

Envision Healthcare Investors Tee Up \$177.5 Million Deal for Nod

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- Bankruptcy increases need to settle, investors tell court
- No class members have objected or opted out, brief says

Envision Healthcare Corp.'s plan to settle class securities fraud claims for \$177.5 million through insurance payments should be given final approval, investors told a federal court.

The healthcare staffing company's May 2023 bankruptcy filing increased the risks that shareholders wouldn't obtain a substantial judgment in the suit over a stock drop tied to billing practices, several pension funds said Thursday in a brief to the US District Court for the Middle District of Tennessee.

The settlement "represents the second largest securities class action recovery ever in this District" and "provides a significant and certain recovery in a case that presented numerous hurdles and risks," the funds said. The amount is also one of the largest securities settlements in the nation reached in 2023, they said.

No class members objected to the deal or opted out of it, the funds said.

Class counsel separately requested a 30% attorneys' fee award, citing "six years of hard-fought litigation" and extensive effort in mediation.

Investors sued the company following a July 2017 New York Times report that Envision subsidiary EmCare routinely sent patients who sought treatment at in-network facilities to out-of-network physicians and billed them at higher rates.

Investors alleged that the defendants made materially false or misleading statements about the business and its growth before the billing practices were brought to light.

The proposed settlement first went through a bankruptcy court's approval process. The deal would benefit Envision and associated debtors, the company said in September 2023. The US Bankruptcy Court for the Southern District of Texas gave its approval in October, the same month it approved the company's reorganization plan.

Judge William L. Campbell Jr., who oversees the securities case, preliminarily approved the settlement in November.

Robbins Geller Rudman & Dowd LLP represents the investors. Simpson Thacher & Bartlett LLP and Bass, Berry & Sims PLC represent Envision.

The case is In re Envision Healthcare Corp. Sec. Litig. , M.D. Tenn., No. 3:17-cv-01112, brief 2/15/24 .

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Feb. 15, 2024, 10:51AM PST
InMode Sued for Allegedly Hiding Demand, FDA Compliance Issues
By [Ben Miller](#)
Documents

-  [Complaint](#)
-  [Docket](#)
-  [Judge Maame Ewusi-Mensah Frimpong](#)

- COURT:** C.D. Cal.
- TRACK DOCKET:** [2:24-cv-01219](#)

Bloomberg Law News 2024-02-16T12:20:13597746818-05:00
InMode Sued for Allegedly Hiding Demand, FDA Compliance Issues

By Ben Miller 2024-02-15T13:51:12000-05:00
COURT: C.D. Cal.
TRACK DOCKET: [2:24-cv-01219](#)

InMode Ltd. and its top executives allegedly deceived customers, secretly discounted products, and violated Food and Drug Administration regulations before its biggest market selloff ever, a proposed class action lawsuit says.

The medical and cosmetic technology company hid the compliance issues, overstating the demand for its products until reports revealed InMode’s legal threats against customers who complained about its devices and sales tactics, which allegedly prompted a pair of stock drops, according to the complaint filed Wednesday in US District Court for the Central District of California.

InMode’s alleged misrepresentations began in June 2021, when Chief Financial Officer Yair Malca said at a health care conference that the company sells its products at full price, without following the “razor and razorblade” model of discounting the platform and overcharging for the consumable component, the complaint says.

Executives continued to tout growing demand and full-price sales tactics in public statements and disclosures while heavily discounting almost every device it sells, which in turn drove demand, according to the complaint.

InMode also allegedly violated FDA regulations by engaging in off-label marketing, promoting treatments that lacked agency approval, and failing to report injuries caused by its devices in a timely fashion, the complaint says.

The company has received an FDA warning in the past for unapproved use of laser or other energy-based devices, namely through the promotion of vaginal rejuvenation treatments, which the agency warned could have serious risks and cause injuries.

An unnamed investigative publication allegedly revealed on Feb. 17, 2023 that InMode had threatened legal action against customers who filed complaints about the devices and sales tactics. The company's share price declined more than 3% to \$35.81 the next session on Feb. 21, 2023.

InMode was also [downgraded](#) by a Needham analyst on Feb. 17, after a survey of aesthetic medical technology patients indicated reduced spending on the procedures.



InMode allegedly continued to misrepresent the pricing and demand for its products, until Oct. 12, 2023, when the company lowered its full-year revenue guidance, citing higher interest rates, tighter leasing approval standards, and loan processing bottlenecks. The same investigative publication released a report later that day related to the alleged misstatements on pricing flexibility and margin consistency.

InMode's stock dropped nearly 26% between Oct. 11 and Oct. 13, according to the complaint. A 20% decline on Oct. 12 was InMode's biggest single-day selloff since its 2019 market debut, according to data compiled by Bloomberg.

The Cement Masons' and Plasterers' multi-employer pension fund that brought the lawsuit seeks to recover damages for a class of shareholders who acquired InMode stock between June 4, 2021 and Oct. 12, 2023, alleging that the company and its executives violated the Securities Exchange Act.

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

Bernstein Litowitz Berger & Grossmann LLP represent the plaintiffs and the proposed class.

The case is Cement Masons' and Plasterers' Local No. 502 Pension Fund v. InMode Ltd., C.D. Cal., No. 2:24-cv-01219, complaint filed 2/14/24.

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Illumina Sued for Records by Pension Fund Amid Icahn Court Fight

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- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0136

A pension fund is suing Illumina Inc. for records over concerns that its failed \$7 billion acquisition of Grail Inc. was the result of reckless corporate decision making.

The lawsuit, filed Wednesday, seeks internal documents to investigate allegations that the board pushed to complete the transaction despite antitrust worries that led regulators in the US and EU to block the deal, which the gene-sequencing giant is now unwinding. The company has so far turned over only redacted files, according to the complaint in Delaware's Chancery Court.

The pension fund, the Pavers and Road Builders Benefit Funds, previously intervened in an ongoing case brought by billionaire activist investor Carl Icahn, who last year waged a proxy fight that earned one of his associates a seat on Illumina's board. That suit assails the company's directors for signing off on its "obsessive quest" to reacquire Grail, a cancer-detection business it spun off in 2017.

Icahn has blasted the board's decision to close the transaction without getting government approval, particularly in Europe, where companies can be fined up to 10% of their annual revenue for violating standstill orders. His lawsuit, which seeks to recoup \$476 million in fines on behalf of the company and its investors, says Illumina's directors made a "decision to break the law."

A Delaware judge, Vice Chancellor Paul A. Fioravanti, issued a preliminary ruling against Icahn in January, ordering him to strip his court filings of confidential information—including information subject to attorney-client privilege—that he got from his appointee to Illumina's board. The decision came about a month after Illumina agreed to divest Grail.

The pension fund's suit—demanding documents under a statute that gives investors broad access to corporate records if they credibly suspect wrongdoing—also concerns information allegedly covered by the privilege. The complaint calls Illumina's redactions "heavy and improper," saying the company blacked out the files "to an extreme degree, rendering many of the documents incomprehensible."

Even the privileged records may be subject to disclosure under an exception for shareholders seeking necessary information that's unavailable elsewhere, the lawsuit says. Records cases often reflect an attempt to drum up fiduciary breach claims—like those Icahn has already asserted—for future litigation.

Illumina continues to insist it can “apply redactions to any documents for any reason,” according to the court filing.

The pension fund is represented by Andrews & Springer LLC and Cohen Milstein Sellers & Toll PLLC.

The case is Pavers & Road Builders Ben. Fund v. Illumina Inc. , Del. Ch., No. 2024-0136, complaint filed 2/14/24 .

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Credit Suisse Units, KPMG Avoid RICO Lawsuits in Federal Court

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- Would-be class suit alleged racketeering, Swiss law claims
- Court dismisses RICO claims, sends rest to Switzerland

Two would-be racketeering class actions against former Swiss bank Credit Suisse Group AG 's subsidiaries and leadership, along with auditor KPMG LLP, were dismissed by a federal court.

The shareholder claims must be dismissed because they didn't allege facts showing a racketeering "enterprise" existed among the defendants or that KPMG engaged in a "predicate act" supporting a RICO violation, Judge Colleen McMahon said in an opinion docketed Thursday in the US District Court for the Southern District of New York. Four of Credit Suisse's US subsidiaries and 29 of its executives and directors were named among the defendants.

The proposed class suits, filed by Credit Suisse shareholders Gregory Stevenson and Nicole Lawtone-Bowles, sought \$120 billion in potential damages and pointed to numerous "scandals" to allege the companies' actions contributed to Credit Suisse's collapse on March 17, 2023. The Swiss bank's stock plunged to \$2.01 per share that day—down more than 94% from when it first traded on October 22, 2013.

The investors alleged Credit Suisse directors and officers and KPMG worked together to "recklessly" mismanage investments and "plunder" the bank for more than a decade in violation of the Racketeer Influenced and Corrupt Organizations Act.

The investors lack standing to bring RICO claims over a stock-price drop, and the KPMG entity they sued didn't conduct the audits at issue, the judge also said. Other claims asserted under Swiss law should be sent to a Swiss court, McMahon said.

McMahon also characterized the claims against KPMG as "fatally deficient" because the alleged misconduct "turns out not to be a crime." KPMG in January argued it should be removed from the suits after prosecutors dismissed charges in a criminal case that accused

the auditor of participating in a scheme to cheat on regulatory inspections.

Credit Suisse investors have also taken to the courts to go after the other Swiss bank that acquired it when it wound down, UBS Group AG.

Alfred G. Yates, Jr., who practices in Pittsburgh; Byron Georgiou, who practices in Las Vegas; and Bottini & Bottini Inc. represented the plaintiffs and proposed class. Cahill Gordon & Reindel LLP represented the Credit Suisse individual defendants and entities. Latham & Watkins LLP represented KPMG.

The case is *Stevenson v. Thornburgh*, 2024 BL 49384, S.D.N.Y., No. 1:23-CV-04458, docketed 2/15/24 .

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Lottery.com Investors Withdraw Proxy Misstatement Lawsuit

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Litigation

Feb. 15, 2024, 10:02 AM PST

Mike Vilensky

A group of Lottery.com investors alleging the company breached an agreement to borrow from them and omitted the potential breach from a proxy statement are dismissing their lawsuit.

Woodford Eurasia Assets Ltd. and three other investors sued the lottery company in the US District Court for the District of Delaware, unsuccessfully seeking to enjoin a meeting where shareholders voted to allow stock sales and a potential change in company control.

- The investors “hereby provide notice of dismissal of all claims without prejudice against” Lottery.com, the notice of voluntary dismissal said, with the each party paying their own attorneys’ fees
- Attorneys for Woodford and the other investors did not respond to requests for comment
- Lottery.com faces other litigation in New York and Delaware over actions it took ahead of going public

Heyman Enerio Gattuso & Hirzel LLP represent the investors. Attorneys for Lottery.com haven’t made an appearance in the case.

The case is Woodford Eurasia Assets Ltd. et al v. Lottery.com, Inc. , D. Del., No. 1:23-cv-01317, notice of voluntary dismissal 2/14/24 .

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Slot Machine Maker PlayAGS Defeats Remaining Securities Claim

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- Misrepresentation claim had failed to allege fraud, scienter
- Scheme liability claim failed for same reason

Investors suing PlayAGS Inc. failed to show that the company engaged in a scheme to artificially inflate its share prices through misrepresentations and omissions, a federal court said.

Because the lead plaintiff, the Oklahoma Police Pension and Retirement System, previously failed to allege PlayAGS intentionally or knowingly made misleading statements, its scheme liability claim failed, the US District Court for the District of Nevada said in a Feb. 12 order entered Tuesday. The court dismissed the suit with prejudice.

Scheme liability and claims for misrepresentation both come from a subsection of Rule 10(b) of the Exchange Act broadly prohibiting fraudulent conduct. The difference is that scheme liability requires some kind of scheme, and if defendants run a fraudulent scheme, they can be liable under both theories.

The court previously said the pension fund failed to allege scienter required for fraudulent conduct under heightened pleading standards when it pleaded a misrepresentation claim.

“Logically then, if a plaintiff’s scheme liability claim is based on the same alleged facts as its misrepresentation claim, and the court finds that those facts do not sufficiently allege fraud (with the requisite scienter) to sustain the misrepresentation claim, the scheme liability claim necessarily fails,” Judge James C. Mahan said.

He noted that it was “irrelevant” whether the pension fund sufficiently pleaded a scheme if it didn’t also sufficiently plead “the existence of an underlying fraud.”

The pension fund alleged PlayAGS misrepresented its economic performance during its public offerings which led to inflated share prices.

The court previously dismissed all five of the pension fund’s claims, but reserved judgment about whether its cause of action under Section 10(b) of the Exchange Act, which prohibits material misrepresentations related to the sale of securities, survived under various subsections. The pension fund didn’t specify which subsections of the rule PlayAGS violated.

The pension fund failed to convince the court that its scheme liability claim should survive because it was pleaded independently from the misrepresentation claim.

“The subsections do not govern mutually exclusive spheres of conduct but rather proscribe fraudulent and deceptive practices in general and specific terms,” Mahan said. He noted that the difference between the two types of claims is that scheme liability involves conduct made “in furtherance” of a scheme while misrepresentation doesn’t involve a scheme.

PlayAGS argued the court should dismiss the pension fund’s claim for scheme liability because scienter for fraudulent conduct is also a required element, but the pension fund argued that the heightened pleading standards for misrepresentation claims aren’t applicable to scheme liability ones.

The court rejected the pension fund’s argument and said that all claims brought under that rule are subject to heightened pleading standards.

The pension fund was represented by Labaton Sucharow LLP and Kemp Jones LLP.

PlayAGS was represented by Baker Hostetler LLP and Brownstein Hyatt Farber Schreck LLP.

The case is *In re AGS, Inc. Sec. Litig.*, D. Nev., No. 2:20-cv-01209, 2/13/24 .

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SVB's Ex-CEO Gets Insider Trading Allegations Tossed, for Now

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- Plaintiff and Becker traded their SVB stock two years apart
- Two sets of trades at issue aren't contemporaneous, judge says

Silicon Valley Bank's former president and CEO Gregory Becker won't have to face insider trading allegations from a shareholder, after a judge granted a motion to dismiss the individual investor's lawsuit.

The lawsuit focuses on two sets of trades, made by plaintiff John Pauly in 2021 and by Becker in 2023, that aren't adequately contemporaneous to meet the standard for such a claim, Judge James Donato ruled Wednesday in US District Court for the Northern District of California.

Pauly lacks standing to bring his individual claim against Becker over the alleged insider trading, because the Securities Exchange Act would require a plaintiff to have traded SVB stock at roughly the same time as Becker, not two years apart, Donato said.

This contemporaneous trading requirement permits only plaintiffs who have traded with someone who had an unfair advantage to bring insider trading allegations, the judge said in his order, citing another ruling in the same circuit that concluded even a two-month gap is excessive under the statute.

The suit highlights Becker's \$3.6 million sale of 12,451 shares of SVB Financial Group stock on Feb. 27, which marked the first time the company's then-CEO had sold shares in over a year, according to regulatory filings. The bank's collapse began less than two weeks later, when the bank disclosed sizeable losses that sent the company's share price into a tailspin as Becker urged clients to stay calm.

Pauly's 97-page complaint was a "puzzle pleading," offering a rambling set of allegations and lengthy quotes to support sweeping set of misconduct claims, Becker argued in his motion to dismiss. The complaint also failed to allege any actionable misstatement or omission, even when highlighting Becker's statements before Congress following the bank's collapse in the spring of 2023, because Pauly bought his shares more than two years before that testimony took place, the motion to dismiss said.

Donato granted Becker's motion to dismiss, but didn't dismiss the complaint with prejudice. Instead, the order allows Pauly—who was proceeding pro se—an opportunity to amend his complaint by March 8, despite the judge's stated doubts that he will be able to update his claims in a meaningful way. No new claims or parties may be added to the amended complaint without the court's approval, according to the order.

Orrick Herrington and Sutcliffe LLP represent Becker.

The case is Pauly v. Becker , N.D. Cal., No. 3:23-cv-03108, 2/14/24 .

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Second Circuit Sets Standard for Distinguishing Opinions From Facts In Securities Fraud Cases

 [law.com/newyorklawjournal/2024/02/16/second-circuit-sets-standard-for-distinguishing-opinions-from-facts-in-securities-fraud-cases](https://www.law.com/newyorklawjournal/2024/02/16/second-circuit-sets-standard-for-distinguishing-opinions-from-facts-in-securities-fraud-cases)

By Karen Meara and Christopher Rizzo

A discussion of the case ‘Union Asset Management Holding AG v. Philip Morris International Inc. (In re Philip Morris International Inc. Securities Litigation)’ where the Second Circuit elucidates on distinguishing fact from opinion.

