal/litigation/ozempic-side-effects-lawsuits-centralized-pennsylvania-court-2024-02-02)

Diana Jones

Boxes of Ozempic and Mounjaro, semaglutide and tirzepatide, injection drugs used for treating type 2 diabetes and made by Novo Nordisk and Eli Lilly, is seen at a Rock Canyon Pharmacy in Provo, Utah, U.S. March 29, 2023. REUTERS/George Frey/File Photo Acquire Licensing Rights , opens new tab

Feb 2 (Reuters) - At least 55 lawsuits accusing drugmakers Novo Nordisk and Eli Lilly of failing to warn people about harsh side effects associated with their blockbuster diabetes and weight loss drugs Ozempic and Mounjaro will be centralized in a Pennsylvania federal court, according to an order issued on Friday.

Court records show that 55 lawsuits have been filed against the companies by people who say they were prescribed the drugs to treat their diabetes or to help with weight loss but weren't warned about severe side effects including gastroparesis, or stomach paralysis, and intestinal obstruction.

The U.S. Judicial Panel on Multidistrict Litigation in its order , opens new tab agreed to send the cases to U.S. District Judge Gene E.K. Pratter in the Eastern District of Pennsylvania, where 13 of the cases are currently pending.

The existing filings and any future lawsuits over the side effects will now be part of a multidistrict litigation, or MDL, which will allow Pratter to issue rulings and make decisions that apply to all the cases.

Novo Nordisk, which is facing the majority of the lawsuits, said in a statement it supports the creation of the MDL but believes the claims are without merit and intends to vigorously defend against them.

Eli Lilly, which is a defendant in a small proportion of the lawsuits, objected to being included in the MDL with Novo Nordisk.

Representatives for Lilly did not immediately respond to requests for comment.

Advocates of MDLs say they allow the cases to be streamlined while preventing different judges from issuing conflicting rulings, while companies that have defended against MDLs say they can make it too easy for attorneys to file baseless lawsuits.

Paul Pennock of Morgan & Morgan, which has filed at least nine of the lawsuits and moved to establish the MDL, said in a statement that he was glad the panel had agreed that both companies should be part of the MDL. Pennock said he expects up to 10,000 cases will ultimately be filed in the litigation.

The lawsuits accuse the companies of failing to warn doctors about some harsh side effects associated with Novo Nordisk's Ozempic, Wegovy and Rybelsus and Eli Lilly's Trulicity and Mounjaro, a class of drugs known as GLP-1 receptor agonists.

The companies have refuted the claims in court filings, arguing in motions to dismiss filed in one of the earliest cases that the side effects of the drugs are well known and printed on their labels.

In the ruling, the Judicial Panel on Multidistrict Litigation said the drugs are similar enough that one MDL for the cases would make discovery and other proceedings more efficient.

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Reporting by Diana Jones

Diana Novak Jones
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Co-author of the Daily Docket, Reuters' daily legal industry newsletter. Diana reports on litigation, mass torts and the plaintiffs' bar. She previously worked at Law360 and the Chicago Sun-Times.

Pennsylvania Judge to Oversee Lawsuits Targeting Weight Loss Drug Ozempic

 [law.com/nationallawjournal/2024/02/02/pennsylvania-judge-who-will-oversee-lawsuits-targeting-weight-loss-drug-ozempic](https://www.law.com/nationallawjournal/2024/02/02/pennsylvania-judge-who-will-oversee-lawsuits-targeting-weight-loss-drug-ozempic)

What You Need to Know

- Plaintiffs' lawyers predict there could be at least 10,000 lawsuits filed over Ozempic and related drugs, such as Wegovy and Mounjaro.
- The panel rejected pleas from some plaintiffs' lawyers and Eli Lilly to sever lawsuits against the pharmaceutical giant from multidistrict litigation involving Novo Nordisk.
- The panel said the Eastern District of Pennsylvania was near Novo Nordisk's headquarters in Plainview, New Jersey.

A panel decided Friday to send dozens of lawsuits filed over Ozempic and related drugs prescribed for type 2 diabetes, but increasingly used for weight loss, to be sent to a federal judge in Philadelphia.

The U.S. Judicial Panel on Multidistrict Litigation rejected arguments from defendants Novo Nordisk and Eli Lilly to send the cases to other venues, such as North Carolina or California. The panel concluded that at least 13 of the 55 lawsuits so far are in the Eastern District of Pennsylvania.

The panel reasoned that the district is near the headquarters of Novo Nordisk in Plainfield, New Jersey, and lawsuits allege “many of the witnesses and documents relating to the sales and marketing, regulatory affairs, and safety and pharmacovigilance of Novo Nordisk’s products will be located there.”

Now, the panel assigned U.S. District Judge Gene Pratter to the multidistrict litigation.

The decision is significant because plaintiffs' lawyers predict there could be at least 10,000 lawsuits filed over Ozempic and related drugs called “glucagon-like peptide-1, or GLP-1, receptor agonists,” including Wegovy and Rybelsus by Novo Nordisk, and Eli Lilly’s Trulicity and Mounjaro.

The lawsuits allege that both companies failed to warn that their prescription medications, which have gone viral on social media, increased the risk of gastroparesis, or stomach paralysis, leading to nausea, vomiting and hospitalizations. The labels caution users about gastrointestinal problems, among other side effects, but the lawsuits say the warnings have downplayed the severity of the stomach issues.

“We are excited by the panel’s decision and look forward to getting to work representing our clients in this important case,” said Motley Rice’s Jonathan Orent, in Providence, Rhode Island, who had argued to send the cases to the Eastern District of Pennsylvania.

Paul Pennock of Morgan & Morgan. Courtesy photo

But the panel rejected a plea from Orent and other lawyers to sever cases against Eli Lilly from

multidistrict litigation involving Novo Nordisk. Eli Lilly also had argued against being involved in the multidistrict litigation with Novo Nordisk.

The panel, however, noted that Eli Lilly is named in a dozen lawsuits, six of which also involve Novo Nordisk’s medications, and allege “sufficiently numerous and complex” claims.

“Generally, we are wary of centralizing litigation on an industry-wide basis,” the panel wrote. “Here, though, we are not convinced that alternatives to centralization—such as informal cooperation between the parties and coordination among the involved courts—are preferable to centralization of the actions containing claims against Eli Lilly.”

Another lawyer, Paul Pennock, of Morgan & Morgan in New York, had argued with many other plaintiffs’ attorneys, that the cases should be sent to the Western District of Louisiana, where U.S. District Judge James Cain already has rejected dismissal motions in one case.

“We are very pleased that the Judicial Panel on Multidistrict Litigation not only agreed with our position that all defendants must be included in this MDL, but also that they have chosen such an experienced and knowledgeable judge to address the many complex issues in this case,” Pennock said. “Judge Pratter’s background and experience will help the parties navigate through this important MDL.”

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Girardi firm lawyers get 2025 trial date in Chicago fraud case

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David Thomas

REUTERS/Irfan Khan/Pool Acquire Licensing Rights  , opens new tab

Feb 2 (Reuters) - A federal judge in Chicago on Friday set a March 3, 2025 trial date for David Lira and Christopher Kamon, two former members of disbarred California attorney Tom Girardi's defunct law firm, who are facing charges of misappropriating millions in client funds.

U.S. District Judge Mary Rowland put Girardi's own criminal case on hold, however, delaying a decision over whether to conduct her own hearing on his competency until after a May trial in Los Angeles on related charges.

"My gut is we should put that off until we see what happens in that trial," Rowland said during Friday's status hearing.

Prosecutors in both Chicago and Los Angeles charged Girardi last February, accusing him of taking more than \$18 million in funds belonging to his firm's clients. Girardi, 84, has pleaded not guilty in both cases, and his lawyers have asserted he is not mentally competent to stand trial.

Kamon was also charged in the Chicago and Los Angeles cases, while Lira is just facing charges in Chicago. Both pleaded not guilty. Chicago prosecutors alleged that Girardi, Kamon and Lira misappropriated more than \$3 million in client funds owed to families of the victims of the 2018 Boeing 737 MAX Lion Air Flight 610 crash in Indonesia. The crash killed all 189 onboard.

Kamon is separately facing wire fraud charges for allegedly embezzling \$10 million from the defunct Girardi Keese law firm. He is in talks with the government "to see if we can resolve his cases globally," federal prosecutor Corey Rubenstein said at Friday's hearing.

Lira's attorney Damon Cheronis predicted that Kamon would reach a deal, and that his client will be "sitting in that courtroom by himself to defend against these charges."

In the Los Angeles case, U.S. District Judge Josephine Staton ruled last month that Girardi was competent to stand trial, finding  , opens new tab that he had exaggerated his symptoms of dementia.

Seema Ahmed, Girardi's federal public defender in Chicago, told Rowland on Friday that she wants to hire her own experts and litigate the issue of Girardi's competency separately from the Los Angeles proceedings.

"I find it a little bit frustrating that the government is deciding on the front end that everything has been briefed, everything has been decided," Ahmed said. "I don't think that's their place to decide it."

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Reporting by David Thomas

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ANALYSIS

Most law firms aren't feeding client data into generative AI tools, but a handful have begun testing the technology on closed systems with client permission.

January 31, 2024 at 05:00 AM

Artificial Intelligence

Dan Roe
Reporter

The original version of this story was published on The American Lawyer

What You Need to Know

- Big Law firms are developing policies and training around generative AI usage.
- Most firms aren't using the technology on client information, but an increasing number of firms are using it for research and drafting.
- Training is as important as policies, several top information officers said, due to generative AI's propensity to hallucinate.

This is the second part of a series on how large law firms are using generative artificial intelligence, based on questions we put to every firm in the Am Law 100. For part one, click [here](#).

For law firms, generative artificial intelligence has the potential to streamline legal work and cut hours off of a task. It can also get you benchslapped—just ask the New York lawyers who were sanctioned last summer after they cited fake cases in legal briefs.

To find out how law firms are navigating the use of generative AI, The American Lawyer polled the entire Am Law 100 on their approach to the technology. More than 30 firms provided information on their policies, which ranged from outright bans to experimentation on client data with permission.

So far, a majority of firms who responded have stopped short of allowing lawyers to input client data or confidential firm information into a generative AI tool.