February 16, 2024 at 10:00 AM

By Anthony Michael Sabino | February 16, 2024 at 10:00 AM

Facts versus opinions. A material misstatement of the former is the first and foremost requirement in claiming federal securities fraud; the latter, even if subsequently debunked, can never be the basis for such a serious charge. Yet while the nation’s highest court concisely articulated the differences between the two in, among other milestones, *Omnicare, Inc. v. Laborers District Council Construction Industries Pension Fund*, 575 U.S. 175 (2015) (“*Omnicare*”), the lower federal courts nonetheless continue to labor with distinguishing proscribed factual miscues from permissible utterances of opinion. *Union Asset Management Holding AG v. Philip Morris International Inc. (In re Philip Morris International Inc. Securities Litigation)*, ___ F.3d ___ (No. 21-2546) (2d Cir. Dec. 26, 2023) (*PMI*), provides a cogent example.

In a case which the U.S. Court of Appeals for the Second Circuit labelled as presenting an issue of first impression, shareholders had alleged that a global purveyor of tobacco had materially misrepresented the results of its scientific research into smokeless alternatives.

Rejecting the plaintiffs’ characterization, the panel dismissed the underlying putative class action, decreeing that the disclosures at issue were no more than opinions, opinions which were moreover reasonable, given that the U.S. Food & Drug Administration (FDA) had largely confirmed the defendant’s research.

PMI represents the Second Circuit’s latest insights into the critical task of differentiating fact from opinion in shareholder litigation. Yet before we turn to the particulars, we must first set out a précis of the essentials for alleging federal securities fraud.

Federal Securities Law and ‘Omnicare’

The paramount anti-fraud provisions of the federal securities laws are Section 10 of the Securities and Exchange Act of 1934, 15 U.S.C. §78j, its regulatory counterpart Rule 10b-5, 17 C.F.R. §240.10b-5, and Section 20 of the 1934 Act, 15 U.S.C. §78(t) (“control person” liability).

Securities fraud is comprised of six, irreducible elements: 1) material misrepresentation or omission; 2) scienter; 3) connection with the purchase or sale of a security; 4) reliance; 5) economic loss; and 6) loss causation. See Sabino, “#MeToo and Securities Fraud: Lessons From the ‘CBS’ Case,” 263 *New York Law Journal* p. 4, cl. 4 (June 3, 2020).

With regard to the first requirement, *Omnicare* strenuously warns against “wrongly conflat[ing] facts and opinions” when alleging misleading statements of material fact. Therein Justice Elena Kagan emoted quite plainly that the statutory scheme “does not allow investors to second-guess inherently subjective and uncertain assessments.” Moreover, quotidian antecedents such as “I believe” or “I think” are sufficient to categorize a disclosure as nonactionable opinion, even if that assertion is subsequently proved to be erroneous.

‘PMI’ and Allegedly Misleading Statements

And now for the case at hand. Lead defendant PMI International (PMI) derives its global appellation from the fact that it inherited the offshore businesses of its eponymous progenitor, now known as the Altria Group, Inc. Notwithstanding that the company generally delimits itself to overseas markets, its stock is traded on the New York Stock Exchange, and its wares are still sold in the United States by its former parent.

Confronted by the reality of a dwindling demand for traditional cigarettes, PMI embarked upon developing and marketing noncombustible tobacco products. In public filings, PMI averred that: 1) its own scientific studies demonstrated its smokeless offerings potentially “reduced risk” of or “reduced exposure” to harm; 2) the FDA had generally endorsed the manufacturer’s data; and 3) nascent sales in Japan had captured a significant percentage of a growing market for noncombustible tobacco.

Unfortunately, bad news followed the good. For one, sales in Japan plateaued. Then regulators delayed any further approval of PMI’s noncombustible tobacco products, once a special advisory panel convened by the agency disputed the manufacturer’s claims that its wares were less inimical to health. A putative class action, alleging deceit by the manufacturer in its public utterances, was dismissed by a lower court on the grounds that the investors had failed to make out a sufficient cause of action for fraudulent misstatements. This appeal followed.

Opinions Not Actionable

The first step taken by the *PMI* court was to posit the aforementioned six elements essential to pleading, and then later proving, a violation of the anti-fraud provisions of the federal securities laws. Here the tribunal made its first clarification; the sole relevant question before it was the allegation that the manufacturer had made materially misleading statements to its shareholders. There would be no consideration of whether scienter or any of the remaining prerequisites to a finding of liability were present in the case at bar.

Agreeing that dismissal was, in fact, appropriate, the Second Circuit parsed its rationale into two main components. For the first, the panel was unanimous in characterizing PMI's disclosures as nothing more than vague descriptions, generalizations, and opinion or, stated differently, nothing more than mere puffery.

As such, the manufacturer's proclamations were incapable of being relied upon by any rational investor. Making a straightforward application of *Omnicare's* precepts, the tribunal reminded that allegedly misleading disclosures do not violate the anti-fraud laws unless the statements are determinate and verifiable.

The Second Circuit likewise rejected the argument that only disclosures prefaced by "we believe" or "we think" qualify as nonactionable opinion. *Omnicare*, said the court, had made it plain that such cautious introductions are "*sufficient-not necessary*-to render a statement one of opinion rather than fact" (emphasis in the original).

Separating Facts from Opinions

Embarking upon its second line of reasoning, the august tribunal next examined allegations that PMI had materially misled investors when proclaiming that its research into the health effects of noncombustible tobacco had conformed to "good clinical practice."

Here the appellate court posited an analogy, one likely to resonate in future federal securities litigation; that representations by the manufacturer herein were indistinguishable from the routine attestations proffered by public accountants that they conform to generally accepted auditing standards when reviewing financial statements.

Both assertions are inherently generic and subjective; therefore, they are incapable of being classified as factual misstatements.

The unimous panel found "no meaningful daylight" between a disclosure that one had complied with the scientific community's notions of acceptable research practices, and a declaration that one's research practices were good.

What of the allegation that the manufacturer's disclosures were materially misleading for reason of the existence of differing opinions? Recall that the FDA advisory panel had disputed the results of PMI's research into the risk-reducing aspects of noncombustible tobacco.

Writing for the panel, Circuit Judge Richard J. Sullivan handily rejected that portion of the investors' arguments. The seasoned jurist remonstrated that the Second Circuit has "never held that a statement of opinion can be rendered actionable by the speaker's failure to mention the *possibility* of contrary *opinions*" (emphasis in the original). Indeed, the tribunal's precedents weighted heavily in the opposite direction, clearly articulating that management is neither required to take a gloomy, fearful or defeatist view of the company's prospects when communicating with shareholders; nor is it obligated to incorporate into its public statements every opinion differing from its own.

When Opinions Differ

Next was an equally salient question: had PMI so irrationally interpreted the data from its own studies of noncombustible tobacco as to render its related disclosures materially misleading? Or were those same pronouncements reasonable because the FDA had reached essentially the same conclusions?

Once more the appellate court sided with the defendant. Notwithstanding that Circuit Judge Sullivan first quoted the controversial disclosures at some length, seeming to imply that they did, indeed, strike an optimistic tone, the panel remained true to the precept that any statement founded upon a rational basis is incapable of being categorized as deceptive, even if differing points of view are extant. Notably, while this axiom has been previously suggested only in Second Circuit *dicta*, this tribunal now explicitly adopted it as binding, and applicable to the case at bar.

Finding that the manufacturer's "carefully measured statements" had been "essentially mirror[ed]" in the FDA's own conclusions, the tribunal perceived no merit to the plaintiffs' allegations that PMI had misled investors. Rather, the irrefutable similarity between the two separate pronouncements fundamentally immunized the defendant's revelations from claims of irrationality or unreasonableness; moreover, their commonality rendered the company's disclosures reasonable *per se*. Circuit Judge Sullivan further opined that, even where a firm and its pertinent regulators disagree, typically the former is not liable for espousing a materially misleading statement simply because respective opinions differ (assuming, of course, that the company's disclosures are honestly held, and grounded in diligent inquiry).

In sum, explained the panel, the question at hand never was “whether [PMI’s] statements were factually false when made, but whether they expressed an ‘interpretation of the data’ that was objectively ‘irrational or unreasonable.’” The tribunal’s robust conclusion: the FDA’s acceptance of the manufacturer’s explication made it beyond cavil that the latter’s disclosures were rational and reasonable, rendering it “immaterial” that others differed.

The New Standard

For our own *coda*, we emphasize that only a disclosure of fact, not mere opinion, can constitute a material misstatement. *PMI* represents the Second Circuit’s latest elucidation on distinguishing one from the other. Given its vaunted status as the “Mother Court” of the federal securities laws, see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (Blackmun, J., dissenting), not to mention its physical proximity to Wall Street, the tribunal’s new wisdom shall be keenly felt.

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Facebook must face \$3.8 bln UK mass action over market dominance, tribunal rules

 [reuters.com/legal/facebook-must-face-37-bln-uk-mass-action-over-market-dominance-tribunal-rules-2024-02-15](https://www.reuters.com/legal/facebook-must-face-37-bln-uk-mass-action-over-market-dominance-tribunal-rules-2024-02-15)

Reuters

[1/2]Facebook app logo is seen in this illustration taken, August 22, 2022. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

LONDON, Feb 15 (Reuters) - Facebook must face a collective lawsuit valued at around 3 billion pounds (\$3.77 billion) over allegations the social media giant abused its dominant position to monetise users' personal data, a London tribunal ruled on Thursday.

Legal academic Liza Lovdahl Gormsen, who is bringing the case on behalf of around 45 million Facebook users in the UK, says they were not properly compensated for the value of personal data they had to provide.

Her lawyers argue users should get compensation for the economic value they would have received if Facebook was not in a dominant position in the market for social networks.

Facebook's parent company Meta Platforms Inc (META.O) , opens new tab, however, says the lawsuit is "entirely without merit" and its lawyers argue the claimed losses ignore the economic value Facebook provides to its users.

The Competition Appeal Tribunal (CAT) last year refused to give the go-ahead to the case against Meta.

But the CAT ruled on Thursday that a revised claim put forward by Gormsen's lawyers should be allowed to proceed towards a trial.

Judge Marcus Smith said in a written ruling that a final hearing in the case could be heard in "the first half of 2026 at the latest".

A Meta spokesperson said in a statement that the company would "vigorously defend" the case.

"We are committed to giving people meaningful control of what information they share on our platforms and who with, and already invest heavily to create tools that allow them to do so," they added.

The case against Meta is the latest to be given the go-ahead at the CAT, with separate claims against Sony (6758.T) , opens new tab, Apple (AAPL.O) , opens new tab and major banks being certified last year alone.

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Reporting by Sam Tobin Editing by Tomasz Janowski

Proposed Rule 16.1: A Fix for MDL Problems?

 [law.com/thelegalintelligencer/2024/02/16/proposed-rule-16-1-a-fix-for-mdl-problems](https://www.law.com/thelegalintelligencer/2024/02/16/proposed-rule-16-1-a-fix-for-mdl-problems)

By Amanda O'Brien

Stephen McConnell, left, and Dillon Smith, right, of Reed Smith. Courtesy photos

COMMENTARY

The proposal of Rule 16.1 poses the question of whether there are serious problems afflicting MDL procedures. And if so, is proposed Rule 16.1 the solution?

February 16, 2024 at 10:13 AM

Litigation

By Stephen McConnell and Dillon Smith | February 16, 2024 at 10:13 AM

The judicial conference committee on rules of practice and procedure (committee) has recently proposed the addition of Rule 16.1 to the Federal Rules of Civil Procedure (FRCP). Proposed Rule 16.1 seeks to address concerns regarding case management in multidistrict litigation proceedings (MDL). The proposal of Rule 16.1 poses the question of whether there are serious problems afflicting MDL procedures. And if so, is proposed Rule 16.1 the solution?

What Is an MDL?

An MDL is a type of civil procedure used in U.S. federal courts to coordinate and consolidate the pretrial proceedings of duplicative civil actions. Several states, such as California, provide for similar coordination proceedings. An MDL typically involves the consolidation of thousands of individual claims against a handful of defendants. As of writing, MDLs make up more than 50% of pending federal civil cases. Nonetheless there is currently no FRCP that uniformly governs practice and procedure in MDLs. Instead, courts have relied upon ad hoc case management controls, such as the use of master and short-form complaints. This reliance on ad hoc procedures has led to practices in MDLs that vary significantly and are untethered to any FRCP. The varying and improvisatory nature of MDL practice has led some to characterize the MDL process as the “Wild West.”

How Does the Current MDL Process Work?

The use of MDLs is authorized by 28 U.S.C. Section 1407. The judicial panel on multidistrict litigation (JPML) decides when to create an MDL. An MDL will be used when there are civil actions involving “one or more common questions of fact” pending in different federal judicial districts against the same defendants. All cases within an MDL will be transferred to a single federal district court (“transferee court”). The transferee court will then deal with all pretrial proceedings that are common to all consolidated actions before remanding the cases to their original jurisdiction for trial. The transferee court will also appoint lead plaintiff and defense counsel, who have sole control over coordinating all pretrial proceedings. For plaintiffs this often takes the form of a plaintiff steering committee (PSC). The court selects PSC membership after a beauty contest that highlights the lawyers’ capabilities and experience. In addition, diversity considerations are increasingly playing a role in PSC selection.

MDLs share many similar characteristics with class actions. But the two procedures are theoretically and practically distinct. A class action consolidates claims for trial, while an MDL consolidates claims only for pretrial proceedings. At the same time, MDLs share this important feature with class actions: both draw to a close with large scale settlements. In fact, the goal of most MDL proceedings is to reach a global settlement. The culmination of most MDLs is a series of bellwether trials followed by global settlement negotiations. Some judges even render opinions, or refuse to render opinions, with a view toward what will most push the parties toward settlement – ultimately at the cost of distorting the substantive rights of the parties. The similarity of MDLs and class actions has also been driven by the current trend against certifying mass tort class actions. The result is that many cases which would have previously been class actions are being pushed into the MDL process for resolution. This treatment of MDLs as the modern class action has fueled concerns among practitioners.

What Concerns Have Been Raised Regarding the Current MDL Process?

Over the years there have been numerous criticisms levied against the MDL process by both defense and plaintiff counsel. Defense-side critics commonly raise concerns over the “Field of Dreams” scenario—if you build it, they will come. MDLs offer economies of scale and attract a flood of tagalong cases that can, so the criticism goes, be “parked” in the docket and merely await a global settlement. Critics estimate that generally 30-40% of all MDL claims are meritless. For example, in a product liability MDL, there will be plaintiffs who never actually used the product, or their alleged injuries predated use of the product. According to critics, MDLs operate as settlement machines for these meritless claims because MDLs currently lack a meaningful early vetting procedure, small claim discovery, and interlocutory appellate review.

Plaintiff-side critics of the current MDL process suggest that MDLs cause non-lead plaintiffs to lose their autonomy and control over their individual claims. Unlike in most class actions, consolidation is always mandatory in an MDL. A plaintiff whose claim is chosen for coordination has no choice in whether his claim is swallowed up by thousands of other claims. Critics allege that loss of control is further exacerbated by the appointment of a PSC that pools authority over pretrial decisions at the expense of individual plaintiffs. No matter how capable the PSC is, some individual plaintiffs and their attorneys feel aggrieved at being forced into a process in which their substantive rights will be significantly affected, if not effectively resolved, by the efforts of another plaintiff's attorney.

What Would Proposed Rule 16.1 Do?

Proposed Rule 16.1 was drafted with the aim of creating “a rule that could assist the transferee court in addressing a variety of matters that often proved important in MDL proceedings.” Proposed Rule 16.1 provides a framework for an initial MDL management conference, empowering the transferee court to designate coordinating counsel, require conference reports, and issue a management order. However, the framework appears to be completely optional. The language of the proposed rule is discretionary and not mandatory. The draft liberally employs the words “should” and “may.” It looks like a nudge:

After the JPML orders the transfer of actions, the transferee court should schedule an initial management conference ...

The transferee court may designate coordinating counsel ...

The transferee court should order the parties to meet and prepare a report ... which may include any matter addressed in a provided list or Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

After the conference, the court should enter an initial MDL management order... Proposed Rule 16.1(a)–(d) (emphasis added).

The committee's comments show that the use of such permissive language was deliberate:

Proposed Rule 16.1(a), (c), and (d) all use the verb “should” with regard to the court's management of MDL proceedings. During the advisory committee meeting, concerns were raised about whether use of this verb made the proposed rule mere advice and not a genuine rule ... The MDL subcommittee caucused ... and concluded that the rule ought to use “should” ... “Must” would be too strong.

Preliminary Draft of Proposed Amendments (August 2023) at 112.

What Are Commenters Saying About Proposed Rule 16.1?

The most common criticism of Proposed Rule 16.1 has been that it is not actually a rule due to its permissive language. Commenters have pointed out that such frequent use of permissive language is unusual for the FRCP. Commenters have explained that the rule is instead merely aspirational, offering transferee courts guidance on best case management practices. However, most commenters believe that Proposed Rule 16.1 falls well short of the depth or breadth of already existing guidance, such as the oft-cited manual on complex litigation. Such weak or tentative guidance amounts to bad guidance. As such, many commenters claim, the proposed rule does nothing to address the primary reason for why the rule was drafted: to mitigate the profusion of ad hoc and inconsistent practices across MDL cases. As one commenter stated, the proposed rule “provides only the illusion of action while doing nothing to solve the existential MDL management problem that everyone knows exists.”

Is the Criticism of Proposed Rule 16.1 Warranted?