However, a handful of firms are testing closed systems with client data. In addition to getting client consent (or engaging the technology at the request of a client), firms are also requiring attorneys to independently verify the AI's work.

"The clients that are eager for us to explore, we are partnering with them. Those that are reticent, we hold off," said Carla Swansburg, CEO of Cleary Gottlieb Steen & Hamilton's legal tech incubator Cleary X.

Lewis Brisbois Bisgaard & Smith convened a formal AI committee in September to write a firmwide policy on the use of generative AI. Although not yet finished, the policy seeks to maximize the benefits of generative AI without running afoul of confidentiality and ethics obligations. "We want to make sure that clients sign off if we use AI for their specific matter," said AI committee member Sean Shecter.

Using enterprise-ready tools and a custom system, lawyers at Cozen O'Connor are able to use generative AI on legal work in limited circumstances. "You have to be in compliance with client guidelines," said Kristina Bakardjiev, director of legal practice innovation. "Any use of generative AI has to be independently verified. We don't use open systems."

At Taft Stettinius & Hollister, chief client and innovation officer Lyndsay Capeder said the firm's AI policy seeks to train lawyers on the responsible use of generative AI.

"We do see value in learning the skill set, learning how to prompt-engineer," she said. "With our policy, one of the key things we've communicated is under no circumstances should any client information be put into the prompts or queries of these systems. Additionally, we should not—without client consent—use it for client work."

Sidley Austin also stipulates that generative AI shouldn't be used on client work without client consent, said commercial litigation practice co-leader David Gordon. Winston & Strawn is taking a similar stance as the firm, and others in the Am Law 100, await guidance from bar associations.

"The state bars and the ABA really haven't spoken yet," said Winston & Strawn partner John Rosenthal. "If you look at the framework of most ethical opinions out there, they talk about cloud-based tools, but not generative AI tools. We believe the bars are going to speak and endorse the use of these technologies with these guidelines, but we're not there yet."

Fox Rothschild hasn't prohibited the use of public tools like ChatGPT, said technological department co-chair Mark McCreary, but the firm has mandated training for anyone using generative AI and prohibited the technology's use with client data and personal information. "Only for drafting, no legal research," McCreary said.

Morgan, Lewis & Bockius took a similar stance. "The policy prevents using client information," said chief knowledge management and practice services officer Colleen Nihill, adding that the firm installed safeguards to help lawyers properly use publicly available generative AI tools.

Meanwhile, Crowell & Moring has outlawed the use of generative AI for all legal work.

"I think we're entering the stage now where we're ready to start working with clients who may be open-minded on possibilities for that, because we do have it on our own Azure Instance, but we want to tread carefully there," said chief innovation and value officer Alma Asay. "So as a policy we've said it may not be used on legal work. That includes client names, because we've heard from some clients that for them, they don't even want their name put into a publicly available generative AI tool."

In addition to AI policies, law firms placed similar importance on training attorneys to engineer generative AI prompts and identify "hallucinations" or instances where AI tools deliver inaccurate or nonsensical results.

"AI hallucinates. It doesn't have an innate sense of what's true. It's confidently incorrect to things that we know," said Barclay Blair, senior managing director of AI product innovation at DLA Piper.

"Policies are great but training is where the rubber meets the road," added Blair's colleague, AI and data analytics chair Danny Tobey. "If you are not trained on how to use it, you're going to get garbage in, garbage out. It's hard to tell the difference because the outputs can be compelling either way."

As a result, firms such as Nixon Peabody are training attorneys to independently verify the work of generative AI tools. "Certainly nobody should be generating briefs from any of these AI tools and filing them in court," CIO Aaron Yowell said.

To avoid risking client confidentiality in its generative AI training, K&L Gates uses publicly available data to coach its large language models, said partner Brendan Gutierrez McDonnell.

Dentons trains its lawyers on prompt guidance as well as recognizing hallucinations and identifying prompt errors, said legal AI adoption manager Sam Chen. "Anyone who logs on is flashed with the terms and conditions, with bold lettering that says, 'you must validate the

output and don't overly rely on it," Chen said.

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Chris Prentice, Jody Godoy

Archer Daniels Midland Co (ADM) logo is seen displayed in this illustration taken, April 10, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Acquire Licensing Rights , opens new tab

WASHINGTON, Feb 5 (Reuters) - The U.S. Justice Department is probing accounting practices at Archer Daniels Midland Co (ADM.N) , opens new tab, according to two people with direct knowledge of the matter, ramping up pressure on the global commodities giant. New York-listed shares of ADM's stock dropped 24% on Jan. 22 after the company disclosed the previous day that it had suspended its CFO amid an internal probe into accounting practices related to its Nutrition division. The company's probe was prompted by a Securities and Exchange Commission (SEC) inquiry, it said.

The two sources said that in recent days the U.S. Attorney's Office for the Southern District of New York (SDNY) has interviewed former ADM employees about accounting practices at the 122-year old Chicago-based maker of animal feed, sweeteners and other products.

The sources each said a prosecutor asked about the company's pricing practices related to the sales of goods from ADM's commodities units to its Nutrition division.

Reuters could not immediately determine the scope of the probe or how advanced it was.

Spokespeople for ADM and SDNY declined to comment. Government investigations are not evidence of wrongdoing and do not necessarily result in charges.

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Chris Prentice
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Chris Prentice reports on financial crimes, with a focus on securities enforcement matters. She previously covered commodities markets and trade policy. She has received awards for her work from the Society for Advancing Business Editing and Writing and the Newswomen's Club of New York.

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Feb. 2, 2024, 2:13 PM PST

Former ADM CFO Young Resigns From Hormel Foods Board

By Tarso Veloso

Bloomberg Law News 2024-02-05T09:47:49114446198-05:00

Former ADM CFO Young Resigns From Hormel Foods Board

By Tarso Veloso2024-02-02T17:13:26610-05:00

Ray Young, who joined Hormel's board last year, is stepping down immediately, the company said in a regulatory filing.

- He was previously vice chairman and CFO at Archer-Daniels-Midland Co., a company now facing an accounting probe
- [READ: ADM Plunges Most on Record After Probe, CFO Placed on Leave](#)

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Ex-US Cyber, Intelligence Leaders Rally Behind SolarWinds (1)

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- Briefs urge caution in validating agency enforcement
- SEC claims harm cyber industry, efforts, groups say

More than 20 high-ranking former federal officials, including ex-US cyber chief Chris Krebs and ex-National Cyber Director Chris Inglis, urged a New York federal court to dismiss a lawsuit alleging SolarWinds Corp. downplayed security threats to investors over the massive 2019 Russian cyberattack which compromised government networks.

The Securities and Exchange Commission's enforcement action against SolarWinds and its chief information security officer could discourage information sharing between future victims and the federal government over security threats, the officials said in their friend-of-the-court brief filed late Friday in the US District Court for the Southern District of New York. The complaint alleges SolarWinds broke federal securities law by mischaracterizing its cybersecurity posture in "false and misleading" disclosures that masked legitimate risks.

The amicus brief coalesced leading US cybersecurity experts who emphasized the importance of balancing secure information sharing with public disclosures in the face of potentially damaging cyberattacks. The memo comes days after senior administration officials appeared before a congressional hearing to warn about China's growing cyber ambitions.

"Public disclosure is not a substitute for, and must not come at the expense of, voluntary confidential sharing of more detailed cyber threat information with the agencies tasked with combatting cyber threats," the former officials said in the brief supporting the company's motion to dismiss the suit. "A regime that incentivizes early detailed public disclosure of vulnerability information, along with information detailing a company's security posture, can actually damage law enforcement investigations, provide a roadmap to aid threat actors, and make companies less safe."

Signatories included former Acting National Cyber Director Kemba Walden, former SEC enforcement official John Reed Stark, and former White House cyber response chief, Jeff Greene.

The supportive filing comes as SolarWinds and its CISO, Tim Brown, defend allegations they defrauded investors by failing to execute on security protocols promised in public disclosures. The SEC filed its complaint after the agency investigated SolarWinds' cybersecurity preparedness and Brown's response to a Russia-backed attack that affected networks across approximately 100 companies and federal government agencies.

It appeared alongside others filed by security executives and industry lobbyists also supporting the company's motion to dismiss the SEC's case.

Thirty cybersecurity organizations and top executives who have worked in top cybersecurity positions at companies including Blackstone Group, Salesforce.com Inc., and Intel Corp. criticized the SEC's theories for pursuing liability against SolarWinds and Brown as "counterproductive" to national security and warned the lawsuit's success could negatively affect good-faith efforts to secure company systems.

"Liability under these theories empowers threat actors, chills internal communications about cyber-threats, exacerbates the already severe shortage of cybersecurity professionals, and deters collaboration between the private sector and the Government," the coalition's brief said.

Amicus briefs opposing SolarWinds' dismissal motion are due March 15. SEC spokesperson David Ausiello declined to comment beyond the agency's existing public filings and statements.

Industry Support

Several powerful trade associations also filed briefs supporting SolarWinds' motion to dismiss, expressing concern about the legal implications of a ruling favoring the SEC's charges. Among the supporters were the Software Alliance (also known as BSA), CEO group Business Roundtable, and the US Chamber of Commerce, the largest lobbying arm in the country.

Counsel representing amici curiae include: Covington & Burlington LLP for BSA, Sullivan & Cromwell LLP for the Chamber of Commerce and Business Roundtable, and Cooley LLP and Freshfields Bruckhaus Deringer LLP for the cybersecurity coalition.

"We are grateful for the thoughtful amicus briefs filed by a wide range of stakeholders, which highlight that the SEC's positions in this case are not only unsupported by the law but raise serious security concerns for companies, CISOs, and the public at large," said Serrin Turner, SolarWinds counsel and a partner at Latham & Watkins, in a statement. "We remain confident that SolarWinds' disclosures at all times were appropriate, and the SEC's assertions otherwise are fundamentally flawed."

The cybersecurity coalition and the BSA argued in separate briefs that holding SolarWinds liable could threaten cybersecurity endeavors across industries by scaring companies into disclosing more details than necessary about security incidents and risks or by discouraging “candid communication” internally about cyber risks.

“Requiring companies to publicly disclose details about cybersecurity weaknesses and incidents, as the SEC seeks to do here, will serve only to give threat actors more information about how better to attack American companies,” BSA’s brief said.

The SEC’s complaint alleged SolarWinds made public filings and statements downplaying known cybersecurity risks including an unsecured VPN network and weak password protections. It cited numerous internal staff messages framing SolarWinds as “so far from being a security minded company.”

The cybersecurity coalition also criticized the SEC’s pursuit of personal liability against Brown over “routine aspects of a CISO’s job,” and said the charges could push security executives out of the industry.

“In short, the SEC’s action could incentivize CISOs to avoid discussing and investigating risks internally while also giving an incentive to overstate and overshare potential vulnerabilities in SEC disclosures,” their brief said. “This, in turn, would hamstring CISOs in the arms race by undermining the work of detecting and improving vulnerabilities.”

The case is SEC v. SolarWinds Corp. , S.D.N.Y., No. 1:23-cv-09518, amici briefs filed 2/2/24 .

(Updated with former officials’ brief in first five paragraphs.)

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Jamie Dimon Has Spent \$117 Billion Propping Up JPMorgan's Share Price with Buybacks in 10 Years; He's Counting on Trump's MAGA Crowd to Rescue Him

 wallstreetonparade.com/2024/02/jamie-dimon-has-spent-117-billion-propping-up-jpmorgans-share-price-with-buybacks-in-10-years-hes-counting-on-trumps-maga-crowd-to-rescue-him

By Pam Martens and Russ Martens: February 5, 2024 ~

On January 19, Jamie Dimon stunned CNBC viewers when he launched into what sounded like a TV commercial for Republican Presidential candidate and 91-count indictee Donald Trump. Dimon stated:

"Take a step back, be honest. He was kind of right about NATO, kind of right about immigration. He grew the economy quite well. Tax reform worked. He was right about some of China...He wasn't wrong about some of these critical issues."

Dimon also said that Democrats need to be more respectful of their fellow citizens that identify as MAGA Republicans.

Former U.S. Labor Secretary Robert Reich was one of the folks who caught Dimon's act and published a sharp retort the same day, writing:

"Kind of right about NATO? Trump wanted the U.S. to withdraw from NATO — and may get his way if he becomes president again. This would open Europe further to Putin's aggression.

"Kind of right on immigration? Even the conservative CATO Institute found that Trump reduced *legal* immigration but not *illegal* immigration. Trump refused to grant legal status to children of immigrants born in the United States or who grew up in the U.S. He banned Muslims from America, and when the Muslim ban was found to be unconstitutional, banned people from Muslim countries. He fueled the flames of nativism by describing poorer nations as 'shit holes' and has used Nazi terms to describe foreigners as 'poisoning the blood' of Americans.

"Grew the economy quite well?" In fact, under Trump the economy lost 2.9 million jobs. Even before the pandemic, job growth was slower than it has been under Biden. The unemployment rate increased by 1.6 percentage points to 6.3%. The international trade



Jamie Dimon, Chairman and CEO of JPMorgan Chase

deficit Trump promised to reduce went up. The U.S. trade deficit in goods and services in 2020 was the highest since 2008 and increased 40.5% from 2016. The number of Americans lacking health insurance rose by 3 million. The federal debt held by the public went up, from \$14.4 trillion to \$21.6 trillion.” (Read Reich’s full column here.)

What has caused Jamie Dimon to appear to be auditioning for the job of advance man for Donald Trump and his MAGA followers?

Dimon is Chairman and CEO of the largest Wall Street mega bank in the United States, JPMorgan Chase. Under Dimon’s tenure, the bank has the dubious distinction of having admitted to an unprecedented five felony counts brought by the U.S. Department of Justice as well as being labeled the riskiest bank by its regulators.

Now Dimon is in a pitched battle with federal banking regulators over their proposed new rules that would make JPMorgan Chase hold more capital against its riskiest trading positions. (This is, after all, the bank that secretly used deposits from its federally-insured Chase Bank to gamble in derivatives in London and lose \$6.2 billion. The notorious scandal, known as the “London Whale,” occurred just two years after Congress had passed the Dodd-Frank financial reform legislation in 2010 — legislation that was supposed to rein in the reckless activities of the Wall Street mega banks which had brought on the worst financial crash in the U.S. in 2008 since the Great Depression of the 1930s.)



Running to the aid of Dimon in his battle to stop the proposed new capital rules by federal regulators – which would impact just the 37 banks (out of 4,600) in the U.S. that hold \$100 billion or more in assets – is the MAGA-controlled House Financial Services Committee. Its website is so brazenly pro-Trump that *yesterday* it featured under a heading of “Latest on Twitter” a 2020 Tweet heaping praise on Trump along with a photo of Trump in the Oval Office. (See screenshot to the right.)

On January 31, the MAGA-dominated House Financial Services Committee held a hearing on the proposed new capital rules under the biased title: “Rules Without Analysis: Federal Banking Proposals Under the Biden Administration.”

The witness panel was stacked three-to-one against an honest debate on the topic. The one speaker who was not a lobbyist, law firm or sycophant for Wall Street mega banks was Professor Jeremy Kress, Assistant Professor of Business Law at the Stephen M. Ross School of Business, University of Michigan. (Clearly, Democrats were allowed to select just one of the four witnesses on the panel.) Professor Kress told the Committee the following:

“The pending Basel III Endgame rules will foster— not threaten—credit availability, as most of the proposed capital increase is associated with large banks’ trading and fee-generating businesses—not their lending activities—and the risk-weights for many categories of traditional loans actually decrease under the proposal...

“...the banking sector is trying to invent new legal standards in a brazen attempt to defeat these rules. Requiring banks to fund themselves with more equity will not impair credit availability, but it will modestly reduce bank stock prices, share buybacks, and executive compensation. To avoid this outcome, large banks are attempting to hold their regulators to legal standards that simply do not exist. Congress has subjected rulemaking by some agencies, including the Securities and Exchange Commission, to various types of cost-benefit tests. However, Congress has not imposed any cost-benefit requirement on the federal banking agencies. And for good reason: quantifying the benefits of a banking crisis averted is a nearly impossible task. The law that does govern rulemaking by the federal banking agencies—the Administrative Procedure Act—requires only ‘reasoned decision making,’ a standard the current proposals assuredly meet. Indeed, the level of analysis in the current proposals is at least equal to, and in many cases exceeds, prior federal banking agency rules. Make no mistake: if the current proposals are legally deficient, so too are the vast majority of the deregulatory rules adopted under the Trump Administration with far less reasoned analysis.”

Jamie Dimon has been able to keep his job at the helm of JPMorgan Chase because his Board of Directors has chosen to look the other way at how Dimon keeps the stock price moving higher despite a Rap Sheet that rivals an organized crime family. As Professor Kress points out, under the proposed new capital rules the Wall Street mega banks would have to reduce their spending on share buybacks to prop up their share prices and use at least part of that money instead for an accounting category called “retained earnings,” which increases equity capital at the bank and helps to prevent taxpayer bailouts.

Over the past decade, from January 1, 2014 through December 31, 2023, Dimon has overseen \$116.8 billion in stock buybacks of JPMorgan Chase stock as his Board made Dimon a billionaire with stock options. (Not shown in the first link in this paragraph is the \$2.3 billion JPMorgan Chase spent in the fourth quarter of 2023 on buybacks — per the 8K the bank filed with the SEC.)

In another move that shows Dimon is getting nervous about banking regulators breathing down his neck, Dimon announced in October that he and his family planned to sell a whopping one million shares of their JPMorgan Chase common stock.



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Class Action Group Of The Year: Robbins Geller

By **Rae Ann Varona**

Law360 (February 2, 2024, 3:28 PM EST) -- Robbins Geller Rudman & Dowd LLP is behind numerous high-impact class action deals, including a record-breaking \$1 billion settlement for minority shareholders who accused Dell Technologies Inc. of shortchanging them in a controversial \$23.9 billion stock swap, earning the firm a spot among **Law360's 2023 Class Action Groups of the Year**.



The securities class action settlement — which received **final approval** in April — marked the peak of a dispute initiated by a class suit of minority investors who accused Dell, private equity firm Silver Lake Group, and others of breaching their fiduciary duties and shortchanging shareholders by roughly \$10.7 billion in a deal that exchanged Class V stock for Class C stock they alleged was overvalued. The Class V stock was meant to track Dell's stake in cloud computing company VMWare Inc.

The deal ended up being the largest recovery reached before judgment in a fiduciary duty action in Delaware's Chancery Court, with Vice Chancellor J. Travis Laster — citing 4½ years of litigation and more than 53,000 attorney hours racked up before a hearing on the approval — describing the settlement as a "huge effort."

According to Robbins Geller, the deal also set a high bar for Fortune 500 companies eyeing mergers or stock swaps. More than 66% of Fortune 500 companies are governed by the court, according to the state.

"It was understood throughout the bar that that was going to be a very difficult case from the word go," Chad Johnson, partner in the firm's Manhattan office, said.

Johnson, a former deputy attorney general for New York, said a big challenge was making sure the defendants understood that the firm was not only willing but ready to take the case to trial.

That, Robbins Geller did, when it secured the deal less than a month before trial was supposed to start.

Johnson credited the success to the firm's "ethos of mutual support." He said the firm truly operates as one in that it's not internally competitive and, importantly, gets resources to cases that need them.

He said that in the Dell case, for example, a lot of work came out of the New York City office, but the firm also tapped into other offices when needed.

With the help of co-counsel, Johnson said the firm was able to not only take the case to the brink of trial but ultimately send a message to Wall Street and the rest of corporate America that they couldn't cheat minority shareholders and not expect to be held accountable.

Johnson said it also helps that he and his colleagues get to work with some of the "smartest and most creative" lawyers on the plaintiff's side.

"You bounce thoughts off of others, and you only get sharper and sharper ideas," he said.

The firm's ability to seamlessly work as one found success with big wins over the past year not only in securities, but in antitrust and consumer rights.

In March, the firm helped to get the Second Circuit to **uphold** a historic \$5.6 billion credit card interchange fee deal against Visa and Mastercard — a settlement that involved nearly 18 years of litigation and is believed to be the largest-ever antitrust class action settlement in history.

In the months after, it helped secure favorable resolutions on consumer rights when getting Walgreens and management consulting giant McKinsey & Co. to pay out hundreds of millions of dollars for their roles in the opioid crisis.