Proposed Rule 16.1 really is more of a nudge than a rule. To be sure, to the extent such a nudge generates more dialogue among the parties and the court, that is undeniably a good thing. But the nudge might do precisely nothing to change the status quo and in fact may make the process worse. Its permissive language, in addition to being out of place in the FRCP, does not provide transferee courts or litigants anymore predictability than they already have. The proposed rule provides no applicable metric for a court to apply.

Instead, it merely codifies preexisting MDL case management strategies. It also threatens to codify the troubling ad hoc nature of the current MDL process by making the application of the rule optional. Furthermore, the proposed rule does nothing to address long-standing concerns around meritless tagalong claims, asymmetrical discovery, or the lack of plaintiff autonomy. In fact, it will likely lead to even less plaintiff autonomy by encouraging transferee courts to designate coordinating counsel for the management conference. That designation could create an additional barrier to individual plaintiff involvement. A better rule is possible and is not in conflict with the nature of the MDL process. As one especially insightful federal judge observed, “MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance ... Whereas the rules are law in individual cases, they are merely hortatory in MDL ones.”

Stephen McConnell *is a partner in Reed Smith's life sciences and health industry group and Dillon Smith is an associate in the firm's global commercial disputes group.*

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Boy Scouts org urges Supreme Court not to stop \$2.4 bln abuse settlement

 [reuters.com/legal/government/boy-scouts-org-urges-supreme-court-not-stop-24-bln-abuse-settlement-2024-02-15](https://www.reuters.com/legal/government/boy-scouts-org-urges-supreme-court-not-stop-24-bln-abuse-settlement-2024-02-15)

Dietrich Knauth

The statue of a scout stands in the entrance to Boy Scouts of America headquarters in Irving, Texas, February 5, 2013. REUTERS/Tim Sharp Purchase Licensing Rights , opens new tab

- About 150 of 82,000 Boy Scouts claimants seek to stop the deal
- Supreme Court is already weighing key legal issue in Purdue case
- Boy Scouts settlement has already paid \$7 million to victims

NEW YORK, Feb 15 (Reuters) - The Boy Scouts of America on Thursday asked the U.S. Supreme Court to allow the youth organization to proceed with a \$2.46 billion settlement of sex abuse claims, despite the high court's ongoing review of a related legal issue in the Purdue Pharma bankruptcy.

A group of 144 sex-abuse victims asked the Supreme Court to block the settlement from moving forward on Feb. 9, saying the deal unlawfully stops them from pursuing lawsuits against organizations that are not bankrupt, such as churches that ran scouting programs and insurers that provided coverage to the Boy Scouts organization.

The Supreme Court is already considering whether U.S. bankruptcy courts are allowed to wipe away legal claims against non-bankrupt people and organizations in an appeal of OxyContin maker Purdue Pharma's bankruptcy. In that case, the court will decide whether the company's owners, members of the wealthy Sackler family, can receive immunity in exchange for paying up to \$6 billion to settle thousands of lawsuits over the company's allegedly misleading marketing of its powerful pain medication.

The Boy Scouts of America, in its Thursday response to the Supreme Court, said that blocking the bankruptcy settlement now, 17 months after it was approved in court, would "throw the Scouting program into chaos" and "potentially destroy BSA's ability to carry out its 114-year-old charitable mission."

The Purdue case is "starkly different" because that company's bankruptcy plan has not yet gone into effect, the Boy Scouts argued. The organization emerged from bankruptcy in April 2023 and its settlement has already paid more than \$7 million to nearly 3,000 survivors of sexual abuse.

"Regardless of the outcome in Purdue Pharma, this Court is unlikely to conclude that the distinctive record here warrants an enormously destructive attempt to unwind the effective BSA Plan," Boy Scouts of America wrote.

The Boy Scouts filed for bankruptcy in February 2020 after several U.S. states enacted laws allowing accusers to sue over decades-old abuse allegations. The organization ultimately reached a settlement, approved in court in September 2022, that would pay between \$3,500 and \$2.7 million to abuse victims.

Read more:

Some Boy Scouts' victims ask Supreme Court to stop \$2.46 billion settlement

Boy Scouts victims can't change 'quick pay' decision, judge rules

US Supreme Court torn over Purdue Pharma bankruptcy settlement

Reporting by Dietrich Knauth

Monsanto's 7th California trial over Roundup starts in Sonoma County

DJ [dailyjournal.com/articles/377183-monsanto-s-7th-california-trial-over-roundup-starts-in-sonoma-county](https://www.dailyjournal.com/articles/377183-monsanto-s-7th-california-trial-over-roundup-starts-in-sonoma-county)

Torts/Personal Injury

Feb. 16, 2024

The company has secured three defense verdicts, but its biggest loss in California courts came in the 2019 Pilliod trial, where a judge ordered the company to pay \$2.05 billion.

RoundUp weed killer on a store shelf in Sunnyvale, 2019. (Shutterstock)

Jury selection is underway in Sonoma County's first trial involving Monsanto Company defending against claims that its Roundup herbicides cause users to develop Non-Hodgkin's lymphoma. It's the seventh such trial in California.

Attorneys for the two plaintiffs, Michael and Bobby Meyer, and Monsanto were scheduled to appear Friday before Superior Court Judge Christopher M. Honingsberg to continue day four of jury selection, according to the court docket. *Meyer v. Monsanto Company*. SCV-269068 (Sonoma Sup. Ct. filed Aug. 15, 2021).

Monsanto's counsel — Alicia J. Donahue, Kara M. Flageollet, Mayele C. Montenegro-Urch of Shook Hardy & Bacon LLP; Manuel Cachan of Skadden, Arps, Slate, Meagher & Flom LLP; and Jennifer Saulino of Sidley Austin LLP — previewed their trial arguments in the trial brief filed on Feb. 2.

"The scientific evidence does not support plaintiffs' claims," the attorneys wrote. "Regulators in the U.S. and around the world have considered the relevant scientific literature — including epidemiologic, animal, and mechanistic studies — and concluded that Roundup products are safe, effective, and do not cause NHL. The evidence also does not support that Roundup played any role in the development of Mr. Meyer's specific case of NHL. To the contrary, Monsanto will present evidence through its expert witnesses that Mr. Meyer's disease was likely caused by natural replication errors."

According to Sonoma County's docket as of Thursday, the plaintiffs are represented by: Gregory David Rueb and Behram Viraf Parekh of Rueb Stoller Daniel LLP; David Wool of Wool Trial Law LLC; and Leslie Agnes Brueckner of Bailey & Glasser LLP.

The Sonoma County proceedings will be the seventh trial Monsanto litigates in California as the company prepares for two other trials this month in Pennsylvania and Arkansas.

Monsanto's ability to defend similar claims throughout California has been a mixed bag. In 2023, the company secured a defense verdict in one trial but was ordered to pay \$332 million to the plaintiffs in the trial *Dennis v. Monsanto Co.*, 32-2021-00047326-CU-PO-NC (S.D. Sup. t. Filed Nov. 5, 2021).

The company had a successful year in 2021, defending itself against similar litigation as Monsanto attorneys secured defense verdicts in two more trials.

However, the company's biggest loss in California courts came in the 2019 trial *Pilliod v. Monsanto Co.*, RG17862702 (JCCP No. 4953). where a judge ordered the company to pay \$2.05 billion. The first trial in the state resulted in a verdict of \$289.2 million.

#377183

Wisdom Howell

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Stanley Tumbler Maker Sued Again Over Alleged Lead, Advertising

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X9BUA9R4000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X9BUA9R4000000)

Pacific Market International LLC, the parent company behind the viral Stanley tumbler, was hit with another proposed class action alleging it negligently failed to disclose the presence of lead in its viral Adventure Quencher tumblers.

PMI promoted the cups as safe to use during strenuous outdoor activities while concealing the risk of lead exposure if the cups are dropped or damaged, the complaint filed Wednesday in the US District Court for the Western District of Washington alleges. Robin Krohn says she wouldn't have paid as much for her Stanley cup if she had known the product contained any lead and seeks to represent a class of consumers who bought the tumblers after February 2019.

Stanley's reusable 40 oz. metal cup has morphed into a status symbol and internet phenomenon as a result of ramped up social-media marketing geared towards women starting in 2020. On the brink of discontinuation rumors, a popular consumer product blog called The Buy Guide bought 10,000 cups wholesale and sold them within a week.

The company then started creating limited edition collectible cups and just a few years later, social media influencers were showcasing collections of hundreds of cups. Stanley's revenue reportedly ballooned ten-fold from \$73 million in 2019 to \$750 million in 2023.

Krohn's suit comes on the heels of another proposed class action on behalf of California consumers who say PMI failed to disclose its use of lead to maintain its massive social media influencer-driven sales. In January 2024, in the wake of a wave of social media users showing their Stanley cups contained lead, the company admitted its vacuum insulation process involves lead at the base of the product but is covered with stainless steel. Experts have noted that lead isn't on the surface and as long as the product remains intact, users aren't at risk of coming into contact with lead.

But Krohn noted that PMI also "advertises and sells the Stanley cups to consumers with the assurance that they can be used during activity (i.e. hiking and climbing) where a consumer could drop and/or damage the Stanley cups."

The complaint also notes that competitors like Hydro Flask, Owala, and Klean Kanteen have created alternative lead-free manufacturing processes for their bottles.

Krohn brings claims for breach of warranties, fraud, unjust enrichment, false advertising, and defective manufacturing under various consumer protection statutes.

She's seeking an injunction barring PMI from selling the cups until the lead is removed or the company adds a full disclosure to its packaging and advertising. She is also seeking an order requiring corrective advertising, damages, and attorneys' fees.

PMI and Stanley didn't immediately respond to requests for comment.

Krohn is represented by Breskin Johnson Townsend PLLC, Gustafson Gluek PLLC, and Lockridge Grindal Nauen PLLP.

The case is Krohn v. Pac. Mkt. Int'l LLC , W.D. Wash., No. 2:24-cv-00200, complaint filed 2/14/24 .

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Federal judge questions lack of details in 'genuine' honey lawsuit

 [courthousenews.com/federal-judge-questions-lack-of-details-in-genuine-honey-lawsuit](https://www.courthousenews.com/federal-judge-questions-lack-of-details-in-genuine-honey-lawsuit)

Alan Riquelmy

A hive of honeybees on display at the annual Vermont Farm Show in Essex Junction, Vt. (AP Photo/Andy Duback, File)

SACRAMENTO, Calif. (CN) — A Sacramento federal judge on Thursday said he was leaning toward dismissing a claim against a hive of honey companies, saying the lawsuit lacked specifics.

Henry's Bullfrog Bees, Golden Prairie Honey Farms and Kelvin Adee filed suit in 2021, arguing that a handful of competing honey companies used improper methods when producing, packaging, selling, testing and importing honey. They said the companies don't deal in genuine honey, but instead use a product with foreign sugars, an improper processing technique and immature honey.

Despite the buzz around genuine honey, factors like climate change, pollution and natural disasters have affected the supply of true, bee-created honey — leading some companies to make "fake honey" and pass it off as genuine, the plaintiffs say.

One federal judge in 2022 dismissed the complaint, saying it lacked specificity. The "genuine" honey makers then filed an amended complaint.

On Thursday, U.S. District Court Judge Daniel Calabretta said he was inclined to dismiss for the same reason.

"Do you have to plead fraud at the 30,000-foot level or something specific?" Calabretta asked, adding a lawsuit doesn't have to detail every transaction, "but there have to be some," he said.

Attorney Jack Fitzgerald, representing the plaintiff honey makers, argued that as much as 50% of the honey in the country is adulterated.

Fitzgerald also said that all honey imported from India uses immature honey — product that hasn't had time to mature and isn't truly honey — meaning all honey imported from the country isn't considered genuine in the U.S.

He also pointed to a 2018 test of 36 honey samples from one so-called fake honey company, saying 24 tested positive for extraneous syrups.

Calabretta questioned whether that specific batch of adulterated honey was then sold.

"It's not pleading a particular instance of fraud," the judge said.

"There's just not a through-line of, they said this, then they did this," he added.

The judge also appeared unpersuaded by the India argument. He said that claiming that all honey from that nation isn't genuine and that "fake" honey companies must know that information lacks the specificity required in a legal complaint.

Attorney Jeffrey Miller — representing Dutch Gold Honey, one of the defendants — echoed some of the concerns raised by the judge. Miller pointed to the earlier complaint dismissed by the first judge, saying the "genuine" honey makers were told to return with specifics. Instead, they added phrasing to describe how honey is adulterated and gave no new information, he said.

"It's all speculation," he added.

The suit has different pieces of data, Miller said, but the only thing linking them is that speculation,

Miller said the suit references "audits," "wire fraud" and "mail fraud." However, it lists no details about them and instead is merely "a laundry list of things."

Attacking one of the lab tests the lawsuit mentions, Miller said the test occurred in 2021. No day or month is included, and it's unknown what kind of honey was tested or what type of lab tested it.

After the original suit was tweaked in 2021 and that second version was dismissed by the prior judge, a third version of the suit is now before Calabretta. Miller questioned if the judge would allow the "genuine" honey companies to again amend their complaint when little has changed in previous versions.

"I don't feel like we're much further along," he said.

The judge didn't say when he'd issue his ruling on the motion to dismiss.

"This is my current favorite case that I have," he quipped at the hearing's conclusion.

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Honda's Win Upheld in Civic Air Conditioning Class Action Suit

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American Honda Motor Co. won't face revived class action claims that flaws in its 2016–2018 Honda Civics caused the air conditioning system to fail.

The plaintiffs, 21 consumers who purchased Civics from various dealerships, said the trial court erred in dismissing their fraud, consumer protection, and breach of implied warranty of merchantability claims.

“The vast majority of consumer complaints were made after Appellants purchased the Class Vehicles, and the remaining complaints are too few in number to suggest Honda had knowledge of the defect,” the US Court of Appeals for the Ninth Circuit said.

The implied warranty claims brought under the laws of California, Connecticut, Florida, Illinois, North Carolina, Oregon, and Washington fail because those states require buyers to establish “contractual privity” with a manufacturer, the Ninth Circuit said Wednesday in an unpublished opinion, affirming the district court’s denial of the claim using a different rationale.

The implied warranty claims brought under the laws of the remaining states—Indiana, Michigan, Missouri, New Jersey, Pennsylvania, Texas, and Virginia—fail because the buyers didn’t allege a breach during the three-year or 36,000-mile warranty period, the court said.

The court rejected the buyers’ argument that the breach was within the warranty period because the defect existed at the time of the sale. The buyers “cite California law for that proposition, and California’s approach has been criticized for rendering ‘meaningless any durational limits on implied warranties,’” the court said, citing a 2011 ruling of the US District Court for the Southern District of California.

The trial court also properly dismissed the buyers’ fraud and consumer protection claims because they failed to show Honda knew of the defect before the plaintiffs bought the cars, the appeals court said.

Although the company did communicate with Honda dealer service providers about an air conditioning problem in “certain 2017 Civics,” the fact that Honda was in the early stages of investigating what could have been an isolated problem is insufficient to allege knowledge,” the court said.

The court also rejected the buyers' argument that a high demand for parts related to the air conditioning system showed knowledge. "These allegations do not support an inference of pre-sale knowledge because they are not tethered to any specific time periods," the court said.

The two underlying class action lawsuits were consolidated on Aug. 3, 2021. The trial court dismissed the claims on June 21, 2022.

Judges Kim McLane Wardlaw, Michelle T. Friedland, and Jennifer Sung issued the memorandum.

Marlin & Saltzman LLP, Berger Montague PC, Bradley Grombacher LLP, McCune Law Group APC, and Milberg Coleman Bryson Phillips Grossman PLLC represent the plaintiffs. Lewis Brisbois Bisgaard & Smith LLP represents Honda.

The case is *Wong v. Am. Honda Motor Co. Inc.*, 9th Cir., No. 22-56113, unpublished 2/14/24.

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Bizarre Valedictory Interview by CalSTRS Investment Chief, Chris Ailman, Asks Private Equity to Be Nice and Share with Workers

 nakedcapitalism.com/2024/02/bizarre-valedictory-interview-by-calstrs-investment-chief-chris-ailman-asks-private-equity-to-be-nice-and-share-with-workers.html

February 16, 2024

The Financial Times made its interview with departing CalSTRS' Chief Investment Officer Chris Ailman its lead story yesterday: Private equity should share more wealth with workers, says US pension giant. The Financial Times was too polite to say so, but Ailman could lay claim to being the best large public pension fund chief investment officer. CalSTRS, which manages the pensions of California teachers, is in the same general size league as its Sacramento sister CalPERS, and regularly outperforms CalPERS by a meaningful margin.

We have commented over many years about the degree of intellectual capture, Stockholm syndrome, and soft corruption among investors in private equity funds (called "limited partners"; the private equity fund managers like Apollo and Carlyle are "general partners"). Ailman, who is a devout Christian and no doubt has a very lucrative pension, does not need to curry favor with private equity any more, unless he perhaps fancies staying relevant in his retirement by serving on the board of one of the private-equity-oriented NGOs. But it isn't just that he may not want to rock the boat on behalf of his legacy and the colleagues he is leaving behind at CalSTRS. I have no doubt he sincerely believes this idea of getting private equity firms to be a bit less ruthless towards the workers in their acquired firms is the best way to reduce the damage they do to society.