Walgreens, in May, agreed to pay **\$230 million** to San Francisco in a multidistrict litigation bellwether, following a long bench trial against it, Allergan and its parent AbbVie, and Teva Pharmaceuticals.

While the latter three companies **settled** with the city before closing arguments, Walgreens hung on all the way to the verdict, after which U.S. District Judge Charles R. Breyer handed down an over 100-page decision, holding that evidence during trial established the company breached its duty to make sure drugs weren't being diverted and harming the public.

In September, McKinsey also agreed to pay **\$230 million** to settle claims that it was behind false and misleading marketing strategies Purdue Pharma LP and other pharmaceutical companies used to boost opioid sales while roughly 350,000 people in the U.S. died from an opioid overdose between 1999 and 2016.

Like Johnson, Darren Robbins, a founding partner of the firm, said the firm's ability to strategically dedicate resources to all cases it takes on played a role in its success.

"I think that's what separates us — the breadth of our human and financial resources, which we bring to bear on behalf of pension funds and sovereign wealth funds around the world," Robbins said, adding that the firm's strategies have allowed it to go toe-to-toe with some of the best defense firms in the country, and often with many of them at once.

But Robbins also praised the firm's breadth of experience and its unwillingness to compromise its clients' interests, even in long-running cases like the one involving Visa and Mastercard.

Aelish Baig, a partner at Robbins Geller's San Francisco office who served as co-trial counsel in the Walgreens case and was appointed to the plaintiffs' steering committee in the McKinsey case, similarly credited the firm's "tenacity and endurance."

Whether it be in securities, antitrust or consumer rights, Baig said such steadfastness has ultimately gotten the firm ready to face many of the most topical issues in the country.

"Being at the forefront of that is very exciting and having the resources to go toe-to-toe with the largest corporations in the country is fun and rewarding," she said.

--Editing by Janice Carter Brown.

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FirstEnergy Rips Investor Clarification Bid Amid Cert. Appeal

By **Katryna Perera**

Law360 (February 2, 2024, 9:24 PM EST) -- FirstEnergy Corp. told an Ohio federal judge that investors are making an "extraordinary" and "unprecedented" bid for clarification on a class certification ruling in their suit over the company's role in a high-profile bribery scandal, saying such a clarification in the middle of an ongoing appeal would require an unnecessary, additional round of briefing.

First Energy on Wednesday filed a **memo** opposing the investors' motion, which was filed last month seeking a Rule 62.1(a) indicative ruling from the court. Investors are asking the court to **issue the ruling and clarify** its March 30, 2023, order and opinion that certified the class and its claims that news of the arrest of an Ohio politician for accepting bribes from FirstEnergy caused the company's stock to plummet and cost its shareholders billions of dollars.

In their motion, the investors note they are not asking the district court to reconsider any part of its order or change any of its findings but clarify that it didn't assume the damages methodologies for claims under different federal securities statutes were interchangeable, as FirstEnergy has claimed in its appeal to the Sixth Circuit.

According to the memo, Rule 62.1 allows the district court to consider a motion while an appeal is pending. In considering the motion, the district court may defer it, deny it or state that the motion raises a substantial issue or that it would grant the motion if the appeals court remands the suit for that reason.

But FirstEnergy argues in its Wednesday filing that the investors' motion wrongfully asks the court to interfere in the Sixth Circuit's ongoing review of the class certification opinion and order. FirstEnergy says the district court should deny the investors' motion for an indicative ruling because it fails under both Rule 62.1 and Rule 60.

According to Wednesday's memo, Rule 62.1 only provides a narrow "exception" to the general rule that a district court does not have jurisdiction during a pending appeal. Relief under the rule is limited to certain circumstances, which are not present in the current action, "where the district court acts in aid of the appeal" without "alter[ing] the case on appeal," the memo states.

A district court cannot issue an indicative ruling considering the same question that the appeals court is currently reviewing, and that is exactly what the investors want, according to FirstEnergy.

"[The investors] concede that they want this court to issue a ruling directly addressing one aspect of the [question] now before the Sixth Circuit, hoping that their motion will 'put to rest appellants' first claimed error,'" the memo states.

An indicative ruling at this stage of the litigation would also require an additional round of briefing in the Sixth Circuit, FirstEnergy claims, which would "complicate, confuse and prolong these proceedings."

The memo also states that the investors' request for an indicative ruling fails under Rule 60, which allows a court on motion or its own to correct any perceived oversight, omission, mistake or inadvertent error.

"Rule 60 does not permit seriatim motions for reconsideration or clarification," the memo states. "If plaintiffs thought the ... court's order contained any errors, they should have sought to fix those errors when they first requested clarification of the order nine months ago or, at the latest, when defendants identified them in their [appeal.]"

The Sixth Circuit agreed in November 2023 to **weigh in** on whether the lower court was right to certify the suit's investor class.

The circuit court approved the interlocutory appeal over the objections of the class, which told the appellate court that an Ohio district court judge addressed FirstEnergy Corp.'s arguments and found them lacking when he **certified the class**.

The Sixth Circuit did not say why it agreed to hear an appeal in an ongoing lawsuit, which is something it does not usually do.

Instead, it listed several reasons it might decide to hear the interlocutory appeal, including a belief that the petitioner is likely to succeed on appeal or a determination that the case presents a novel or unsettled question of law. The three-judge panel did not say which factor or factors applied to the case at hand.

FirstEnergy also urged the district court last month **to pause** the class action until the Sixth Circuit rules on its appeal.

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

Letting litigation go on when such a major shift is potentially on the horizon would unfairly harm FirstEnergy and go against the public's interest in a proper application of the law, the company says.

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

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

The investors are represented by Robbins Geller Rudman & Dowd LLP and Murray Murphy Moul & Basil LLP.

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

--Editing by Kristen Becker.



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Attorneys Want \$21.5M In GE Retirement Funds Suit

By **Emmy Freedman**

Law360 (February 2, 2024, 7:21 PM EST) --

Attorneys representing current and former workers who reached a \$61 million settlement in their lawsuit accusing General Electric of mismanaging their retirement savings asked a Massachusetts federal court to greenlight their request for \$21.5 million in fees and expenses, citing their commitment to six years' worth of litigation.

In a **motion** Thursday, attorneys from firms including Sanford Heisler Sharp LLP, Block & Leviton LLP and Robbins Geller Rudman & Dowd LLP, among others, told the court that one-third of the settlement fund should be earmarked for counsel.

The \$61 million deal — which, if approved, will be the highest amount in a lawsuit over retirement plan investments in a proprietary fund — wraps up several consolidated class actions accusing the company of violating the Employee Retirement Income Security Act by directing employee retirement savings into underperforming GE Asset Management funds to generate fees for the subsidiary before it was sold.

"The prosecution and management of a complex national ERISA class action requires unique legal skills and abilities that justify the one-third fee request," the filing said. "As demonstrated by their firm resumes, class counsel are experienced and skilled practitioners in the ERISA and complex class action field."

The attorneys told the court that they devoted more than 24,600 hours of billable time and risked more than \$1.4 million in litigation costs since the case's inception

in October 2017.

But one of the advantages of using a percentage-of-the-fund method to calculate attorney fees is that it directly incorporates the value of the recovery obtained into the calculation of the fee, according to the motion.

In this case, counsel said, the recovery is about 21.5% of the \$283 million in estimated recoverable damages. Further, the deal allows the plaintiffs to avoid the risks associated with continued litigation, the filing said.

"While plaintiffs believe that the ERISA claims asserted against defendants have merit, they recognize that there were significant risks as to whether plaintiffs would ultimately be able to overcome defendants' summary judgment [...] arguments, prove liability and damages on their claims at trial, and prevail against any post-trial appeals," the motion said. "The reality is there remained significant hurdles to recovery and this settlement obviates those risks."

The parties alerted the court that they had reached **a potential deal in August** just as they were gearing up to argue cross-motions for summary judgment. U.S. District Judge Indira Talwani **gave preliminary approval** to the settlement in October.

The settlement would partly reimburse about 200,000 employees who have participated in GE's 401(k) plan since September 2011.

The current and former workers sued GE, GE Asset Management and other related affiliates, accusing them of overlooking their obligations under ERISA and not acting in the plan participants' best interest by choosing GE's own subsidiary's higher-cost and underperforming funds over less costly and better performing ones.

GE instead used the plan to garner fees and boost mutual fund business for GE

Asset Management to make it more attractive to potential buyers, the plaintiffs alleged. GE Asset Management was sold to State Street Corp. in 2016, according to court filings.

The company has maintained that it was entitled to invest employee retirement savings into funds controlled by its subsidiary under federal benefits law, according to court records.

"We are very proud of this record-setting settlement, and we are confident that all aspects of it will be approved," Orin Kurtz, who represents the plaintiffs, told Law360.

Representatives of GE did not immediately respond to requests for comment Friday.

The plaintiffs are represented by Charles H. Field and David McNamee of Sanford Heisler Sharp LLP, by Jason M. Leviton, Jacob A. Walker and Jeffrey C. Block of Block & Leviton LLP, by Orin Kurtz, Meagan A. Farmer, James S. Notis and Mark C. Gardy of Gardy & Notis LLP, by Samuel H. Rudman, Evan J. Kaufman, Magdalene Economou and Jonah H. Goldstein of Robbins Geller Rudman & Dowd LLP, by Lee Squitieri of Squitieri & Fearon LLP, by Theodore M. Hess-Mahan of Hutchings Barsamian Mandelcorn LLP and by Theodore J. Pintar of Milberg Weiss Bershad Hynes & Lerach.

GE is represented by Alison V. Douglass, Benjamin S. Reilly, David Rosenberg, DeMario M. Carswell, Jaime A. Santos, James O. Fleckner and Katherine G. McKenney of Goodwin Procter LLP.

The case is In re: GE ERISA Litigation, case number 1:17-cv-12123, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Julie Manganis. Editing by Nick Petruncio.



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McKinsey's \$78M Opioid Deal With Health Plans Hits Snag

By **Gina Kim**

Law360 (February 2, 2024, 10:37 PM EST) -- A California federal judge considering a \$78 million deal between third-party payors and McKinsey & Co. in multidistrict litigation over the consulting firm's marketing advice to opioid makers held off on preliminarily approving the deal Friday, instead setting a new hearing date after some plaintiffs' attorneys raised issues with aspects of the deal.