First, let's look at the germane parts of this story:

Private equity executives need to "share the wealth" they create with workers at the companies they buy, according to the investment head of Calstrs, the giant US pension fund that is one of the world's biggest investors in the sector....

"Private equity has not shared enough revenues," said Ailman, who pioneered Calstrs' move into private equity two decades ago and now holds \$50bn in the asset class, in an interview with the Financial Times.

"It's great they make money for our retirees — who are teachers and for other funds," he said. "But they need to also share the wealth with the workers of those companies and with the communities they invest in."

It's hard to know where to begin with this. Limited partners like CalSTRS, who are, in Wall Street parlance, the money, have not even been able to get basic disclosures from the general partners like how much in total the private equity firms hoover out in fees and

expenses, despite many years of pleading. Mind you, it's a requirement for a fiduciary to evaluate the costs and risks of any investment, yet these investors have accepted this abuse.

Limited partners don't get P&Ls of portfolio companies. They don't get independent valuations even though that is considered to be essential for every other type of investment. So it's ludicrous to think that general partners will share money with one of the very weakest parties in the picture, mere workers, when they won't give information to the limited partners.

Someone new to this topic might wonder why limited partners don't say "no". The reason is they perceive private equity to be necessary for them to earn enough to reduce their level of underfunding, which in the public pension fund world is typically pretty bad. To make up for the shortfalls, pension funds like CalPERS and CalSTRS have also been increasing the amount they charge to cities, counties, and other local government entities. These pension costs are taking up larger and larger proportions of these budgets, creating concern and anger.

Investors like Ailman haven't even worked out that private equity has been selling them the rope with which they are hanging themselves. Private equity pay and manning-level squeezing crimps incomes, and with it, all sorts of government revenues that derive from income and sales taxes. The more than occasional bankruptcy kills jobs and often puts commercial and residential real estate on the market, hurting values and thus over time, property taxes. One can't know for certain how much, but communities all over California would be better off if private equity predators were not stalking the land. Consider these observations from the Financial Times' comments section:

Nonns

Pe represents toxic finance at its worst. I've now worked at 3 companies that were taken over by pe companies and the playbook was the same every time. They demoralised the workforce, p@ssed off their customers but somehow managed to make their kpis and ebitda targets and then sold it to mugs who were left with a smoking ruin. They load the order books beyond their their ability to deliver, gut the delivery organisation so it's on life support but still delivering enough to maintain credibility to a potential buyer. Destroy morale and then announce what a great organisation they've created when they hit the targets and they sell out paying no tax and leaving a mess behind them. Truly destructive organisations run by amoral unscrupulous get rich quick types. The so called efficiencies they've created aren't real.

Stoupebeck

Over the last ~20years Ive been working for orgs taken over by PE, and also a customer of orgs taken over by PE.

And by PE I mean the highly leverage, financially engineered type.

As an employee the only advice I can offer is to group together and walk out as a group. Your employment experience will only get really really bad.

As a customer of orgs/products took over by PE – start planning on removing the org/product as soon as takeover happens.

Basically – scorched earth strategy.

PE creates wealth in the same way that burning your money keeps you warm.

On top of that, all of that pillaging does not benefit the limited partners. Many studies, when you carefully cut their metrics, have effectively found that private equity has not outperformed on a risk-adjusted basis since the early 2000s, potentially even the last glory year of PE, 1999. The Financial Times has regularly run article featuring the analysis of Oxford professor Ludovic Phalippou, who has found that private equity has not even outperformed stocks on a nominal (as opposed to risk-adjusted) basis since 2006. The dean of quantitative portfolio analytics, Richard Ennis, has written many studies showing that for public pension funds and endowments, investing in “alts” (alternative investments which include private equity) is investment office featherbedding. It creates tons of busywork via overdiversification without increasing returns. Ennis has ascertained they would do as well, and potentially better, by dumping all the alts and sticking to simple stock and bond strategies.

In other words, to the extent private equity does outperform, the general partners suck it all out for themselves.

But worse, Ailman, admitting to falling private equity returns but not admitting to the reality we set forth above, has left his successors with a ticking time bomb by leveraging up on his already-leveraged “alts” positions. The excuse is that it’s necessary to have enough liquidity. What about cash? Leverage to achieve that end via anything more complicated than commitment fees for typically unused lines of credit screams of trying to boost returns.

Recall that leverage on leverage was what made the 1929 and 2008 crashes so spectacular. Further bear in mind that Ailman does not acknowledge that the private equity general partners themselves are often, perhaps even routinely, engaging in leverage by borrowing at the fund level in addition to borrowing against portfolio company assets and income.

This is the bland description from the Financial Times:

One of his final acts has been to obtain board approval for a controversial \$30bn of borrowing to help manage the fund’s giant illiquid portfolio. The move attracted concerns that the fund had become overweight with illiquid assets, which are not easily traded.

Ailman signalled that its private markets allocation, which includes assets such as private equity and real estate and which amounts to about 40 per cent of the portfolio, had peaked.

The Financial Times also presents the image that private equity is nevertheless making some concessions to labor, presumably in response to political pressure:

Ailman's comments come as the private equity industry faces increasing pressure from regulators, campaigners and investors due to its growing influence over the American corporate landscape and a series of scandals involving workers at businesses they own...

He added that Calstrs had been putting pressure on managers such as Blackstone behind the scenes over their investments. "We go directly to our general partners to have conversations, we just haven't done that in the press," he said.

Some private equity managers have taken steps to ensure that employees at companies they own can share in the profits, if the firm performs well.

New York-based buyout group KKR says that billions of dollars in equity have been shared between more than 60,000 employees at its portfolio companies since 2011.

Last year, the firm committed to offering equity-sharing programmes to all employees in the takeover deals coming from its \$19bn North American private equity fund and in all future funds in the region.

More than two dozen buyout groups, including Apollo, TPG, Warburg Pincus and Advent International have committed to a plan called Ownership Works that aims to generate more than \$20bn in wealth for workers by 2030.

If you believe that these ownership schemes in the end will generate more than a hill of beans, I have a bridge I'd like to sell you. If you have followed our work over these many years, or looked at the limited partnership agreements we posted, private equity firms are the masters of "heads I win, tails you lose" provisions. Moreover, it isn't clear to what extent actual vested equity won't wind up being effectively an exchange for current wages.

The Financial Times peanut gallery is as skeptical as I am. For instance:

Abby P

Sorry, has he really *met* people in PE? They are not the type to share wealth, they do the opposite. They bribe politicians to get themselves a lower tax rate than wage earners. They feed themselves dividends while loading their companies with debt.

Quietly fuming

That's exactly what won't happen. Have you ever worked with them?

Maron Fenico

It appears that someone is justifying his decision to invest in private equity when returns have become riskier while fees remain outrageous. What to do? Deflect by suggesting the ridiculous idea that the employees of portfolio companies "share the wealth." This after a decades-long wealth extraction by PE from these employees and the portfolio companies who employ them, a strategy that is now, finally, coming under intense scrutiny. The cancerous effects of PE have infected most American industries, causing millions of lost jobs, destruction of entire communities, poor service, especially in the health care space, while contributing to the yawning wealth gap in the U.S. PE titans- Ackman, Rowan, etc., are now using their political power to make and break university administrations to ensure that the marginally intelligent children of their class –legacy admissions– retain a seat at the best schools unburdened by DEI.

It's striking that Aliman didn't advocate for the most obvious way to redistribute at least some wealth away from private equity to communities at large: ending the carried income loophole, which has the effect of allowing private equity barons have ginormous amounts of ordinary income taxed at capital gains rates.

Sadly, this story confirms that private equity faces no challenge to their unending appetite for more money. Even though trees don't grow to the sky, the only thing that might curb their rapaciousness is a crash....which even then won't damage them all that much, unless the pitchforks come out in a big way. Buy panic room futures.

Delaware's business court to lose long-serving judge

 [reuters.com/legal/delawares-business-court-lose-long-serving-judge-2024-02-15](https://www.reuters.com/legal/delawares-business-court-lose-long-serving-judge-2024-02-15)

Reuters

The seal of the Court of Chancery for the State of Delaware is seen on a wall in the Sussex County Court of Chancery in Georgetown, Delaware, U.S., June 9, 2021. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

WILMINGTON, Delaware, Feb 15 (Reuters) - Delaware's nationally important Court of Chancery, which has come under criticism from Elon Musk this month, is losing its second-longest-serving judge.

Sam Glasscock, who has served on the go-to venue for U.S. corporate disputes since 2011, plans to retire in December, Sean O'Sullivan, chief of community relations for the courts, said in an email.

Glasscock did not immediately respond to a request for comment.

Glasscock last year oversaw litigation over Sculptor Capital Management's acquisition of Rithm Capital Corp. In 2016, in one of his highest-profile rulings, he said Energy Transfer Equity could walk away from its more than \$20 billion takeover of rival pipeline operator Williams Cos.

The court specializes in corporate litigation, including Musk's failed bid to walk away from his \$44 billion deal for Twitter.

The court was thrust into the spotlight last month when its chief judge, Chancellor Kathaleen McCormick, voided Musk's \$56 billion compensation from Tesla. Following the ruling, Musk said he planned to ask Tesla shareholders to move the carmaker's corporate home to Texas from Delaware, where nearly all large publicly traded companies are chartered.

Glasscock is the midst of a second 12-year term. The longest-serving judge is Travis Laster who joined the court in 2009.

The video player is currently playing an ad. You can skip the ad in 5 sec with a mouse or keyboard

A replacement will be nominated by Governor John Carney and must be confirmed by the state's senate.

Reporting by Tom Hals in Wilmington, Delaware Editing by Bill Berkrot

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Fresh Bailout and Bribery Indictments Raise Questions About What Ohio Gov. DeWine Knew and When

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Marty Schladen, The Ohio Capital Journal

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Photo by Graham Stokes for Ohio Capital Journal

COLUMBUS, OH — JANUARY 31: Ohio Governor Mike DeWine gives the State of the State Address, January 31, 2023, in the House Chamber at the Statehouse in Columbus, Ohio.

The announcement Monday of new felony indictments against players in Ohio's massive bribery scandal is again raising questions about what Gov. Mike DeWine knew before and after he nominated Sam Randazzo to be the top utility regulator in the state.

The indictment contained new allegations of a long, nefarious relationship between Randazzo, one of the state's biggest utilities and a group of industrial users. On Thursday, DeWine's spokesman reiterated that the governor believed in 2019 that Randazzo was

qualified to be the top regulator because of his prior representation of utilities and large ratepayers. DeWine on Wednesday conceded that the appointment was a mistake.

Randazzo was indicted along with the former top executives of Akron-based FirstEnergy for their alleged roles in a scheme to pay more than \$60 million in bribes in exchange for the 2019 passage of a \$1.3 billion ratepayer bailout that was mostly intended to prop up two nuclear plants. Former House Speaker Larry Householder, R-Glenford, was convicted of his role in federal court last year and is serving a 20-year prison sentence.

Randazzo, DeWine's 2019 pick to chair the Public Utilities Commission of Ohio, was indicted by the feds in December.

On Monday, law enforcement authorities led by Ohio Attorney General Dave Yost again indicted Randazzo, this time on state felony charges. Also indicted were former FirstEnergy CEO Chuck Jones and former Vice President Michael Dowling. They all pleaded not guilty on Tuesday.

Among the new allegations was that Randazzo had a corrupt relationship with the FirstEnergy executives stretching back to 2010.

As part of it, Randazzo allegedly served as general counsel to the Industrial Energy Users of Ohio while secretly being paid as a consultant for FirstEnergy. In those capacities, Randazzo settled disputes over electricity rates on terms that were acceptable to the energy companies, then channeled the settlement money through shell companies where he skimmed off a portion, the indictment said.

In 2015, FirstEnergy also paid out \$8.5 million in supposed "consulting fees."

The indictment said the money was really intended to be a cash payment to the industrial users so they would drop their opposition to a rate hike FirstEnergy was seeking. Through that "side deal," a powerful utility paid off powerful industries to grease the skids for a rate hike on all FirstEnergy customers, if the allegations are true.

Between 2016 and 2019, FirstEnergy paid \$13 million into Randazzo's shell companies, the indictment said. Of that, Randazzo passed \$7.75 million to the industrial users and pocketed the rest, it said.

On Thursday, DeWine Press Secretary Dan Tierney said that as his boss was entering the governor's office at the start of 2019, DeWine saw Randazzo's relationships with FirstEnergy and big electricity users as a special qualification to be the top regulator.

"Governor DeWine knew of Mr. Randazzo's relationship to FirstEnergy as a paid consultant prior to the Governor's appointment of Mr. Randazzo," Tierney said in an email. "As we have previously stated, Mr. Randazzo was appointed due to his expertise and having represented

many sides of utility rate issues, having represented both utilities as well as large ratepayers (in) whose interest it is to pay as little as possible for utilities.”

The connections between FirstEnergy and the incoming administration of Mike DeWine and Jon Husted were strong. DeWine’s chief of staff, Laurel Dawson, was married to a man who had been a paid lobbyist for FirstEnergy — and who had received a \$10,000 loan from Randazzo in 2016, the indictment said.

DeWine’s legislative affairs director, Dan McCarthy, had also been a FirstEnergy lobbyist. When he was, McCarthy founded Partners for Progress, a 501(c)(4) dark money group that FirstEnergy admitted was used to funnel tens of millions of the corporation’s dollars into the effort to make Householder speaker and pass and protect the bailout. Once in the administration, McCarthy acted from that perch to help pass House Bill 6, the bailout legislation.

And, on Dec. 18, 2018 — just before DeWine and Husted took the oath of office — they met at the Columbus Athletic Club with Jones and Dowling, the top executives for FirstEnergy. Among the topics was whether Randazzo would be acceptable to regulate the executives’ company, the indictment said.

According to the state indictment, Jones and Dowling went from that dinner to Randazzo’s German Village condo, where they seem to have negotiated a payment that FirstEnergy later characterized as a bribe. Shortly after, Randazzo sent the executives a text message requesting \$4.3 million over a period of years, according to copies filed as part of Randazzo’s indictments. Jones responded by saying it would be paid in a lump sum, the messages said.

In January, as Randazzo was being vetted to chair the PUCO, he told Dawson, DeWine’s chief of staff, about the \$4.3 million payment, but he did not tell her about the other millions he had received from FirstEnergy, the state indictment said. Randazzo didn’t report any of the payments to the Ohio Ethics Commission, it added.

A former aide gave DeWine a dossier reporting shady financial connections between Randazzo and FirstEnergy on Jan. 28, 2019. But Tierney said that Dawson never told the governor about the \$4.3 million payment before DeWine nominated Randazzo to chair the PUCO on Feb. 4, 2019.

According to the state indictment, Randazzo spent the rest of the year and part of the next helping to draft and openly lobby for the corrupt bailout. He also took other moves on behalf of FirstEnergy, including canceling a rate review that likely would have forced the utility to lower rates, thereby lowering stock prices and costing Jones and Dowling personally, the indictment said.

Householder and four others were arrested in July 2021. But it wasn't until the following November — when the FBI searched Randazzo's condo — that Dawson finally told the governor about the \$4.3 million payout, Tierney said.

"The Governor had previously stated he had a conversation with Laurel Dawson in November 2020 about Sam Randazzo when Mr. Randazzo's property was the subject of a federal search warrant," he said. "The contractual termination payment was part of that discussion."

Subsequently, DeWine has staunchly defended Dawson, much as he defended McCarthy, the former aide and FirstEnergy lobbyist.

July 2021 brought the lengthy, specific federal indictment of Householder, FirstEnergy, and others on the heels of Randazzo's questionable work in support of HB 6. But DeWine apparently didn't suspect that the company's \$4.3 million payment to Randazzo might have been a bribe — until federal agents searched his condo.

"Please note that the payment was never alleged to our office to be a bribe until later in 2021, well after any such conversation or initial PUCO vetting of Mr. Randazzo," DeWine's press secretary said Thursday.

Interestingly, the indictment unveiled on Monday contained a message from a FirstEnergy lobbyist briefing his top bosses on how to talk to DeWine.

"Explain things like he doesn't know anything about it — and be surprised when he does," the lobbyist wrote. "Sometimes he knows what you're talking about. Sometimes he doesn't. Sometimes he does and pretends he doesn't."

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Photo by Graham Stokes for Ohio Capital Journal

COLUMBUS, Ohio — SEPTEMBER 20: The Gavel outside the Supreme Court of the State of Ohio, September 20, 2023, at 65 S. Front Street, Columbus, Ohio.

When the spread of COVID-19 forced Ohioans to work from home, state legislators created a new way for cities to collect income taxes as workers temporarily made their homes their offices. The Ohio Supreme Court affirmed Wednesday that the temporary law was constitutional.

A Hamilton County man pushed back against House Bill 197, a comprehensive COVID relief bill passed by the General Assembly in 2020, part of which said despite the fact that workers were working from home, for tax purposes, they could be taxed based on the location of the

employer, not their home.