U.S. District Judge Charles R. Breyer of the Northern District of California stopped short of granting preliminary approval to a non-reversionary \$78 million class action settlement reached between third-party payor health plan plaintiffs and McKinsey after hearing objections from some plaintiffs' attorneys who raised concerns over plans for allocation, distribution and out-opt rights.

The class of approximately 80,000 third-party payors includes private benefit plans, self-insured parties whose operations are handled by third-party administrators, and commercial insurers that provide health and welfare benefits. The third-party payor class alleged they had to pay for opioids instead of safer, nonaddictive, cheaper alternatives. The proposed settlement class includes all those who paid or were reimbursed for opioid prescription drugs that were sold and distributed by Purdue Pharma, Johnson & Johnson, Endo, Cephalon and Mallinckrodt between June 1, 2009, and Oct. 31, 2023.

Earlier this week, some attorneys who represent Teamsters Local 404 Health Services and Insurance Plan, International Union of Operating Engineers Stationary Engineers Local 39 Health and Welfare Trust Fund, and other entities filed an opposition to the settlement.

The attorneys, including James R. Dugan II of the Dugan Law Firm APLC and Thomas M. Sobol of Hagens Berman Sobol Shapiro LLP, argued that, after now seeing the preliminary approval motion, they believed some aspects of the proposal were flawed.

Their opposition said that the proposed structure posed needless burdens that the court should weigh against the potential recovery by thousands of individual health plans, which make up the vast majority of the settlement class.

The opposition further said class counsel's expert created an enrollment-based model as a proxy for actual incurred expenses; however, to follow that model, tens of thousands of class members would have to submit new analyses and reporting, "leading to the likelihood that claims rates will suffer significantly."

On Friday, Judge Breyer remarked that the opposing attorneys weren't objecting to the amount of the settlement, but instead had concerns with the method of distribution and allocation plan.

Proposed class counsel Paul Geller of Robbins Geller Rudman & Dowd LLP, who's on the plaintiffs' steering committee, maintained that while the opposing attorneys disagree with the allocation plan, he was willing to work with them to address their concerns.

"We certainly don't think it should prevent preliminary approval or stop notices from going out," Geller said, adding that the driving force for class counsel is to ensure that all class members are treated equally.

Furthermore, the issues for the opposing group — who represent some third-party administrators as

opposed to third-party payors — have contracts with the third-party payors who are part of the settlement class and seek to have the administrators be carved out of the group, he said.

"They want to be paid first without the risk of delay from claims administrators, the court taking time to approve a settlement, [and] delay from appeals," Geller argued.

Judge Breyer remarked he wasn't sure that preliminary approval notices could be disseminated when plaintiffs' counsel haven't identified with certainty their allocation plan.

"I feel uncomfortable in that regard," the judge commented. "I'll let you have a discussion and I think we have to have another preliminary approval session. I don't know how else we'd do it."

Friday's hearing stems from sprawling litigation that **landed before Judge Breyer's docket** in June 2021, coming amid a nationwide legal reckoning for opioid drug manufacturers, distributors, suppliers and marketers who pushed the highly addictive painkillers over the past two decades.

Before the MDL against Purdue's consulting firm, McKinsey reached a \$645 million deal in February 2021 with attorneys general from all 50 states, and in December of that year, McKinsey asked the court to toss claims by school districts, cities and counties, **arguing** that the state settlements covered those plaintiffs' claims and that they can't seek further recovery.

Last September, McKinsey reached its \$230 million settlement — which Judge Breyer gave final approval to on Friday — with local governments and school districts to end accusations that its consulting work with Purdue Pharma and other major drugmakers to develop marketing strategies boosted profits at the cost of an overdose epidemic that claimed the lives of approximately 350,000 Americans between 1999 and 2016.

McKinsey had contended that it believed its prior work was not illegal and denied any admissions of liability.

On Friday, Dugan, who is the court-appointed chair of the third-party payor class, contended he'd characterize the concerns from the opposition as a "family squabble," and that he maintains tremendous respect for the class counsel and that the concerns could be resolved.

Geller told the judge that the proposed allocation plan was excellent, but said the parties could use 30 days to work out the issues while preserving the settlement and not risk opt-outs.

Sobol told Judge Breyer that the concerns over the allocation plan, opt-out rights and adequacy of the overall settlement are issues that go hand-in-glove with one another, and argued that the opt-out provisions in the proposed deal are a "major disservice" to thousands of the smallest health insurance plans.

The claim is for the expenditures on payments for illicit opioid drugs, as well as for healthcare provided to those suffering from opioid use disorders and similar disorders, Sobol explained.

"The class, therefore, is essentially private health insurance, which of course includes large commercial health insurers, but also includes tens and tens of thousands of private employers, health and welfare funds, and the like," he added.

Those who want to opt out must submit a sworn signed declaration, which means "you need to have more than 65,000 private declarations signed if this group of plans wants to be able to opt out to have a fairer allocation plan," Sobol said.

"So, it's really oppressive in our view," Sobol added. "Having said that, there have been ways these issues have been worked out, and I worked them out alongside some of the same lawyers in this room to be able to address those kinds of things. But, ultimately, in our view, not only does the plan of allocation fail, but the opt-out fails."

The judge set a date for March 22 for the next hearing on the preliminary approval motion.

The plaintiffs are represented by attorneys from Lief Cabraser Heimann & Bernstein LLP, Robbins

Geller Rudman & Dowd LLP, Hagens Berman Sobol Shapiro LLP, The Dugan Law Firm APLC and Hach Rose Shirripa & Cheverie LLP.

McKinsey & Co. is represented by attorneys from Morrison & Foerster LLP and Stroock & Stroock & Lavan LLP.

The case is In re: McKinsey & Co. Inc. National Prescription Opiate Consultant Litigation, case number 3:21-md-02996, in the U.S. District Court for the Northern District of California.

--Additional reporting by Jeff Overley, Chris Villani, and Emily Field. Editing by Jay Jackson Jr.

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Pennsylvania AG's Clout In Opioid Deal Likely Has Wide Reach

By **Matthew Santoni**

Law360 (February 2, 2024, 6:20 PM EST) -- A Pennsylvania court's ruling that the attorney general had the power to overrule local district attorneys' objections to a big opioid settlement could affect the prosecutors' power dynamic beyond the painkiller litigation, overshadowing other areas where they could share jurisdiction or clash over politically sensitive issues, attorneys told Law360.

Although the Commonwealth Court's **Jan. 26 ruling** dealt with then-Attorney General Josh Shapiro's ability to dismiss claims that the district attorneys for Philadelphia and Allegheny County brought against the opioid companies who later signed a \$26 billion multistate settlement, experts said the ruling could have implications in other areas of civil litigation where county and statewide attorneys may take different approaches, since other laws have similar language that let either office file suit.

"A lot of laws give concurrent jurisdiction to AGs and DAs to abate nuisances," Chris Carusone of Cohen Seglias Pallas Greenhall & Furman PC, a former chief deputy attorney general now representing clients being investigated by state agencies, said via email.

Philadelphia District Attorney Larry Krasner and Allegheny County District Attorney Stephen Zappala had sued opioid companies over the impact of the epidemic on their communities, then **asked the Commonwealth Court to intercede** when Shapiro joined other attorneys general in **a settlement** that released the district attorneys' claims.

The Commonwealth Court said that in cases representing the people of Pennsylvania, the attorney general "outranks" district attorneys under state law and through the mandate of a statewide election.

While the ruling focused on the shared authority and the attorney general's stronger position to represent the state under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, Carusone predicted the attorney generals' power over local prosecutors would be applied to other laws.

That could include environmental laws like the Clean Water Act or the state's Air Pollution Control Act; the Dam Safety and Encroachments Act; other consumer protection statutes such as the Solicitation of Funds for Charitable Purposes Act and the Home Improvement Finance Act; or the state Liquor Code. Civil suits brought by a district attorney under any of those statutes could set up a conflict similar to the one the court just decided.

"We could see a future case in which the attorney general and district attorney(s) bring concurrent actions to abate an environmental nuisance, only for the attorney general to settle those cases without the consent of the district attorney(s) involved," Carusone said.

Carusone said he believed the Commonwealth Court ruling still wouldn't have much day-to-day effects on the operations of either office: County district attorneys are mostly concerned with criminal prosecutions, and the civil litigation they do that could overlap with the attorney general is usually limited to shutting down local nuisances rather than statewide ones, he said.

But David Noll, a professor at Rutgers Law School, said he could see the opinion being influential in other situations — and even other states — where local officials might take a different stance than their statewide counterparts in the attorney general's office or the legislature.

More progressive district attorneys or local officials could bring claims, but state officials representing a more conservative general electorate could cite the Commonwealth Court's opinion to assert their authority to take over, he said.

"For example, state and local governments have asserted claims against 'crisis pregnancy centers' that aim to dissuade pregnant people from seeking abortions; oil companies for their role in climate change; and gun manufacturers and distributors for fueling gun violence," Noll told Law360. "Where a local government brings such a case, I can imagine a conservative state legislature trying to step in and squash the litigation."

Both Noll and his colleague professor Sarah Swan said that the opinion's focus on Pennsylvania's Unfair Trade Practices Law may limit whether it applies to other clashes, especially in states that have different laws setting up their top lawyers.

Although there are still pending county lawsuits against companies in the opioid business, Villanova Law professor Ana Santos Rutschman said she didn't think the conflict would come up again in any more opioid cases.

She said it was predictable that such conflicts might arise when local officials disagree over whether a settlement reflects the damage done to the communities they see firsthand. But the Commonwealth Court's opinion had reinforced a "pyramid"-style hierarchy between the state and county officials.

Cohen Seglias' Carusone said he was struck by another part of the Commonwealth Court's opinion, which called attention to the stricter limits on the attorney general's ability to take over criminal cases from a district attorney, and highlighted how local prosecutors are the ones primarily responsible for their home turf.

Carusone said he anticipated that Krasner might wield that aspect of the decision in his **pending litigation** over a law, Act 40, that mandated the appointment of a "special prosecutor" within the attorney general's office who would get first dibs on criminal cases involving the Southeast Pennsylvania Transportation Authority or occurring within its jurisdiction.

"The creation of a special prosecutor housed in the attorney general's office to handle crimes occurring at or near mass transit facilities located inside a single county strikes me as contrary to that portion of the Commonwealth Court's opinion stating that the district attorney is the guardian of the interests of his/her local constituents and the attorney general is the guardian of the interests of the public at large," Carusone said.

"However, I don't see this rationale as having much of an impact in the Act 40 dispute because it is not of constitutional dimension, and the General Assembly is free to reallocate the responsibilities of the attorney general and district attorneys as it sees fit," he said.

--Editing by Brian Baresch.



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Drugmaker Endo Wants To Extend Opioid Suit Pause

By **Yun Park**

Law360 (February 2, 2024, 8:12 PM EST) -- Endo has asked a New York bankruptcy judge to pause the opioid litigation leveled against it for five more months, asserting that the pharmaceutical company made "wide-ranging progress" in its Chapter 11 case and expects to have a reorganization plan confirmed by March.

In a **memorandum** filed Thursday, Endo International PLC requested an extension of an injunction currently set to expire Feb. 9 to June 30, explaining that it has a "reasonable likelihood of successful reorganization" by next month. The debtor said the preliminary injunction it received enabled the company and its affiliates to bring significant progress in developing a successful resolution of the Chapter 11 case.

Since August, when the injunction was first extended, Endo has submitted a proposed Chapter 11 plan and disclosure statements and obtained conditional approval of the disclosure statement, the company noted. It started soliciting votes in January, with voting set to close Feb. 22 and a confirmation hearing slated for March.

The debtor pointed out in its latest filing that the proposed Chapter 11 plan included settlements of government claims negotiated by the ad hoc first lien group and government representatives.

"Such a feat is the result of hundreds of hours of mediation and arm's-length negotiations between and among the debtors and numerous key stakeholders," Endo wrote.

The grace period provided by the injunction also allowed the debtors to focus on negotiations and mediation with major stakeholders, winning support for the proposed plan from the official committee of unsecured creditors, the committee of opioid claimants and the ad hoc first lien group, according to the memo. The debtors added that they also negotiated a conditional economic settlement with the U.S. Trustee's Office regarding an asset sale to the ad hoc first lien group.

The drugmaker also argued the debtors and their reorganization efforts will be harmed if the injunction is not extended.

"Continued litigation ... could cost the estates millions of dollars and may erode the debtors' limited financial resources," the company's filing read.

Endo, headquartered in Ireland and Pennsylvania, **sought Chapter 11 protection** in August for itself and some subsidiaries, aiming to deal with \$8 billion in debt and thousands of lawsuits over its sale of opioid painkillers and other products.

It was among several pharmaceutical companies that U.S. states, cities and counties sued in recent years over widespread opioid abuse, which leads to the deaths of roughly 80,000 Americans every 12 months, according to the Centers for Disease Control and Prevention. Most of those suits were consolidated into multidistrict litigation that began in late 2017.

In August 2022, Endo reached a deal with 34 states, the District of Columbia and the U.S. Virgin Islands to pay \$450 million over the next 10 years to state and local governments to resolve opioid claims.

When it filed for bankruptcy protection, a first-lien debtholder group submitted a \$6 billion stalking horse bid for the company, nearly all of which came in the form of a credit bid of existing first-lien

debt.

But the U.S. Department of Justice, on behalf of various federal agencies, the U.S. Trustee's Office and public school entities, opposed the asset sale, saying it funnels money to the trust for the benefit of unsecured creditors while cutting out administration and other priority claimants from recovery.

Endo **said in July** 2023 that mediation with secured lenders, state government entities, opioid claimants, unsecured creditors and the future claims representative had yielded support for the sale. In December, it filed a reorganization plan calling for a substantially similar ownership transfer, as well as nearly \$365 million of payments over 10 years to the Justice Department.

Counsel for the company didn't immediately respond to a request for comment Friday.

Endo and its affiliates are represented by Paul D. Leake, Jason M. Liberi and Abigail E. Davis of Skadden Arps Slate Meagher & Flom LLP.

The case is In re: Endo International PLC et al., case number 7:22-bk-22549, in the U.S. Bankruptcy Court for the Southern District of New York.

--Additional reporting by Vince Sullivan, Rick Archer and Jeff Overley. Editing by Covey Son.

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Musk Pay Package Ruling Offers Detailed Lesson On Del. Law

By **Anat Alon-Beck and John Livingstone** (February 2, 2024, 3:12 PM EST)

In a 201-page opinion **issued on Jan.30**, Chancellor Kathaleen St. J. McCormick of the Delaware Chancery Court rescinded Elon Musk's compensation package granted to him by Tesla Inc. The package had an estimated valuation of \$55.8 billion.

This relief granted to the shareholder plaintiffs is a much-anticipated ruling in a **2018 derivatives case**. The lead plaintiff in the case, Richard J. Tornetta, is an ordinary shareholder of Tesla who believed Musk's compensation was excessive and therefore against the best interest of the corporation.

Issued following a **November 2022 trial**, followed by subsequent briefing and arguments in the spring of 2023, the opinion, while sweeping, does not represent a deviation from long-standing Delaware law and precedent.

The same day as the ruling, Musk posted on X: "Never incorporate your company in the state of Delaware." [1] He suggested Nevada or Texas as alternative states if corporations "prefer shareholders to decide matters." [2]

This statement can only be described as ironic, given that Tesla's own shareholders were the plaintiffs in this litigation. Regardless, a closer look at this case and Chancellor McCormick's ruling provides a detailed lesson on Delaware law.

In this article, we discuss the entire fairness doctrine as it relates to the Musk case, the most notable points from Chancellor McCormick's ruling, Musk's potential options going forward, and the ruling's bigger-picture impact on the executive compensation landscape.

Entire Fairness — Procedure and Price

The entire fairness standard is a Delaware corporate law specialty. It is at the core of the Delaware General Corporation Law and the surrounding precedent, and has been accurately described by the Chancery Court as the "most onerous standard of review." [3]

Directors and officers under Delaware law are protected by a concept known as the business judgment rule. Under the business judgment rule, courts are not permitted to review decisions made by the board or management of a firm, provided they have exercised their reasonable judgment in making an informed decision.

However, in certain circumstances, a plaintiff in a derivatives suit seeks court review of actions under the entire fairness doctrine, even if the business judgment rule would have normally applied. This concept is designed to be a protective measure for shareholders, who are owed fiduciary duties by directors and officers during potentially conflicted transactions.

For entire fairness review, a plaintiff must demonstrate one of two things: that a majority of the directors of a company are "interested" in the transaction (i.e., not independent), or that a controlling shareholder is on both sides of a transaction.



Anat Alon-Beck



John Livingstone

For purposes of Delaware law, controlling shareholders are either majority owners or individuals who exercise "control over the business affairs of the corporation," as noted by the Delaware Supreme Court's 1987 ruling in *Ivanhoe Partners v. Newmont Mining Corp.*[4]

Once that very high threshold is met, the burden shifts entirely to the defendant board to demonstrate the transaction is inherently fair to the stockholders. The defendants must demonstrate fairness in both the procedure and the substance itself of the deal, colloquially known as procedure and price. If the defendants fail on either of these, they expose themselves to review by a Delaware court.

However, they are still provided a second off-ramp in the form of ratification.

In order to meet the requirements of the so-called MFW test — named for the Delaware Supreme Court's 2014 ruling in *Kahn v. M&F Worldwide Corp.* — the controlling shareholder must allow for a special committee of independent directors to negotiate a fair price and inform minority shareholders, free from any coercion.[5] If this committee presents a deal to a majority of the minority and they vote to ratify the deal, the deal is likely to not be reviewed by the court.

In Musk's case, the Chancellor found that the plaintiffs had met their burden, the defendants failed to meet theirs, and their attempt at ratification was insufficient. As such, the plaintiffs were entitled to relief.

For Musk, he's now forced to give up his \$55.8 billion compensation package. For the board's part, in July 2023, **they agreed to return** \$735 million of their own compensation as part of a settlement in a suit that accused them of overpaying themselves.[6]

How Tesla Got Here

The plaintiffs in this case were required to show one of two points: either that Musk was a controlling shareholder, or that the majority of directors were interested parties. Chancellor McCormick, in her ruling, found that both were true, based largely on the same facts for both.

At the time this package was negotiated, Musk owned 21.9% of the voting equity of Tesla. Furthermore, Musk was a uniquely powerful founder, serving as both board chairman and as the CEO of Tesla at the time. Even without owning a majority of the equity, it cannot be doubted that he exercised, and still exercises, substantial control over the business affairs of Tesla and the board of directors.

Under Delaware law, courts can impose some fiduciary duties on controlling shareholders, who are shareholders with less than a majority, if they can control the board. Note that such a board is controlled by the shareholders and therefore will not act as an independent monitoring institution. In these cases, courts will compel the board's fiduciary duties directly onto the shareholders.

As for the board, it was difficult for Chancellor McCormick to view the members as anything but interested parties. As her opinion noted, Ira Ehrenpreis, the chair of the compensation committee who oversaw the negotiation of the compensation package, had a 15-year-long relationship with Musk.

The other member of the committee who was part of the working group that negotiated the deal, Antonio Gracias, had a 20-year-long relationship with Musk and had vacationed with Musk and his family regularly. Brad Buss, another member of the compensation committee, admitted that 44% of his net worth was attributable to Musk entities. Robyn Denholm was also on the committee. She made the vast majority of her wealth from serving on Tesla's board.

Even beyond the compensation committee members, the board seemed clearly conflicted. Musk's own brother, Kimbal Musk, was a member of the board. Another member, James Murdoch, frequently vacationed with Elon Musk, has known him since the late 1990s, and invested millions in Musk's other companies. Of the other two board members, Steve Jurvetson was on a leave of absence and did not vote and Linda Johnson Rice appeared to be genuinely independent.

The conflicted nature of the negotiations also extended to officers and other members of the working group negotiating the package. The general counsel of Tesla, Todd Maron, was Musk's former divorce attorney. And even after extensive discovery, depositions and a trial, Chancellor McCormick found that it was still unclear "on whose side Maron viewed himself." Maron was even the drafter of numerous documents that argued the process was fair.