Josh Schaad, whose financial services offices are in downtown Cincinnati, worked in his home of Blue Ash once the pandemic set in. He said he returned to the office “several days a week” in November of 2020, and in January of 2021, he applied for a municipal income tax refund for the days he worked outside of city limits for the previous tax year.

The City of Cincinnati said he was ineligible because of the state law that had been enacted.

Schaad sued the city of Cincinnati’s finance director and Ohio Attorney General, saying the law “fundamentally altered what had been the law for 70 years and required workers to pay income taxes to cities in which they neither lived nor worked, and in many cases, had not set foot in for months,” according to court documents.

“As the work in question was performed outside the geographical limits of Cincinnati, the city lacked taxing jurisdiction,” attorneys for Schaad wrote in their appeal to the state’s highest court.

When the trial court dismissed his case, Schaad appealed to the First District Court of Appeals, who upheld the dismissal, leading Schaad to appeal to the Ohio Supreme Court. In upholding the dismissal, Schaad said the appeals court departed from established legal precedent and “goes so far as to indicate that the mere presence of an employer within a city’s limits may be enough of a fiscal connection for that city to tax its employees, regardless of where they work.”

Schaad also called into question the authority the General Assembly has over municipal taxation, given Ohio’s status as a Home Rule state, wherein cities and counties have certain powers to govern themselves, such as sanitation services, regulation of police and local taxation.

A bipartisan Ohio Supreme Court majority sided with the state in a Wednesday decision, ruling that the temporary state law “was a valid exercise of the General Assembly’s constitutional authority.”

Justice Patrick DeWine wrote for the majority in the 5-2 decision, and while he and the rest of the majority justices agreed that “emergency legislation” like the COVID-19 relief bill did not expand “substantive constitutional powers” of the General Assembly, “that principle does not change the outcome of this case.”

In terms of the claims that the pandemic law violated Home Rule, DeWine wrote that Home Rule “does not preclude the General Assembly from granting additional powers to municipalities beyond those delegated to them through the Home Rule Amendment.”

“Essentially, what Section 29 (of the COVID relief bill) does is empower a municipality that is not the one where the employee performs his work to collect a tax from that employee,” the majority opinion stated. “At the same time, it prevents the municipality where the employee is actually working from collecting a tax from that employee.”

The majority court found that the section of the COVID relief bill at question in the lawsuit was “completely consistent with the Ohio Constitution.”



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“Because the General Assembly has the power to grant a municipality additional authority, and because it has the power to limit a municipality’s authority to collect taxes, Section 29 is within the General Assembly’s authority to enact,” DeWine wrote on behalf of the majority.

Justices Michael Donnelly, Melody Stewart, Jennifer Brunner and Joseph Deters all signed on to the majority opinion, while Chief Justice Sharon Kennedy and Justice Patrick Fischer, filed dissents in the ruling.

In Kennedy's disagreement with the majority, she said "under no fair reading of the Ohio Constitution can Section 29 be understood to be a limit or restriction on Cincinnati's taxing authority."

"The General Assembly cannot commandeer a municipalities home-rule taxing authority and replace it with a statutory scheme that requires extraterritorial taxation," Kennedy wrote in her dissent. "The Home Rule Amendment denies the General Assembly that power."

The Buckeye Institute, which said it represents parties in several municipal income tax cases, including the Schaad case, expressed disappointment in the decision.

"Local taxing authorities should be able to tax only within their own jurisdictions – where people live and actually perform the work," Robert Alt, the institute's president and CEO who argued the case before the Ohio Supreme Court, said in a statement.

The Ohio Municipal League released a statement praising the majority ruling, as Ohio's cities and villages "rely on certainty and stability when it comes to their revenue streams," the OML's executive director, Kent Scarrett, said in the statement.

"While we consider this a victory for municipalities that affirms what they were directed to do by the state during the pandemic, we remain cautiously optimistic about all the implications of the ruling and will delve deeper into it over the coming weeks and months to gain a fuller understanding of its impacts," Scarrett went on to state.

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(Mugshots from the Summit County Sheriff's Office.)

From left to right: Former PUCO Chair Sam Randazzo, former FirstEnergy CEO Chuck Jones, former FirstEnergy VP Michael Dowling.

An Ohio grand jury has handed up a 44-count indictment against three players in what is likely the biggest bribery scandal in state history. And when the 50-page indictment was unveiled Monday, it provided new details about a decade of payoffs and conflicts as one of them — who became the state's top regulator — allegedly did a huge electric utility's bidding.

The indictment concerns a \$1.3 billion dollar bailout that Akron-based FirstEnergy has already admitted to the federal government that it paid more than \$60 million in bribes to purchase.

Former Ohio House Speaker Larry Householder, R-Glenford, and former state GOP Chairman Matt Borges are serving federal prison sentences for their roles in the 2019 passage of the bailout and the dirty-but-successful fight to thwart a voter-led repeal.

When federal prosecutors in 2021 charged those two and three others, they said their investigation continued. But it wasn't until December that they charged another in the case — Sam Randazzo, a lawyer and longtime energy consultant whom Gov. Mike DeWine nominated to chair the state's top regulator, the Public Utilities Commission of Ohio.

That left the people who paid the alleged bribes — FirstEnergy's top executives — uncharged in a scheme that took place more than four years ago.

Double dealing

All that changed Monday when Ohio Attorney General Dave Yost announced state charges against Randazzo and former First Energy CEO Chuck Jones and former Vice President Michael Dowling for their alleged roles in the criminal conspiracy. The three were arraigned in Akron on Tuesday and each pleaded not guilty.

They were charged in an indictment that alleged shady dealings between the them stretching back 13 years.

"It all began with a well-lawyered theft in 2010," the indictment said.

It went on to describe how Randazzo was general counsel for a group of large FirstEnergy customers — the Industrial Energy Users of Ohio — while also working as a FirstEnergy consultant. Only, the Industrial Energy Users didn't know that Randazzo was also being paid by the company they were paying him to fight, the indictment said.

It accuses Randazzo of settling the industries' claims against FirstEnergy on terms acceptable to FirstEnergy and running the settlements through Randazzo-controlled shell companies where he took a skim — again, unknown to the industrial energy users.

"His clients, the industrial members of IEU-Ohio, did not know he was a consultant for FirstEnergy," the indictment said. "Randazzo did not tell them. Years later, some of the money would make its way to IEU-Ohio. Some of it would end up in Randazzo's pocket."

The Industrial Energy Users appear to have engaged in some cynical conduct of their own, however. The indictment describes a 2015 agreement in which FirstEnergy was to pay Randazzo's company \$8.5 million for "consulting services."

It was really a cash "side deal" in which FirstEnergy paid the industrial users to drop their objections to a rate hike FirstEnergy wanted, supposedly in the name of "energy security," the indictment said. In other words, prosecutors said that with Randazzo's facilitation, FirstEnergy paid off a wealthy, powerful group of electricity users in order to raise rates on everybody else.

Such arrangements proved quite profitable for Randazzo.

"Between 2016 and 2019, FirstEnergy paid... \$13,152,639.94 to Randazzo's two shell companies," the indictment said. "Of that total, Randazzo gave \$7,756,903.84 to his IEU-Ohio Client and kept \$5,395,736.10 for himself."

Cozy relationships

This is the guy the incoming DeWine-Husted administration thought would be a good candidate to regulate utilities — companies to which Ohioans have little choice in paying their billions.

The state indictment describes how, on Dec. 18, 2018, FirstEnergy execs Jones and Dowling met with Gov.-elect DeWine and Lt. Gov.-elect Jon Husted at the Columbus Athletic Club and discussed whether the executives wanted Randazzo to regulate their massive electric utility.

The notion that a governor would ask a huge utility who might be acceptable as a regulator might itself seem startling. But after the dinner, according to the indictment, Jones and Dowling did something even more brazen.

They went to Randazzo's German Village condo and pursuant to that, Randazzo solicited a \$4.3 million payment from Jones and Dowling, the indictment said. FirstEnergy paid the money "without ever having received an invoice for the payment and without any work or consulting services being performed," the indictment said. It added that the executives made the payment over the objections of a company lawyer.

Randazzo told Laurel Dawson, DeWine's chief of staff, about the payment, calling it a "consulting agreement." But he didn't tell her of the other millions he'd gotten from the utility he was seeking to regulate, the indictment said. Randazzo also never told the Ohio Ethics Commission about any of the money he'd gotten from FirstEnergy, the indictment said.

In Dawson, Randazzo might have had a sympathetic audience. Her husband, Michael Dawson, was a "paid FirstEnergy lobbyist" in 2016, when he'd gotten a \$10,000 loan from Randazzo, the indictment said.

But if his chief of staff told DeWine about the huge payoff Randazzo got from FirstEnergy, it must not have fazed the new governor. DeWine nominated Randazzo to be chairman of the Public Utilities Commission — the ratepayers' supposed protector — on Feb. 4, 2019.

Versatile player

During Householder's six-week trial in Cincinnati last year, federal prosecutors put on exhaustive evidence of how the FirstEnergy executives financed Householder's bid to become speaker and to pass the notorious bailout known as House Bill 6.

"Together, Jones, Dowling, Randazzo and his shell companies worked in concert to steal the power of government and bend it to the will of FirstEnergy," was the way the state indictment unveiled on Monday put it.

Most of the details of Randazzo's involvement in the creation and passage of HB 6 are already known from the federal trial. They show him acting in multiple, conflicting, often-undisclosed capacities — similar to those the state indictment alleges he had already played with FirstEnergy and the industrial energy users.

Even though he was supposed to be a regulator, Randazzo drafted portions of the bailout legislation and passed them between FirstEnergy officials and a Householder employee who had recently worked for the PUCO. They sometimes only shared printed copies of the huge bill, out of an apparent apprehension about leaving electronic fingerprints.

According to text messages between Jones and Dowling, Randazzo went so far as to actively lobby for passage of the bailout — which would seem a big departure from the traditional duties of a disinterested regulator.

Jones and Dowling discussed a meeting about HB 6 that Randazzo had with Sen. Steve Wilson, R-Maineville, and the Senate's counsel. "We have a good plan to help," Dowling told his boss.

Other officials

Despite the fact that DeWine had reason to know Randazzo was connected to FirstEnergy, the governor made him the state's top utility regulator and he signed the billion-dollar bailout that benefitted the company the day it passed. And on July 21, 2021 — the day Householder was arrested — DeWine said he wasn't in favor of repealing the measure.

The governor subsequently walked that back, but HB 6 is still on the books and Ohio utilities are still getting hundreds of millions in ratepayer subsidies as a result.

DeWine wasn't the only state official to act at least peripherally in the scandal.

Secretary of State Frank LaRose has refused to explain the "private" updates that FirstEnergy CEO Jones said the state's chief elections official was providing during an attempt to gather signatures to put an HB 6 repeal on the ballot.

And Yost himself dealt a mortal blow to the signature gathering when he initially rejected the ballot language — cutting nearly in half the time HB 6 opponents had to gather a quarter-million valid signatures. And in text messages presented in the federal trial, Borges told a co-conspirator that Yost thought HB 6 was a bad law, but wouldn't speak up because of help he'd gotten from FirstEnergy in the past.

Beyond the bailout

Randazzo's alleged help to FirstEnergy wasn't limited to HB 6. He also thwarted a PUCO look into the company's books that was likely to force a cut in electricity bills. That would have caused falling stock prices and a hit to Jones' and Dowling's portfolios, the indictment said.

The erstwhile regulator was apparently so helpful that Jones at one point told a FirstEnergy subordinate to back off for fear of being too obvious. In a text message included in the indictment, Jones told Dennis Chack that Randazzo's pro-FirstEnergy conduct "has a lot of talk going on in the halls of PUCO about does he work there or for us?"

Even so, Randazzo's behavior at the PUCO continued to be shameless, urging fellow regulators to join him in lobbying for the corrupt bailout, the indictment said.

Randazzo "began internally lobbying PUCO staff members between July 2020 and September 2020 to generate strategies to save HB 6, despite facing internal objections about the inappropriateness of the effort to save HB 6," it said.

The indictment included a Sept. 15, 2020 email in which Randazzo told subordinates, "One option (and I really think we need to get other commissioners and staff into a proactive mode): We could, on our own initiative, issue a show-cause order to (FirstEnergy) directing (FirstEnergy) to show that no costs associated with HB 6 have been included in any riders or base rates."

Had such an order been issued, the result would have been misleading. While the bill didn't raise consumer costs through riders or base rates, it included a provision that ensured FirstEnergy would collect at least as much as it did in one of its best years and it created a massive subsidy for money-losing coal plants.

Randazzo's efforts seemed finally to end two months later, when the FBI searched his condo.

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Tags:

- HB6,
- Gov. Mike DeWine,
- FirstEnergy,
- Sam Randazzo

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- Earnings release error triggers stock price surge
- Mistakes invite scrutiny, questions about number vetting

It was a simple “clerical error,” Lyft Inc. said.

But that typo—an inadvertent zero added to one of the rideshare company’s projected profit measures—triggered a temporary surge in Lyft’s stock price and also questions about corporate controls and the vetting of real-time data that investors rely upon.

Here’s a look at what happened, the safeguards companies often put in place to prevent such mistakes, and any legal fallout Lyft might face.

Lyft did not respond to questions about its reporting oversight or what steps it would take to prevent similar mistakes in the future. In a statement, the ride-hailing platform said that it had updated its materials with the correct forecasted figure and to “flag the clerical error.”

What was Lyft’s mistake?

Lyft on Feb. 13 erroneously reported that it expected adjusted earnings margins to soar 500 basis points, or 5%, over the next year. It should have been a more modest 50 basis points, or 0.5%. The stock jumped more than 60% on the news.

The error quickly surfaced, with the company’s CFO correcting it on the company’s earnings call. As the stock price subsequently fell, the snafu dominated financial press headlines.

“This was a bad error,” Lyft CEO David Risher said in a Bloomberg Television interview the next day. “But it was one zero in a press release.”

Who’s responsible for these disclosures?

No single person is responsible for the accuracy of corporate earnings releases. It takes a team to compile and review the details from forecasts to quotes, including: finance staff, investor relations, in-house or possibly outside counsel, chief executives, various business units and the board’s audit committee.

Outside auditors play a small role if any. External accountants typically review corporate press releases and other statements to check that the messaging aligns with the company's audited financial statements. But they don't audit forecasted information or metrics that deviate from US generally accepted accounting principles, known as non-GAAP data.

Risher took responsibility for the error and described how the company spends "hours and hours of checking and double checking" to prepare such documents. Lyft is reviewing what happened and will have its internal auditors look into how the company could prevent similar mistakes in future, he told Bloomberg Television.

"Sometimes having a thousand eyes on something may not be as important as having a clear owner of the document and to have a process that sort of ticks and ties—that detailed review to make sure each assertion in a press release is in fact supported by the facts," said Paul Washington, executive director of The Conference Board ESG Center and a former executive with Time Warner Inc.

Aren't there controls to prevent mistakes?

Companies put in place processes known as disclosure controls to ensure they provide investors with reliable information and don't hide bad news.

Some corporate policies require a management-level committee to review certain documents. They may also require the audit committee or audit committee chair to review documents, like earnings releases, before they are made public.

Companies may have additional controls for non-GAAP figures to ensure they don't mislead investors. Companies also have to correctly show how the numbers reconcile, or relate back, to US accounting standards.

Despite all those layers of review, mistakes as simple as typing in an extra zero can happen. And sometimes that carefully crafted communication can miss its mark.

"Those people might have thought 500 basis points was the right number," said Kurt Gee, associate accounting professor at Ohio State University. "You might surmise that the way it was written, in terms of basis points, also made it hard for those people to understand that there was a mistake."

Companies should focus their reviews on figures and reporting most prone to errors. Percentages and basis points are all risky, said Stan Keller, a corporate securities lawyer and senior partner with Locke Lord LLP.

How could the SEC respond?

Company earnings press releases become part of official documents they file with US regulators, so mistakes can invite unwanted scrutiny from regulators.

SEC Chair Gary Gensler in a Bloomberg TV interview on Wednesday deflected a direct question about consequences for Lyft. He said the agency's role is to oversee markets and to make sure people don't defraud the public and that "they publish accurate financials."

Anytime there's big market news or lots of shareholder value created and destroyed in a short period of time, the Securities and Exchange Commission pays attention. The SEC and, potentially, the Financial Industry Regulatory Authority, or FINRA, will look under the hood to check out who benefited and who lost from the stock price surge then retraction.

Regulators will first investigate whether any company insiders sold stock at the peak price before the error came to light, said Preeti Choudhary, accounting professor at the University of Arizona.

If the SEC's research shows the error was truly a clerical mishap, then it's unlikely the agency will take action, but its staff will at least ask questions and dig in, said a former SEC official who spoke on background given the sensitive topic.

"I would be stunned if something hasn't already been opened," the former official said.

What other legal exposure does Lyft face?

While the error is a black eye for Lyft, the company doesn't appear at risk of significant legal exposure to lawsuits from shareholders. The likelihood that a case for securities fraud would be successful "seems vanishingly low," said University of Nevada, Las Vegas law professor Benjamin Edwards, who researches securities law and corporate governance.

To prove securities fraud, a shareholder who lost money would have to show Lyft intended to defraud investors or was reckless in making the error. And the inference Lyft acted with the required intent would have to be at least as compelling as any opposing inference. Here, "'whoops' is extraordinarily compelling," Edwards said.

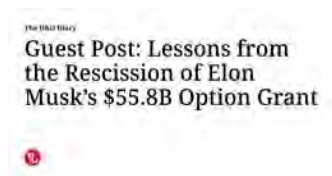
As a policy matter, "we don't want to punish companies for innocent mistakes that they correct quickly," Edwards said.

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Guest Post: Lessons from the Rescission of Elon Musk's \$55.8B Option Grant

K dandodiary.com/2024/02/articles/executive-compensation/guest-post-lessons-from-the-rescission-of-elon-musks-55-8b-option-grant

February 15, 2024



By Kevin LaCroix on February 15, 2024
Posted in Executive Compensation



Priya Huskins

On January 30, 2024, Delaware Chancellor Kathaleen McCormick issued a 200-page post-trial opinion voiding the \$55 billion compensation package that the Tesla board had approved for the company's CEO, Elon Musk. In the following guest post, Priya Huskins, Esq., Senior Vice President at Woodruff Sawyer, takes a detailed look at Chancellor McCormick's opinion and considers the opinion's practical implications. A version of this article was previously published in the D&O Notebook. I would like to thank Priya for allowing me to publish her article as a guest post on this site. I welcome guest post submissions from responsible authors on topics of interest to this blog's readers. Please contact me directly if you would like to submit a guest post. Here is Priya's article.

CEO compensation can be a source of concern for shareholders, which makes it a concern for the Delaware Chancery Court. Another major concern is director independence. The decision by the Delaware Chancery Court to void Elon Musk's 2018 compensation package demonstrates what happens when these two concerns collide.

The court's 200-page legal analysis assesses everything from director independence and what constitutes an appropriate board-led process to disclosure for potentially conflicted transactions and the entire fairness standard of review.

In this article, you'll find out what led the court to rescind Musk's \$55.8 billion Tesla option grants—even though Musk had met aggressive milestones, including growing the company's market capitalization by more than 10x. I'll also offer practical tips for directors coming from the case.

How Did We Get Here?

Having the Delaware Chancery Court intervene in corporate compensation decisions is a relatively recent phenomenon. The court fired a shot across the bows of all corporate boards in 2005 with its decision in *Disney*.

Disney President Michael Ovitz walked away with a \$130 million severance payment after just over a year of work. Shareholders reacted by suing the Disney board for breaching their fiduciary duties, including a claim for a breach of the duty of loyalty and for corporate waste.

Although the case was dismissed, the 37-day trial was embarrassing for the Disney board, revealing an approach to corporate governance that was basically characterized by the court as: not great, but good enough for the 1990s.

However, the *Disney* court was also clear that what was OK in the 1990s (when the compensation package was put together) would not be OK in the future, helpfully providing an outline of the type of activities a court wanted to see. It was also a reminder of how important it is for the board to document its processes.

Of course, *Disney* wasn't the last time shareholders challenged large compensation packages. Fast-forward to today, and the Delaware Chancery Court's decision to strike down the Tesla compensation package.

Tesla Option Grant to Motivate Elon Musk

In 2018, the Tesla board of directors offered Musk, Tesla's co-founder, CEO, and chairman, the largest compensation package anyone has ever received.

The option grant gave Musk an additional 1% of the company each time the company hit one of 12 increasingly difficult operational and financial goals. The value of this compensation package had a maximum value of \$55.8 billion—certainly a lot of money, even though Tesla's market capitalization currently hovers around \$600 billion.

To understand the grant, it is important to understand the context in which the grant was made back in March of 2018. At that time:

- Tesla had a market capitalization just shy of \$60 billion.
- Musk was being paid minimum wage, but Musk declined to accept even this amount.
- None of the executives, including Musk, had any cash bonus opportunities.
- Musk had to meet certain aggressive market capitalization and operational metrics to earn the grant.
- Using the methodology approved by the Financial Accounting Standards Board, the value of Musk's option grant at the time of grant was \$2.6 billion, according to the proxy seeking shareholder approval for the option grant.

- To achieve the maximum value of the option, Musk had to grow the market capitalization of the company 10x within 10 years.
- A condition of the grant was shareholder approval.

The grant was approved by 74% of shares not held by either Musk or his brother.

Note that while there is some dispute about the difficulty of the milestones that Musk had to meet^[i], there is no dispute about whether the proxy sent to shareholders in advance of the vote accurately reflected the economic terms of the grant.

So, if a majority of the disinterested directors knew about the economics of the option grant and approved it, why did the court ultimately, after trial, issue a decision rescinding the option grant?

It's All About Independence

Tesla is a public company—and that is irrelevant to the Delaware Chancery Court's legal analysis in the *Tesla* case, which was a derivative fiduciary duty suit.

The shareholder plaintiffs who sued the board of Tesla asserted that the board breached its fiduciary duty and harmed the corporation by granting an overly rich compensation package to Musk. The fact that shareholders approved the grant does not make the suit go away if, as the plaintiff asserts, the proxy statement is defective.

The court concluded that the proxy statement was defective because, although the board characterized its members as independent in the proxy statement, they were not.

The court doesn't insist that the board members should have stated they were not independent. Instead, the court states that the board members were required to discuss conflicts that might call their independence into question.

What made the board members potentially not independent? As the Delaware Chancery Court has repeatedly held, including famously in cases like *Oracle* and *Blue Bell Creameries*, the independence analysis includes social relationships.

It is especially important to consider social relationships when a company's CEO controls the company, as is the case at Tesla.^[ii]

The *Tesla* court discussed the concept of the "superstar" CEO at length. The court is concerned that the belief that the CEO is irreplaceable shifts the balance of power to the CEO and creates a "distortion field" that interferes with the board's oversight.

The Chancery Court said that, as a matter of law, it does not matter if the board truly thought that losing the CEO would be more harmful to shareholder value than acceding to his compensation desires. The board still has a job to do, which is to protect the interests of the non-controlling shareholders by running a thorough process led by independent directors.

Here are just some of the elements the court focused on when considering whether the directors were independent:

- Some board members received material amounts of wealth^[iii] from outsized board compensation in the millions of dollars.
- Board members gained material amounts of wealth by investing in other companies controlled by Musk.
- Board members regularly socialized with Musk, including attending weddings and birthday parties (including of children related to the people in question) and vacationing together, particularly as part of a tradition and over Christmas.

Any one of these factors may not have been enough for the court to find a lack of independence. The total picture, however, caused the court to be skeptical that the directors involved in setting Musk's compensation were independent.

Process, Process, Process

Even if the directors had been independent, however, the court makes it clear that the process followed by the board's committee demonstrated that the directors handling Musk's grant operated with a "controlled mindset." This means they failed to approach the transaction as an adverse party entering a negotiation.

In this regard, the court focused on the cadence of the compensation process, which was very much at the rhythm and timing set by Musk. The court acknowledged that Musk was going to extraordinary lengths to make the production of the Model 3 a success during the period in question.

Nevertheless, the court gave the directors zero credit for perhaps understanding that running the business might have been more mission-critical to shareholder value than forcing Musk to a particular compensation calendar timeline.

Even taking into consideration the harsh reality of the operating environment, no one would conclude that the board followed a particularly good process. Indeed, the court provided detailed criticisms of the process board members followed to determine the details of the option grant, including its size and the milestones to meet to earn its full value.

But, given how different Tesla is from any other company, it is surprising that the court focused on the lack of peer benchmarking. The court dismissed this difference as a possible reason to skip peer benchmarking, saying:

As CEO, Musk's job was the same as every other public company CEO: improve earnings and create value. A benchmarking study would have shown the committee what other companies paid for executives to perform that same task.^[iv]

Why Pay Him More?

Musk was not being paid in cash, and the equity grant the board had previously granted him—with great success—was soon to expire. Nevertheless, the court criticizes the directors' failure to conduct real diligence on whether Musk needed further incentives to do his job.

One imagines that the court would not expect Musk to work for free. What the court does is focus on the fact that Musk already owned more than 20% of the company. Increasing the value of the company would translate to increasing his own personal wealth—so why give him more?

In addition, the court took Musk at his word when he said that he would not leave Tesla. The court paradoxically both acknowledges and dismisses Musk's penchant for taking on multiple big projects at any moment.

During the time in question, Musk was also taking an active interest in The Boring Company, Neuralink, OpenAI, and SpaceX (where he was also the CEO). The court also discussed Musk's interest in colonizing Mars, noting that Musk makes no bones about working so that he has wealth to fund going to Mars.

The court does not seem to be concerned with the implication that Musk would do something else if he is not generating enough wealth at Tesla.

The court asserted that if board members were really concerned about keeping Musk's attention on Tesla, the board would have written into Musk's contract that he spend a specified amount of time on Tesla matters.^[v]

Thus, the problems for Musk's option grant include:

- Musk's level of control;
- The fact that his compensation package is inherently a conflicted transaction that requires the strong hand of independent directors;
- The board members' lack of independence; and
- The controlled mind-set with which the board approached the option grant, which means there was no real negotiation.

On this last point, there was no credit given by the court for the fact that Musk would sometimes make unilateral decisions that were not to his benefit concerning the stock grant, which is to say negotiate against himself.

The court was also clear that while the company's general counsel worked to document, process, and otherwise steer the ship appropriately, it was of no help on the independence front. This was in part due to the general counsel's affection for Musk, a level of affection that moved the general counsel to tears^[vi] during his testimony.

Entire Fairness Standard of Review

Unfortunately for Musk and the Tesla board, all of these governance failures meant that the court had to review Musk's grant using the entire fairness standard, with defendants bearing the burden of proof.

The burden would shift back to the plaintiffs if the defendants were able to show a good process. Unfortunately, the lack of a well-functioning committee of independent directors made this impossible.

The other way to shift the burden back to plaintiffs is if the shareholder vote were fully informed—again, impossible in this instance for the reasons already discussed.

The economic terms of the deal will not suffice to fully inform shareholders if shareholders are also not advised of potential conflicts. There are other failures in the proxy as well in terms of, for example, who was talking to whom about which elements of the grant and when.

Thus, the court was forced to analyze the option grant itself in terms of "fair dealings" and "fair price."

While the court actually complimented the defense counsel's efforts, the defense fell short. The court was explicitly unimpressed by the defense's efforts to assert that it was worth it for shareholders to "give" up equity to "get" the bump in valuation they enjoyed during the timeframe of the stock grant (the "give/get" argument) given that Musk already had a more than 20% equity stake in the company.

Also, the court noted that Musk's existing equity stake "was also a powerful incentive to avoid allowing Tesla to fall in what Musk might consider to be incapable hands."

To defend the grant as being a "fair price," the defense argued that Musk's equity grant was not abnormal in the world of private equity. It was clear to the court that the private equity argument was one that the defense created for trial, and that this consideration had not been part of the original process to grant Musk's option grant.

Thus, the court did not need to consider the private equity argument or even whether a public company CEO's compensation package could be based on private equity benchmarking.

Thus, the court ordered the option grant to be rescinded. No word (as of this writing) on whether the case will be appealed.

Who Pays for All This Litigation?

The Tesla case was a derivative suit against the board of directors, so the proceeds of the shareholder's win technically go back to the company. This is also what happens anyway when an equity grant is rescinded.

Legal defense costs of directors subject to a derivative claim are indemnifiable by a company, assuming the company is not bankrupt. Thus, if a company is buying classic D&O insurance, one would expect the directors' defense costs to be paid by the D&O insurance policy, subject to the self-insured retention (similar to a deductible).

These costs will not be paid by D&O insurance if a solvent company is only buying a Side A policy, a policy that only responds to non-indemnifiable claims.

Companies of Tesla's size will often choose to self-insure indemnifiable claims, and some might go so far as to set up a captive to handle non-indemnifiable claims.

In any case, don't expect insurance carriers to "pay" anyone the value of an executive's voided compensation agreement given the standard exclusions in D&O insurance policies for that sort of thing.

Even worse, to the extent a board is found to have engaged in wrongdoing, you might see insurance carriers attempt to claw back defense costs from the company.

Practice Tips for Directors

The *Tesla* decision isn't exactly a mighty blow in favor of communism. The list of the most highly compensated CEOs included jaw-dropping amounts last year, and next year's list will be no different.

But boards will want to be mindful of the following practice points if they want to grant unusually large compensation packages to CEOs for legitimate, shareholder wealth-enhancing reasons.

- **Director Independence is the whole show.** You can be an independent board member, or you can vacation with your CEO, but you can't do both. You can invest in a lot of different ventures with your CEO, or you can be an independent directors, but you can't do both. Enough said.
- **Avoid the appearance of having a controlled mindset.** Boards can respect and esteem their CEOs, but Delaware has made it clear that you can't adore them to the point of becoming deferential. Also, there's no crying in baseball.

Run the process. The CEO cannot run the compensation process. The board must be in charge of the process, including timing, and ideally the initial economic terms. Also, although the board often functions as a source of advice and counsel for a CEO in the normal course of business, your posture must be one of an arms-length negotiator when it comes to negotiating executive compensation.

Document the process. If you, as a director, think your shareholders want you to do something big to motivate your CEO to deliver outsized returns, do this:

- Read the entire text of the 200-page *Tesla* decision.
- Rest up.

You will need to be prepared to complete the arduous process and extensive documentation required to survive litigation scrutiny. This advice will be true even if parts of the Chancery Court opinion in *Tesla* are ultimately overturned. Your goal is not to win on appeal, but rather to avoid litigation in the first place. Failing that, your goal is to win on a motion to dismiss the suit.

The Cost of Sloppy Corporate Governance

Sloppiness when it comes to corporate governance can be costly. In the *Tesla* case, corporate governance sloppiness cost Musk \$55.8 billion.

Reasonable minds can disagree whether a grant this sizable was needed to create the type of enormous value for shareholders that Musk did.

But Tesla's independence and process failures—some of which are probably a direct result of Musk's own leadership style—meant that Musk was penalized despite actually delivering value to his shareholders.

[i] This court's discussion of the milestones demonstrates a lack of understanding of just how extraordinary Musk's achievements were during the years covered by the option grant. The court is aided in its misunderstanding by certain accounting conventions, which most operators know are just that—conventions. Much like explorers who believed that finding the Americas was not hard **after** Christopher Columbus ran into them, the court's analysis infers

that meeting the grant milestones was really never in doubt. This is notwithstanding the fact that the court itself notes that for Musk to earn each tranche of his option grant, he would have to grow Tesla's market capitalization by \$50 billion, which was "an amount in market capitalization {roughly} equal to that of the most significant domestic car manufacturers for Musk to earn a single tranche of compensation," the combined market capitalization of Tesla, Ford, and GM at the time.

[ii] No serious-minded person disputes that Musk controls Tesla. Nevertheless, the court goes to great lengths to lay out in detail the elements of the analysis of why Musk controls Tesla.

[iii] It is worth reading the opinion for the details on the wealth the Tesla directors accumulated as a result of their relationship with Musk. The amounts are eyebrow-raising, even for the most avowed anti-regulation capitalists among us. The numbers are really, really big for all but one director. The court uses phrases like "life-changing" and "dynastic and generational wealth" to describe it, and accurately so. Also, recall that Chancery Court judges make about \$218,000 per year, putting them at the 96th percentile of US individual incomes (Loo, W. US Income Percentile Calculator. Available at: <https://www.omnicalculator.com/finance/us-income-percentile>. Accessed: Feb 02, 2024.)

[iv] Regardless of whether one is a fan of Musk or not, it does not track reality to take the position that Musk's job was the same as any other CEO. As such, it's hard to see how peer benchmarking would have been helpful, given the uniqueness of Musk and Tesla.

[v] This is a tough one. On the other hand, it beggars belief that the court thinks a creative serial entrepreneur like Musk would work at a place that required him to "clock in." On the other hand, one is sympathetic to shareholders seeing Tesla underperform while Musk is clearly spending time on a variety of distracting projects. See more recently, e.g., reports about Musk and Twitter.

[vi] References to the general counsel's tears appear in the opinion on three separate occasions. This opinion is not the first time the Chancery Court characterized tears as being evidence of a lack of independence. See, e.g., *Tears of a Director*, discussing a case concerning weeping as a sign of a director's lack of independence.

Elon Musk's \$56 billion pay package saga ensnares Tesla chair Robyn Denholm, the woman who was supposed to rein him in

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Elon Musk's \$56 billion pay package saga ensnares Tesla chair Robyn Denholm, the woman who was supposed to rein him in

By Emma Hinchliffe, Joseph Abrams

(FORTUNE)

Good morning, Broadsheet readers! Judges from the New York Court of Appeals could revisit Harvey Weinstein's previous convictions, funding for women-led health startups spiked more than 2,000% in 2023, and a Delaware judge's decision striking down Elon Musk's pay package puts Tesla chair Robyn Denholm in the spotlight. Have a restful weekend.

- Pay package. Late last month, a Delaware court struck down Elon Musk's \$55.8 billion Tesla pay package in response to a shareholder lawsuit that claimed the proposal breached fiduciary duty to investors. Chancellor Kathaleen McCormick's decision enraged the Tesla CEO, who has said he plans to reincorporate Tesla in Texas rather than stay in Delaware.