Ehrenpreis testified that he didn't view the negotiations as "adversarial." Two other members of the working group were in-house attorneys who reported directly to Maron. The rest of the group included an outside consultant hired specifically for these negotiations and Tesla's longtime CFO Deepak Ahuja, who reported directly to Musk.

From a substantive perspective, Musk made it clear at the outset of the process and throughout that he had no intention of leaving Tesla. In the opinion, Chancellor McCormick outlined how the Musk negotiation was a "self-driving process," with Musk dictating each and every part as he saw fit the entire time.

According to Chancellor McCormick, the board never seemed to ask the \$55.8 billion question: "Was the plan even necessary for Tesla to retain Musk and achieve its goals?"

In Chancellor McCormick's view, given that Musk already owned a 21.9% stake in the company and made clear that he was not planning to leave, the incentive was unnecessary at worst and overblown at best. As she put it: "[A]t a minimum, could the Board have accomplished its goals with less, and would Musk have taken it?"

Where Does Musk Go From Here?

Musk is now faced with several options. He could try to renegotiate with Tesla and would likely receive significantly reduced compensation relative to the original \$55.8 billion. The court would not retain oversight of this, but given this loss, there would be considerable incentive for Tesla to both improve the procedures and reduce the amount.

Alternatively, he could simply take whatever compensation the board independently decides to provide him without the need for a high-level negotiation. He could also leave the company, something he appeared reticent to do during this suit.

Musk could also appeal to the Delaware Supreme Court. He has a limited time to file such an appeal. Given that this case is not particularly groundbreaking from a legal perspective, despite the high-profile nature of it, the Delaware Supreme Court would likely hear it as a three-justice panel, rather than hearing it en banc with a full bench of all five justices.

Finally, he could attempt to restructure Tesla in some way to make this original deal workable and attempt to obtain it again. Musk has hinted at making Tesla a dual-class company, but depending on the company's charter and Delaware law itself, he'd likely need a supermajority of the remaining shareholders to even have a chance at such a move. Even he concedes that this would nearly be impossible as a public entity incorporated in Delaware.[7]

He could attempt to move the company out of Delaware into a state with friendlier laws like Nevada, which he has said on Twitter he plans to do.[8] But this presents problems under Delaware law.

As an existing Delaware company, Tesla would be subject to Delaware law for the procedures by which Tesla shareholders would approve any reincorporation to another jurisdiction. Recent Chancery Court decisions have indicated that Delaware courts are highly skeptical of such moves when they are designed to strip away protections like the entire fairness doctrine from existing shareholders.

Of course, he could also attempt to take the company private, which may give him some more flexibility, depending on the specifics of that hypothetical deal. This seems least likely for a multitude of reasons; namely, he needs Tesla to stay public to provide him with liquidity to finance his other endeavors, and it would be exceedingly difficult to raise the necessary capital to take a nearly \$600 billion company private.

Undoubtedly, this case is far from over. The court's ruling simply places the ball back in Musk's court.

Musk's other endeavors present a tangential problem for him here.

As part of his acquisition of X, formerly known as Twitter, he was forced to sell off \$15.5 billion in Tesla shares to finance the deal, which contributed to the \$27 billion in total cash that he ended up supplying personally. Part of the rest of that deal was approximately \$13 billion in debt, backed by Twitter itself, including \$3 billion with a crushing maximum interest rate of 11.75%.

If Twitter is truly losing as much money as has been recently reported, then Musk may be forced to offset with his own wealth, and that tightens the belt even more. Musk also announced just two weeks before the Chancery Court ruling that he wants at least 25% voting control over Tesla in order to be "influential, but not so much that [he] can't be overturned." [9]

Clearly, he has given up all interest in attempting to argue he's a noncontrolling shareholder, and this seems like an open invitation for more challenges under Delaware law's entire fairness doctrine. The challenges will likely keep coming if he continues to use Tesla as his primary liquid asset.

The Bigger Picture

Moving away from Tesla specifically, this case is groundbreaking under Delaware law in some ways, but in others, not at all.

From a purely doctrinal perspective, this is as close to a textbook application of the entire fairness doctrine as we've ever seen. On the other hand, it is relatively unique in that it was applied to executive compensation.

Going forward, for other boards that are considering large grants of equity or options to their top-level executives, this can serve as a blueprint for what not to do. Of paramount importance, in the eyes of Delaware courts at least, is the independence of the negotiators.

Perhaps most interestingly, in ruling not just on the procedural aspects of these negotiations, and instead ruling on the substantive portion (i.e., the actual price), Chancellor McCormick has laid down Delaware precedent that indicates there is such a thing as overpaying executives.

While she did not set out a bright-line rule, the implication that boards can properly procedurally approve compensation, but that it may still be a violation of fiduciary duties on substantive grounds, is likely to send ripples throughout the broader executive compensation landscape.

Anat Alon-Beck is an associate professor of law and John M. Livingstone is a research fellow at Case Western Reserve University School of Law.

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[1] <https://twitter.com/elonmusk/status/1752455348106166598>.

[2] <https://twitter.com/elonmusk/status/1752486201083543842>.

[3] *In Re Multiplan Corp. Stockholders Litigation* , 2022, <https://courts.delaware.gov/Opinions/Download.aspx?id=328120>.

[4] *Ivanhoe Partners v. Newmont Min. Corp.* , 1987, <https://casetext.com/case/ivanhoe-partners-v-newmont-min-corp#p1344>.

[5] *Kahn v. M&F Worldwide Corp.* , 2014, <https://casetext.com/case/kahn-v-mf-worldwide-corp>.

[6] <https://www.cbsnews.com/news/tesla-directors-return-millions-in-compensation/>.

[7] <https://twitter.com/elonmusk/status/1747035106257023362>.

[8] <https://twitter.com/elonmusk/status/1752922071229722990>.

[9] <https://twitter.com/elonmusk/status/1746999488252703098>.

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Coinbase Directors Must Face Del. Insider Trading Suit

By **Jeff Montgomery**

Law360, Wilmington, Del. (February 2, 2024, 8:53 PM EST) -- In a decision that sharpens the contours of state insider trading and unjust enrichment claims, Delaware's chancellor has refused to dismiss a stockholder derivative suit against Coinbase Global Inc. directors and officers who saved \$1.09 billion by selling \$2.9 billion in shares just ahead of a stock plunge.

Chancellor Kathaleen St. J. McCormick's ruling on Thursday found "reasonably conceivable" class claims that five directors and four officers of the crypto exchange company held material, non-public information when they unloaded "staggering amounts" of stock in 2021, during the first several days of the company's direct listing on the NASDAQ exchange.

The direct listing avenue allowed the company to enter the stock market without the disclosure requirements and diligence check conducted by underwriters during a formal, initial public offering and without "lock-up" restrictions on director and officer sales.

"The sales were made as soon as weeks before Coinbase's earnings showed that the company was not doing as well as the market originally anticipated," Chancellor McCormick found. "Further, defendants sold \$2.93 billion to avoid over \$1.09 billion in losses. The totality of circumstances in this case support a pleadings-stage inference" that those named acted intentionally despite knowledge that the conduct could face a challenge.

Coinbase was able to jump directly onto the NASDAQ without closer restrictions and oversight, the chancellor observed, under equity market practices that have raised concerns among scholars.

Attorneys for those sued termed the insider sales "utterly non-suspicious" during a dismissal hearing in October 2023, and insufficient to trigger claims in the suit.

But early public buyers remained in the dark about pre-listing, company-commissioned valuations and market checks — known to insiders — that pegged the company at prices far below opening day sales of \$380 to \$429 on the first day, April 13, 2021.

"Not constrained by a lock-up period, the members of Coinbase's board and its senior officers sold Coinbase stock worth \$2.9 billion. Thirteen of the eighteen sales were completed by April 15, 2021, with only one board member selling as late as April 22, 2021.

A majority of the board sold ahead of the cryptocurrency trading and investment platform's 37.3% plummet from \$381 per share on April 14, 2021, to \$239 per share on May 18, 2021. Along the way, the company lost about \$37 billion in market capitalization.

The court found that stockholder Adam Grabski cleared a derivative action hurdle requiring a plaintiff to show that directors would have been too conflicted to pursue the claims against themselves.

"In the real world, the billions of dollars made by the director defendants constitutes a material personal benefit that would render a director incapable of impartially considering a demand attacking those sales," the chancellor wrote. "Demand is excused on this basis."

Those named also faced a substantial likelihood of liability, as did the directors named in the action, and received a material personal benefit, the decision said. Those findings allowed the suit to clear dismissal hurdles established by the Delaware Supreme Court's refinement of demand-futility rules in *United Food And Commercial Workers Union and Participating Employers Tri-State Pension Fund v.*

Mark Zuckerberg et al., or "Facebook," in 2020.

In the ruling, Chancellor McCormick said the gains for those named — including venture capitalist Fred Wilson and Netscape co-founder Marc Andreessen — met requirements needed to move the case ahead. Total alleged insider sales ranged from \$43 million to \$1.8 billion.

"Plaintiffs need not allege facts concerning each director defendant's personal wealth to support this conclusion — \$50 million is presumptively material," the Chancellor wrote.

Various non-public checks before the company went public priced the company at levels ranging from about \$344 per share to \$303.75 and as low as \$263.50, the opinion noted. All would have had "actual significance to persons who purchased stock from defendants in the direct listing in the \$300s and \$400s."

Counsel for Grabski and the proposed class and those named in the suit did not immediately respond to requests for comment.

Adam Grabski is represented by Edward G. Timlin, Gregory V. Varallo, Daniel E. Meyer and Mae Oberste of Bernstein Litowitz Berger & Grossmann LLP, Robert E. Bishop and Frank Partnoy of Bishop Partnoy LLP and Brian Schall of The Schall Law Firm.

Coinbase Global Inc. and the director defendants are represented by Andrew Clubok, Matthew Rawlinson and Morgan E. Whitworth of Latham & Watkins LLP and David E. Ross, Adam D. Gold, and S. Reiko Rogozen of Ross Aronstam & Moritz LLP.

The case is Adam Grabski on behalf of Coinbase Global Inc. v. Marc Andreessen et al., case number 2023-0464, in the Court of Chancery of the State of Delaware.