But McCormick's decision didn't only target Musk. Another figure in her 200-page document is Robyn Denholm, Tesla's board chair. Denholm, an Australian former telecom exec who is also a partner at Canva investor Blackbird, became chair of Tesla's board in 2018 after Musk was forced to step down from the role as part of an SEC settlement. At the time, the SEC said Musk's removal as chairman-and the appointment of an independent successor-was "intended to prevent further market disruption and harm to Tesla's shareholders." Denholm has served on Tesla's board since 2014.

McCormick struck down Musk's pay package because she determined the process that led to its approval was deeply flawed, pinning most of that blame on the board and its compensation committee. Musk's pay was the largest ever proposed for an executive at a publicly traded company, she found. She argued that several decision-makers were " beholden to Musk" because of personal relationships and sky-high compensation.

Denholm, in particular, is called out for earning \$280 million from sale of Tesla options in 2021 and 2022. McCormick repeatedly cites Denholm's testimony that the money was "life-changing" compared to the \$3 million a year she earned beforehand.



Robyn Denholm, chair of Tesla Inc., during the South by Southwest (SXSW) Sydney festival in Sydney, Australia, on Monday, Oct. 16, 2023. The event is the first iteration of SXSW to be held outside North America and is expected to attract around 27,000 visitors and inject A\$24 million (\$15.4 million) into New South Wales state economy, according to the government.

Photographer: Brent Lewin/Bloomberg via Getty Images

Tesla and Denholm haven't respond to requests for comment.

McCormick's decision prompted all kinds of reactions-Musk's fury, Denholm's silence so far, and others' defense of the chair. ARK Invest's Cathie Wood, a major Tesla investor, defended Denholm after the ruling as a "professional of unquestionable integrity."

Two weeks after the decision, shareholders and others are still waiting to find out what it will mean for them. In the meantime, the situation provides a fascinating look at one of the trickiest jobs in corporate America.

When Musk was forced to step down as Tesla's chair, some questioned whether any incoming chair would be able to effectively oversee one of the world's richest men. Denholm was cast as a kind of "adult in the room," a role that women in Silicon Valley-starting with Sheryl Sandberg-have often been slotted into. (It's a dynamic Musk seems to seek out-see: Linda Yaccarino at X and Gwynne Shotwell at SpaceX.)

And governing Musk-a CEO who this week posted, "boobs just rock, it's a fact"-is arguably a challenge levels beyond overseeing another eccentric CEO.

As recently as 2022, Denholm was praised by another judge as an "independent, powerful and positive force" in a lawsuit over Tesla's 2016 acquisition of SolarCity. So what changed?

During the SolarCity acquisition, Denholm was only a director-not chair. In the years since, Musk has become even more of a wildcard, with his attention diverted to his purchase of Twitter. And the spotlight on Denholm's decision-making has grown brighter.

Charles Elson, a retired professor at the University of Delaware who specializes in corporate governance, argues that directors should never sell stock. He believes the recent court decision damages the reputations of Tesla's directors and says the board will need to be "refreshed." "No one should have taken that kind of money," he says of the board's compensation. "At that point, it begins to compromise your independence."

And, he tells me, this episode provides some insight for other boards overseeing headstrong CEOs. "Stand your ground," he advises. "You have to represent the investors."

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The Broadsheet is Fortune's newsletter for and about the world's most powerful women. Today's edition was curated by Joseph Abrams. [Subscribe here.](#)

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Tesla and Elon Musk Show Why Governance Doesn't Matter—Until It Does

Companies with dominant shareholders have a record of outperformance, but the wheels can come off quickly in a crisis

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

Feb. 16, 2024 5:30 am ET



A Tesla store in Shanghai displays a picture of CEO Elon Musk. PHOTO: CFOTO/DDP/ZUMA PRESS

Elon Musk's Tesla **TSLA -0.50% ▼** is an extreme example of an uncomfortable truth for investors: Companies run by big shareholders often give smaller shareholders good returns—while also flouting rules and norms designed to protect them.

Tesla's governance, long a target for the car maker's critics, is back in the spotlight after last month's ruling against Musk's \$50 billion-plus pay packet from 2018. The case was brought in Delaware by a small shareholder who was concerned about the potentially dilutive effect of stock options amounting to a gargantuan 12% of the share count at the time they were granted, even though the performance hurdles for them to vest were set very high.

This revives an old question: How should investors deal with powerful shareholders? Almost by definition, the founders of big public companies have strong track records, and large shareholdings give them an incentive to keep those records going. But their disproportionate voting rights and influence also put them in a position to disregard the views and interests of other owners.

In the U.S., this tension is mostly associated with Silicon Valley tech companies. While Delaware's Chancery Court found that Musk controls Tesla with a strong personality and a weak board, the likes of Meta and Alphabet entrench the power of founders through multiple share classes. In Europe, long-term shareholders anchor some of the world's top consumer companies, such as LVMH, L'Oréal and BMW, though in many cases the founders' families are now in control.

On average, such companies have a record of outperforming their peers despite governance scores that today are roughly 7% worse than average, according to calculations by French asset manager Carmignac. If you invested 100 euros, equivalent to about \$108, in its Carmignac Family 500 database in January 2004, you would have had €393 at the end of 2023, compared with €310 if you had invested in a nonfamily business. The investor includes companies run by families, founders, trusts and foundations with more than 10% of voting rights in its list.

Obe Ejikeme, who runs a Carmignac fund drawing from this universe, says he was skeptical of the effect before running the numbers. Governance isn't the only reason why investors might view such stocks with suspicion. Their liquidity is lower too: The more shares that are held long-term, the fewer are available to trade.

"There are so many risk factors involved that it's actually extraordinary that they do outperform," he says.

The short explanation is that so-called "skin in the game" counts for a lot. Long-term shareholders whose wealth depends heavily on one company have the kind of incentive to keep it in good shape that CEOs for hire don't.

It might be tempting to conclude that governance worries are overblown—perhaps by the armies of lawyers and boardroom consultants paid to help

companies toe the line since the 2002 Sarbanes-Oxley Act toughened U.S. rules. A *Journal of Corporate Finance* paper from 2022 found that poor governance was actually associated with stronger market returns after 2008.

But that might be because poor-governance stocks performed badly during the financial crisis, leaving them at a discount that unwound over the following bull market, says Mohammed Zakriya, associate professor at France's IÉSEG School of Management and one of the study's authors. The outperformance of family businesses in Carmignac's database was also measured over a very strong two decades for stocks.

Good governance is probably best seen as an insurance policy against things going wrong rather than as a driver of returns. Beyond the risk of a deep recession, corporate crises such as Enron's collapse—which triggered the Sarbanes-Oxley rules—or Volkswagen's 2015 diesel scandal have often occurred when executive power went unchecked.

In another sign that governance matters more in its absence, Carmignac found no benefit to being invested in family-run businesses in emerging markets. Institutions that make and enforce governance rules tend to be weaker in poorer countries, leaving minority shareholders more exposed to exploitation.

One recent focus of such concerns is Indian conglomerate Adani, which last year was accused by American short seller Hindenburg of using close political ties to engage in stock manipulation and accounting fraud. The group has rejected the claims, and a year on, shares of its flagship company Adani Enterprises are almost back where they were.

At Tesla, the governance mess is one explanation for a roughly 20% fall in the stock this year, even as the likes of Microsoft and Nvidia, fellow members of the Magnificent Seven, have risen. These companies are sometimes considered peers because of their focus on artificial intelligence, but Musk last month threatened to take his AI interests elsewhere if he didn't control 25% of Tesla, compared with about 13% today. Over five years, the stock is still up roughly 10-fold.

Whether Musk would actually neglect his single most valuable asset is doubtful. There may be a way to square the circle with a new, supervoting Tesla share

class—the same sort Mark Zuckerberg at Meta and Larry Page and Sergey Brin at Google parent Alphabet own. At face value, though, shareholders have an unappealing choice between, on the one hand, another hugely dilutive pay deal to replace the rescinded 2018 one and, on the other, losing Musk's attention.

The drama, which will continue to play out noisily in the coming months, seems to be confirming an old truism: Good governance doesn't matter until suddenly it does.

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By Liam Denning
Opinion

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Elon, It's Time for a Tesla Buyback. Ugh: Liam Denning

By Liam Denning 2024-02-16T06:00:15205-05:00

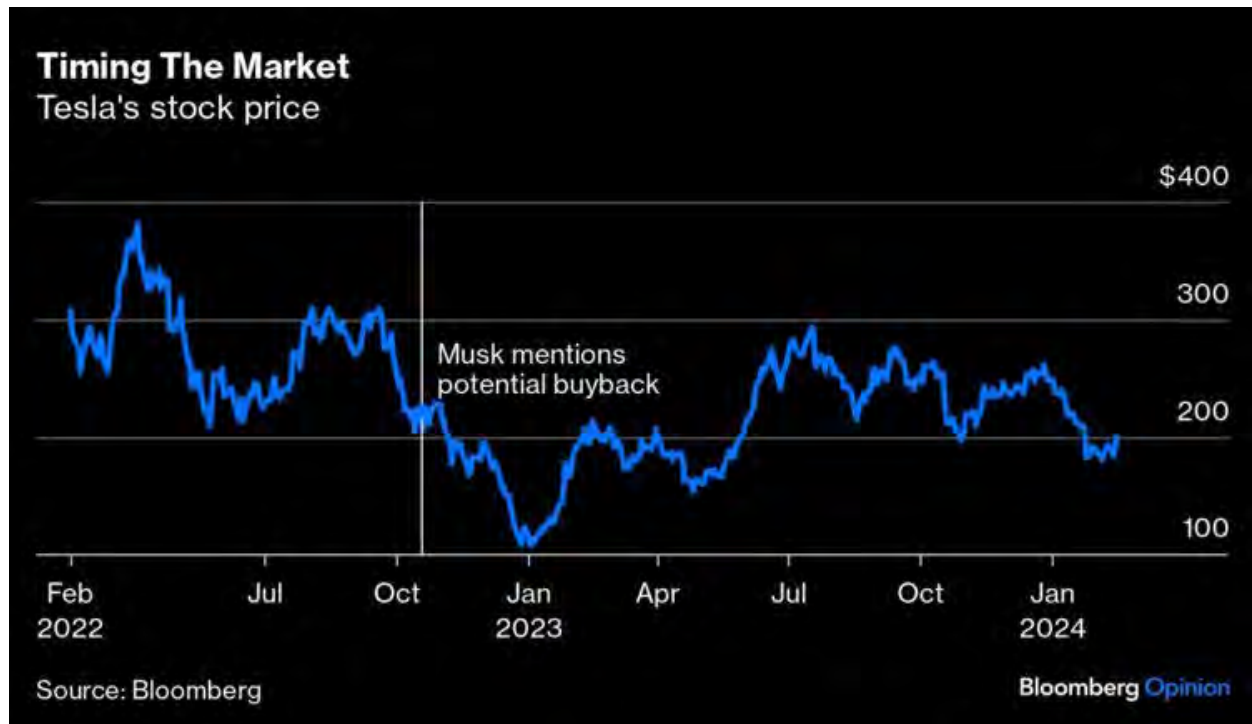
Tesla Inc. is a car manufacturer that pitches itself, very successfully, as a technology hothouse. So perhaps it will take the most tech-like step possible in 2024: Announce a big stock buyback. Conversely, Tesla is a tech wannabe that is, in essence, a car manufacturer. In which case, maybe it will ... launch a buyback.

Tesla's stock has had a miserable couple of months, dropping by roughly a quarter since its most recent peak in late December and risking its membership of the stock market's Magnificent Seven. Meanwhile, that Detroit dinosaur General Motors Co. has been racing along since it announced a \$10 billion buyback in November.



Elon Musk would surely scorn taking cues from GM (he reserves that for the likes of @ScottAdamsSays these days). But how about Silicon Valley? With Meta Platforms Inc., Uber Technologies Inc. and even Airbnb Inc. – which only went public a few years ago – announcing [big buybacks](#) and dividend debuts, Tesla's chief executive might feel more comfortable hopping on that bandwagon. There are several tactical reasons to do so, albeit with one fundamental drawback.

Back in October 2022, Musk said on an earnings call that a potential buyback of perhaps \$5 billion to \$10 billion had been debated "extensively" by that hothouse of candid back-and-forth known as the Tesla board. Funnily enough, this came just after the stock had dropped by more than a quarter over the prior month. Even funnier, this all coincided with Musk's tortuous takeover of Twitter Inc., now dubbed X, and his rampant [selling of Tesla stock](#), fueling its dive as that year closed.



I wrote at the time that it made little sense to announce a buyback when Tesla was also touting a 50% annual growth target for vehicle production. Expansion like that requires a lot of cash, even before getting to the side hustles of humanoid robots and such. Plus, investors buy this stock, at huge earnings multiples, for the promise of growth. They want Tesla to do magic stuff with the cash, not give it back.

Some 16 months on, the growth target has [just been ditched](#) and Tesla's latest magic trick, the Cybertruck, offers spectacle but leaves its audience a touch too baffled. The stock has spent February bouncing along sideways with a floor coalescing around \$180, although it made a spirited run at \$200 on Thursday. But with growth in electric vehicle sales [slowing in general](#), no growth target and pressure on margins unlikely to have abated, weak sales or financial results come April could break that lower resistance. Meanwhile, Tesla's board is surely having an extensive debate right now about how to pay Musk to stick around after he [essentially threatened](#) to take his artificial intelligence ideas – the Dojo mojo, as it were – elsewhere and a Delaware court then [struck down](#) his prior package. (Musk's lawyers will discuss requesting a stay of that order with the litigant, pending a [potential agreement](#)).

A buyback would offer a counter to both of these unhelpful narratives. Yes, Tesla is “between two major growth waves” but here's some money while you wait for the next one to raise you Mars-ward. And yes, keeping the Technoking onboard might require some major dilution of other shareholders, but Tesla could offset a bit of that with some repurchases – mostly optically, but anyway. With net cash of about \$19 billion and forecast free cash flow of almost \$14 billion over the next two years, it also looks affordable.

Buybacks are like accelerated dividends, declarations of better times to come and financial strength; not dissimilar to the various teases Musk sprinkles on earnings calls or his X account: The visions of robotaxis and robots or the potential for Tesla's market cap to reach double that of Saudi Arabian Oil Co. (it's currently about 30%).

In that sense, a Tesla buyback, even if aligned with the tech zeitgeist, would also have something in common not only with GM but those other old industrial giants struggling with a changing world: Oil majors. GM messed up badly on electrification and autonomy; the buyback [buys time](#) for a fix. Big Oil, meanwhile, is squeezed between the shadow of energy transition and the [disinterest of tech-dazzled investors](#); mega-payouts keep it in the game until sentiment turns (maybe). This is the sort of company you might expect for an autos manufacturer, not an AI pioneer.

Therein lies the strategic risk around what looks like a tactical layup. Tesla's problem in 2024 is that it is a growth stock now shorn of a growth target and lacking a clear, near-term catalyst. A buyback might provide that but only at the cost of confirming that Tesla needs it.

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- 1. There is an endless debate over Tesla's identity as either a car company, or an energy company, an artificial intelligence or technology company et al. But given that the selling and leasing of vehicles has generated 96% of Tesla's gross profit over the past three years, I'm going to lean toward car company.
- 2. All else equal, if Tesla wanted to grant Musk enough stock to reach the 25% ownership threshold he has mentioned, this would require an extra 513 million shares, based on the current share count and Musk's existing stake of 12.9%. If Tesla first bought back \$10 billion of its stock from non-Musk shareholders at the current price of about \$194, the company would repurchase about 52 million shares. This would, by default, raise Musk's existing stake slightly to 13.1%, meaning Tesla would need to grant him instead about an extra 500 million shares to reach the 25% level. This assumes his existing options package is void following the Delaware judgment.

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Feb. 15, 2024, 2:38 PM PST

Why Elon Musk Moved SpaceX's Incorporation to Texas: QuickTake

By Madlin Mekelburg

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Why Elon Musk Moved SpaceX's Incorporation to Texas: QuickTake

By Madlin Mekelburg2024-02-15T17:38:13001-05:00

The tiny state of Delaware has long been the most popular home for US corporations: almost 70% of Fortune 500 companies are incorporated there. A number of business titans are challenging the state's power over companies, foremost among them Elon Musk. Last year, he moved the incorporation of two of the six companies he controls – X Corp. and the Boring Company – from Delaware to Nevada, where his xAI was situated to start with. Now, he's moved two more out of Delaware, [taking the incorporation](#) of Neuralink Corp. to Nevada [and that](#) of SpaceX to Texas, where he also hopes to move Tesla Inc.

1. Why is Delaware the popular choice for incorporation?

The First State has long been the destination of choice for companies seeking to incorporate, due to a well-developed set of corporate-governance laws and 125 years of case decisions out of state courts that provide robust protections for board directors and executives. [Chancery Court judges](#) in the state are recognized as business-law experts who can hear cases on a fast-track basis. Most high-profile merger-and-acquisition disputes are litigated in Delaware in non-jury cases. Even foreign companies come to the state to have corporate disputes decided.