--Editing by Emily Kokoll.

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Del. Justices Uphold Chancery Toss Of Baker Hughes Suit

By **Leslie A. Pappas**

Law360 (February 2, 2024, 5:11 PM EST) -- The Delaware Supreme Court has upheld a decision ending consolidated derivative litigation by Baker Hughes stockholders who alleged a series of transactions in 2018 unfairly benefited GE, finding that the Court of Chancery had discretion to dismiss the case based on testimony of a one-member litigation committee.

The **3-page order** issued Thursday by the full high court upholds Vice Chancellor Lori W. Will's **77-page opinion** from April 2023. The justices affirmed the vice chancellor's conclusion that Baker Hughes Inc. director Gregory L. Ebel, the sole member of the energy company board's special litigation committee, had conducted a good-faith probe into the shareholders' allegations and the lawsuit could be terminated.

Two Baker Hughes investors **sued in early 2019**, asserting that a multipart, multibillion-dollar separation agreement carried out in 2018 was unfairly skewed in favor of General Electric Co.'s interests.

Then-Chancellor Andre G. Bouchard allowed the stockholder suit to **move forward in October 2019**, prompting the Baker Hughes board to form a special litigation committee to investigate the investors' allegations.

Ebel, appointed as the litigation committee's only member, embarked on a nine-month investigation, and concluded that the transactions were entirely fair to Baker Hughes. The committee sought to terminate the Chancery Court litigation in October 2020.

Following more than a year of briefings, depositions and live testimony from Ebel during oral arguments, Vice Chancellor Will found that despite the committee's flaws, its "independence, the thoroughness of its investigation, and the reasonableness of its conclusions are not in doubt."

Shareholders appealed the Chancery Court ruling, **arguing** that the vice chancellor erred by "weighing the evidence to excuse Ebel's flaws and failures based upon SLC-friendly interferences."

Baker Hughes **urged the state Supreme Court** to affirm the Chancery Court's decision, saying the stockholders' challenge was "based on nothing more than plaintiffs' disagreement with the SLC's process and conclusions."

In its arguments before the justices, the investors contended that the Chancery Court's decision violated summary judgment standards, partly because the vice chancellor weighed evidence and made determinations based on the live testimony from Ebel during oral arguments.

But they were given notice ahead of the Chancery Court arguments that Ebel was going to be called as a witness, the high court determined in its order Thursday.

Despite receiving this notice, the shareholders did not object, and in fact cross-examined Ebel extensively, the justices noted

While an evidentiary hearing with a live witness might pose "a risk of procedural unfairness," the issue should have been addressed when it arose in the lower court, according to the high court's ruling.

"Here, in the face of the plaintiffs' acquiescence to Ebel's live testimony, the vice chancellor did not abuse her discretion by relying on that testimony, including its credibility, in reaching her decision," Justice Gary F. Traynor wrote in the Delaware Supreme Court's order.

Karl Stern of Quinn Emanuel Urquhart & Sullivan LLP, an attorney representing the special litigation committee, told Law360 Friday that the justices got it right.

"We believe the Delaware Supreme Court properly affirmed the Court of Chancery's well-reasoned conclusion that the hard work of the Baker Hughes special litigation committee was independent and in good faith and its recommendation that the litigation be terminated was entirely appropriate under the circumstances," Stern said in an email.

Counsel for the shareholders did not immediately respond to request for comment on the decision.

The special litigation committee is represented by A. Thompson Bayliss and Matthew L. Miller of Abrams & Bayliss LLP, and Karl Stern and Elizabeth M. Devaney of Quinn Emanuel Urquhart & Sullivan LLP.

The stockholder class is represented by Michael J. Barry and Jason M. Avellino of Grant & Eisenhofer PA, Peter B. Andrews, Craig J. Springer, David M. Sborz and Andrew J. Peach of Andrews & Springer LLC, and Jeremy S. Friedman, David F.E. Tejtzel and Christopher M. Windover of Friedman Oster & Tejtzel PLLC.

The case is *In re Baker Hughes, a GE Company, Derivative Litigation*, case number 169, 2023 in the Supreme Court of the State of Delaware.

The underlying case is *In re: Baker Hughes, a GE Company, Derivative Litigation*, case number 2019-0201, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery and Rose Krebs. Editing by Covey Son.



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Apple Users Win Class Cert. In App Store Monopolization Case

By **Hailey Konnath**

Law360 (February 2, 2024, 10:08 PM EST) -- A California federal judge certified a class of consumers Friday in high-stakes antitrust litigation over Apple's App Store, finding the consumers have addressed issues with their damages models and rejecting Apple's argument that testimony from the consumers' experts should be thrown out.

U.S. District Judge Yvonne Gonzalez Rogers certified a nationwide class of individuals who purchased one or more iOS applications or application licenses from Apple or who paid for in-app purchases since 2008. Members of the class must have spent more than \$10 in that time period, according to the order.

In her order, Judge Gonzalez refused to exclude testimony from the consumers' experts: Daniel L. McFadden, an economics professor at the University of California, Berkeley, and Rosa M. Abrantes-Metz, a managing director at consulting firm Berkeley Research Group LLC. Contrary to Apple's contentions, McFadden demonstrated his methodology is reliable and his data is sufficient, she said.

Ultimately, Apple's arguments against him "go to weight, not admissibility," the judge said.

"They are fodder for cross-examination, not reason to exclude Professor McFadden's testimony," Judge Gonzalez Rogers said.

Similarly, Apple's qualms with Abrantes-Metz's analysis are unfounded at this stage in the litigation, according to the decision.

"Dr. Abrantes-Metz has sufficiently justified the opinion," Judge Gonzalez Rogers said. "Apple's objection may be reraised on cross-examination."

Judge Gonzalez Rogers noted she previously held that the consumers met the requirements of Rule 23(a). Now that their experts have offered a satisfactory damages model, the only lingering question is if the consumers can prove antitrust injury on a classwide basis, she said. According to the decision, the answer is yes.

The consumers claim Apple forces iPhone users to get apps through its App Store and also requires developers to use Apple's payment systems. Apple collects commissions of up to 30% on apps and in-app purchases; they allege those costs are then passed off to consumers, who pay higher prices than they would have otherwise.

Judge Gonzalez Rogers **initially rejected** the consumers' certification bid, pointing to issues with their experts' damages model. However, the judge said they could likely address those problems.

In Friday's order, Judge Gonzalez Rogers said that, this time around, the consumers have offered a more narrow class definition that only includes Apple account holders who've spent \$10 or more on app or in-app content: that means the class will inadvertently scoop up a smaller percentage of users who weren't actually injured by the alleged conduct.

Judge Gonzalez Rogers also noted the Ninth Circuit recently rejected the argument that Rule 23 doesn't permit the certification of a class that potentially includes "more than a de minimis number of uninjured class members."

"While the court remains concerned that the \$10 cutoff results in an estimated 7.9% or 10,283,035 million uninjured accounts, it expects, given [the] plaintiffs' representations, that once the model is fully run, that number will be reduced or the cutoff could be changed to reduce the impact of including unharmed accounts," she said.

That means the predominance requirement is met under Ninth Circuit precedent, she said.

Judge Gonzalez Rogers also appointed Wolf Haldenstein Adler Freeman & Herz LLP and Kellogg Hansen Todd Figel & Frederick PLLC as co-class counsel and Stephen H. Schwartz, Edward W. Hayter, Robert Pepper and Edward Lawrence as class representatives.

Mark C. Rifkin, counsel for the class, told Law360 Friday that the class includes "millions of consumers who have incurred billions of dollars in damages from Apple's App Store monopoly."

"This decision reflects enormous effort by the economists and attorneys who have worked tirelessly to protect these consumers from Apple's unlawful conduct," Rifkin said. "We look forward to the next phase of the class action."

Apple didn't immediately respond to a request for comment late Friday.

The sprawling litigation kicked off after video game app-developer Epic Games Inc. filed a landmark antitrust suit against Apple in **August 2020**, and lodged similar allegations against Google. A California federal jury sided with Epic in that case **last year**, but Google is **hoping to get its case thrown out**.

Apple had urged Judge Gonzalez Rogers not to certify the class, arguing the consumers didn't adequately address the concerns she identified in their first attempt. It also argued the proposed class would include millions of members who suffered no harm.

But the judge seemed **hesitant to accept** that argument during oral arguments last summer, telling defense counsel that "in some ways you're arguing that Apple is too big to be held accountable, and I don't buy that perspective."

The proposed class in the larger litigation is represented by Betsy C. Manifold, Rachele R. Byrd, Mark C. Rifkin, Matthew M. Guiney and Thomas H. Burt of Wolf Haldenstein Adler Freeman & Herz LLP and David C. Frederick, Aaron M. Paneer and Kyle M. Wood of Kellogg Hansen Todd Figel & Frederick PLLC.

Apple is represented by Daniel G. Swanson and Cynthia E. Richman of Gibson Dunn & Crutcher LLP and John J. Calandra, Nicole L. Castle, Michelle Lowery and Elizabeth Rodd of McDermott Will & Emery LLP.

The consumer case is In re: Apple iPhone Antitrust Litigation, case number 4:11-cv-06714, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins and Matthew Perlman. Editing by Caitlin Wolper.



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BREAKING: Brokerage Asks High Court To Apply Arbitration To \$1.8B Verdict

By **Nate Beck**

Law360 (February 5, 2024, 11:18 AM EST) -- HomeServices told the U.S. Supreme Court that the Eighth Circuit wrongly rejected arbitration agreements with unnamed members of a class that won a \$1.8 billion verdict from a Missouri jury in October against the company, Keller Williams and the National Association of Realtors.

HomeServices on Friday asked justices to review the August Eighth Circuit decision finding arbitration agreements with the unnamed class members were irrelevant since they related to subsidiaries of the company instead of the parent.

"That erroneous ruling had enormous ramifications: Despite waiving their right to pursue class litigation against HomeServices, the plaintiffs obtained a \$1.8 billion verdict, which they are seeking to treble," the company argued in its brief to the justices.

The company faced a Friday deadline to file its appeal to the Supreme Court, after Justice Brett Kavanaugh granted an extension in late November.

--Editing by Robert Rudinger.

This story will be updated.

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