2. What's Musk's beef with Delaware?

The billionaire has faced two legal setbacks in Delaware. In late January, a Delaware judge voided his \$55.8 billion Tesla compensation package – the largest in US corporate history – after an investor claimed it was flawed by conflicts of interests and misleading disclosures by the electric car company. Afterward, Musk said he would summon shareholders to vote on moving Tesla's incorporation to Texas. In 2022, [the same Chancery Court judge](#) repeatedly dealt Musk setbacks in pretrial rulings concerning his effort to back out of his \$44 billion offer to buy Twitter Inc., which is now known as X. He eventually gave up the effort. After the setback on his pay package, Musk posted on X: "Never incorporate your company in the state of Delaware."

3. Why reincorporate in Nevada?

Nevada's corporate laws offer more protections from investor suits against executives. Plus, the state does not have a corporate income tax or franchise tax for corporations. Other companies, including travel website TripAdvisor, want to follow X's relocation to Nevada, but some TripAdvisor shareholders [have sued to block](#) the move, saying owner Greg Maffei wants to go to a state whose "race-to-the-bottom" corporate liability laws will harm investors.

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4. Why Texas?

Texas has been luring chief executive officers and their companies for years by touting its light regulatory touch and low taxes – the state does not tax income or capital gains for individuals. Plus, Musk already has a massive footprint there. Tesla's headquarters have been located in Austin since 2021 and SpaceX has testing, manufacturing and production facilities across the state. The politics of the Lone Star State could also be appealing for Musk. Texas lawmakers recently banned public universities from maintaining offices of diversity, equity and inclusion, taking on a subject that the billionaire [has often criticized](#).

5. Are there risks to reincorporating in Texas?

Unlike Delaware, Texas does not have established business courts with judges well versed in business law. Leaders in the state are hoping to change that. Last year, they moved to establish such courts in major Texas cities in an effort to streamline proceedings for corporate disputes. The courts won't open until September, and much about how they will operate has yet to be established. The state has struggled to recruit judges with 10 or more years of experience in complex civil business litigation due to its refusal to boost pay for judges. The starting salary for a judge on the business courts would be \$140,000. By comparison, a Delaware chancery judge starts at almost \$185,000.

--With assistance from Jef Feeley.

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That's a wrap...or not? Regulatory data incident investigation resolutions and the path forward

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Stephen Piepgrass, Gene Fishel, Sadia Mirza

A man types into a keyboard during the Def Con hacker convention in Las Vegas, Nevada, U.S. on July 29, 2017. REUTERS/Steve Marcus Purchase Licensing Rights , opens new tab

February 14, 2024 - As we discussed in part three of this series, "Navigating the complexities of regulatory data incident investigations , opens new tab," Reuters Legal News and Westlaw Today, Dec. 12, 2023, when an organization is the subject of regulatory data incident investigations, it must navigate a tangled regulatory web. Extricating itself from that web is the ultimate goal. But what form does that take?

Resolutions manifest through myriad permutations, but if the investigation does not resolve via litigation or settlement, the outcome can be frustratingly nebulous. Regardless, an organization's subsequent focus should be on compliance and avoiding the regulatory radar; thus, it should plan accordingly.

In the fourth and final installment of this series, we discuss the varied ways a data incident investigation concludes and how an organization can forge a successful path ahead in its aftermath.

Forms of data incident investigation resolutions

Depending on the size of the breach and the number of regulators involved, a data incident investigation can take years to resolve. State attorneys general, federal regulators, and state administrative agencies generally move very deliberately, and the more regulators involved the longer the investigation typically takes, particularly with larger incidents. Ultimately, such investigations will resolve through one of four ways: litigation, settlement, a closing notice, or silence.

Settlement

Investigations always risk developing into litigation that exposes organizations to potential court-imposed orders and judgments. Regulators may file court actions prior to negotiations or due to a breakdown in negotiations. Regardless of the order of events, data incident investigations often end in a negotiated settlement.

A settlement can take a variety of forms with different states, such as a Letter Agreement, Settlement Agreement, Assurance of Voluntary Compliance (AVC), Assurance of Discontinuance (AD), Consent Order, Consent Decree, Consent Judgment, or Stipulation of Judgment. Some regulatory agencies, especially on the federal side, have set forms through which they must resolve a case. State entities, however, vary widely, and the parties often may negotiate any of the above forms.

Whether a form is filed in court is dependent on each state's practices and procedures. Generally, Letter Agreements and Settlement Agreements are most often not filed in court, whereas AVCs and ADs likely will be filed in court, although not always. Consent Orders, Consent Decrees, Consent Judgments, and Stipulations of Judgment are almost always filed in court.

Whatever the form, agreements typically have two major components: injunctive relief and monetary relief. Regulators propose injunctive terms to improve organizations' security systems and related processes, and to enhance data protection and privacy measures. These terms could include, among other things, requiring segmentation or encryption of data, limiting access to databases, creating risk management teams, devoting a specific number of personnel to information security, adjusting how outside vendors are managed, or drafting more robust privacy policies.

Negotiations over injunctive relief can last for extended periods as organizations detail their current operations to regulators and regulators subsequently assess effective changes to implement.

Beyond reviewing company-specific goals, regulators also consider broader policy objectives when fashioning injunctive terms. This may include pushing an industry toward adopting newer, more comprehensive practices to avoid future similar incidents. A regulatory body will often highlight these developments through press releases following settlement.

Organizations and associated counsel should therefore routinely monitor regulatory developments in this area to keep abreast of shifting parameters.

Monetary penalties, especially larger ones, offer regulators a higher-profile mechanism to advance their policy goals, as they are more likely to garner press attention and the attention of the broader industry. Regulators advocate for amounts that correspond to the perceived egregiousness of the incident, with higher amounts sought where there are large numbers of affected consumers involving more sensitive personal information.

While monetary payments are frequently punitive in nature, regulators also use monetary relief to signal to organizations to invest in robust data protection on the front end or pay on the back end. Settlements may also involve restitution for consumers when the incident has led to consumer loss, in addition to penalty amounts.

Finally, regulators typically insist on enforcement tools within an agreement, such as routine assessments where organizations report back to regulators at set intervals detailing compliance with settlement provisions.

Closing notice and silence

On rare occasions, a regulator will send a "close out" notice that they have closed the investigation and will take no action. Regulatory bodies often avoid such definitive statements because, although they are non-binding, they potentially expose the agency to public scrutiny if it later reopens the investigation because of new information or a change in administrations. Regulators thus prefer to reserve their rights by not "officially" closing a matter.

Sometimes frustratingly, a regulator may simply drop an investigation and never alert the subject organization of such. This is a common occurrence characteristic of data incident investigations. Regulators receive hundreds if not thousands of data incident reports every year, and their silence is often because of this deluge and the time it takes to officially "close out" inquiries by alerting every subject organization.

Additionally, there is no set time that must pass after an organization's last interaction with a regulator before it can assume an investigation is complete, which may be measured in years. Organizations must simply forge ahead despite this uncertainty with renewed vigilance and dedicated compliance in its cybersecurity and privacy efforts.

Forging a successful path forward in an investigation's aftermath

Regardless of an investigation's outcome, an organization that controls or processes personal identifying information must comprehensively reassess cybersecurity measures, privacy policies, and incident response plans in its aftermath to identify gaps and take corresponding action to reduce the risk of future incidents and associated regulatory scrutiny.

Regulators assume that an organization under investigation has been put on notice and therefore should devote adequate resources to cybersecurity and privacy moving forward. Indeed, regulators have historically viewed organizations that suffer multiple incidents through a harsher lens.

While not an exhaustive list, below are some general measures that companies should consider to better position themselves should regulators ever come knocking:

- Regulators frequently request details about the security protocols and measures implemented prior to any incident. By establishing an information security program based on recognized frameworks like the CIS Security Controls or the NIST Cybersecurity Framework, organizations can demonstrate their proactive efforts to secure data. However, cybersecurity

is not a one-time task; it necessitates ongoing monitoring and assessment of cybersecurity risks, and requires businesses to regularly review and update their security programs. It is worth noting that the "reasonableness" of an organization's information security program depends on various factors, including the nature and volume of the data they handle or process. As a result, security measures that are deemed sufficient for one business may not be adequate for another. For instance, a small chain of smoothie shops processing only credit card numbers is not expected to invest in the same level of security resources as a tax service handling highly sensitive taxpayer information.

- Even the best cybersecurity measures and privacy policies can easily be circumvented if an organization does not adequately train its employees on best practices and company policies. Businesses should consider including not only instructional materials such as training videos, but also interactive exercises such as random "social engineering" tests that assess employees' vigilance. Methods such as fake "phishing" emails or "vishing" and "smishing" phone messages mirror current techniques that cybercriminals employ and provide illustrative examples for employees. Further, educating employees on how to identify and report security incidents through dedicated communication channels is equally important. Regulators often show interest in employee training, so investing time and resources in this area could yield significant benefits in the long run.

- Finally, tabletop exercises, which are simulated attacks designed to test an organization's ability to respond to a cyber incident, are also an effective way for an organization to measure preparedness. These exercises typically require the expertise of external professionals to run specific security incident scenarios, which can help organizations identify potential vulnerabilities and shortcomings in their existing plans. Tabletop exercises offer team members the chance to comprehend their roles and responsibilities during an incident, thereby boosting their preparedness and confidence to manage real-world situations. They also promote collaboration and communication across various departments, enhancing overall coordination during an actual incident. Furthermore, these exercises may assist organizations in complying with regulatory requirements related to cybersecurity planning and preparation. For a tabletop exercise to be effective, it should involve decision-makers at all levels, from IT and security staff to C-suite executives and legal counsel. However, it's not necessary for all these individuals to participate simultaneously. Tabletop exercises are often divided into "technical" and "executive" sessions, reflecting the kind of incident response communications and collaborations an organization would encounter in reality.

Conclusion

A regulatory data incident investigation can follow several paths to conclusion, including through litigation or various forms of settlement. At times that conclusion may not be definitive as regulators may simply drop the investigation without further notice.

Regardless of the outcome, a regulatory investigation serves as a signal to an organization and as such it should endeavor to bolster its cybersecurity systems, privacy measures, and incident response plans. By investing in adequate resources and remaining vigilant of shifting threats and a changing legal landscape, an organization can avoid the worst fates of future potential investigations.

Stephen Piepgrass is a regular contributing columnist on data privacy law at Reuters Legal News and Westlaw Today.

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Jamie Dimon Is Desperate to Pin the Jeffrey Epstein Scandal on Jes Staley; Bloomberg News Is Carrying His Water — Again

 wallstreetonparade.com/2024/02/jamie-dimon-is-desperate-to-pin-the-jeffrey-epstein-scandal-on-jes-staley-bloomberg-news-is-carrying-his-water-again

By Pam Martens and Russ Martens: February 16, 2024 ~

After hurling salacious allegations for months against Jes Staley in a federal lawsuit JPMorgan Chase had brought against its former executive, the bank decided last September to quietly settle the case without disclosing the terms.



Jeffrey Epstein (left);
Jamie Dimon (right).

The bank sued Staley *after* it had been sued by victims of sex trafficker Jeffrey Epstein and *after* it had been sued in a separate lawsuit by the Attorney General of the U.S. Virgin Islands, where Epstein owned a private island compound that was a frequent venue of Epstein's sex trafficking of minors. Lawyers for the U.S. Virgin Islands charged that JPMorgan Chase had "actively participated in Epstein's sex-trafficking venture from 2006 until 2019." (Both cases were settled last year by the bank, with it paying a whopping \$290 million to the victims and \$75 million to the U.S. Virgin Islands.)

The bank's lawsuit against Staley appeared to be a damage control effort to redirect the media's attention to Staley and away from the man he reported to – Jamie Dimon, the Chairman and CEO of JPMorgan Chase who has survived a breathtaking array of criminal charges against the bank while he has sat at its helm. (See JPMorgan's Board Made Jamie Dimon a Billionaire as the Bank Rigged Markets, Laundered Money, and Admitted to Five Felony Counts.)

While evidence submitted to the court showed Staley was deeply involved with Epstein, the evidence is also overwhelming that more than a dozen other bank personnel, including top executives, facilitated Epstein's ability to keep his sex trafficking of minors' scheme alive.

A Memorandum of Law filed by the U.S. Virgin Islands made the following points:

"Even if participation requires active engagement...there is no genuine dispute that JPMorgan actively participated in Epstein's sex-trafficking venture from 2006 until 2019. The Court found allegations that the Bank allowed Epstein to use its accounts to send dozens of payments to then-known co-conspirators [redacted] provided excessive and unusual amounts of cash to Epstein; and structured cash withdrawals so that those withdrawals

would not appear suspicious ‘went well beyond merely providing their usual [banking] services to Jeffrey Epstein and his affiliated entities’ and were sufficient to allege active engagement.”

The U.S. Virgin Islands alerted the court to the unfathomable sums of *hard cash* that Epstein was able to take from the accounts he maintained at JPMorgan Chase without the bank filing the legally mandated Suspicious Activity Reports (SARs) to the Financial Crimes Enforcement Network (FinCEN). The U.S. Virgin Islands tallied up the hard cash dispersals as follows:

“Between September 2003 and November 2013, or approximately ten years, JPMorgan handled more than \$5 million in outgoing cash transactions for Epstein — ignoring its own policy discouraging large cash withdrawals....”

The U.S. Virgin Islands’ attorneys cite to internal emails at JPMorgan Chase showing that employees at the bank were aware of Epstein’s “[c]ash withdrawals ... made in amounts for \$40,000 to \$80,000 several times a month” while also being aware that Epstein paid his underage sexual assault victims in cash.

On August 25 of last year, JPMorgan Chase filed a document with the court as part of a discovery demand showing that, in addition to Staley, 14 of its executives, private bankers and other staff had made visits to Epstein’s private residences. One of those employees, Justin Nelson, visited Epstein’s residences more times than Staley. Nelson was at Epstein’s Manhattan mansion – a key location of the sex trafficking operation – 12 times and one time at Epstein’s Zorro Ranch in New Mexico – an additional location of the sex trafficking ring. That’s a total of 13 visits to the residence of a sex trafficker. Staley’s visits to Epstein’s residences tally up to 11, according to JPMorgan’s chart. (See pages 3, 4 and 5 at this link.) Eight of Nelson’s visits to Epstein’s residences occurred after 2013, the year that the bank claims it fired Epstein as a client. Disbursements from Epstein accounts were occurring long after 2013 according to court documents, raising questions about just when, or if, Epstein was terminated as a client from the Private Bank or the bank’s brokerage unit, J.P. Morgan Securities. Nelson was dually employed at both units.

Notwithstanding this hard evidence of JPMorgan Chase’s culpability in the Epstein saga, on February 7 of this year – months after the bank had quietly settled its case against Staley and the matter had disappeared from news headlines – Bloomberg News inexplicably decided to put Staley and Epstein back in its headlines. (Paywall.) In an article written by Harry Wilson, Ava Benny-Morrison, and Jason Leopold, one sentence jumps out. It reads: “The bank, which through Staley served Epstein as a client....”

The bank’s own chart, linked above in the ninth paragraph, shows that the following 14 individuals, *in addition to Staley*, were making visits to Epstein’s private residences while employed at the bank:

Paul Barrett (Managing Director, Private Bank); Mary Casey (Managing Director, Private Bank); John Duffy (CEO, Private Bank); Mary Erdoes (CEO, Asset & Wealth Management); David Frame (Global Chief Executive, Private Bank); Christopher French (Managing Director, Private Bank); Joanna Jagoda (Assistant General Counsel, Legal); Jeffrey Matusow (Managing Director, Private Bank); Thomas McGraw (Managing Director, Private Bank); Paul Morris (Banker, Private Bank); Justin Nelson (Managing Director, Private Bank); Carolyn Reers, Managing Director, Private Bank); James von Moltke (job title not provided by the bank).

If Dimon is fearful of Staley providing evidence against the bank in the Epstein matter to the criminal division of the U.S. Department of Justice, it would have an incentive to continue to undermine Staley's credibility in the press.

What was JPMorgan Chase's incentive to keep such a clearly dangerous man as Epstein as a client? The U.S. Virgin Islands makes a very credible case that the bank was getting lots of profits – both from trading in Epstein's own accounts as well as his referrals of rich clients to the bank. It tells the court in one filing:

"In 2003, Epstein was, by double, the top revenue generator in the Private Bank, and the source of Google co-founder Sergey Brin ('one of the largest [relationships] in the Private Bank, of +\$4BN'), Glenn Dubin (billionaire founder of Highbridge), and many other ultra-wealthy clients and connections, which would come to include Bill Gates, Leon Black, Larry Summers, the Sultan of Dubai, Prince Andrew, Ehud Barak, Thomas Pritzker, Lord Peter Mandelson, and Prime Minister Netanyahu."

And what would be the incentive for Bloomberg News to carry water for Jamie Dimon?

Michael Bloomberg, the former Mayor of New York, is the majority owner of the publishing and data terminal empire that has, for years, published flattering articles about Jamie Dimon. In 2016, Michael Bloomberg even co-authored an opinion piece with Dimon. The same year, the New York Post reported that JPMorgan Chase was the second largest customer of Bloomberg's data terminal business with 10,000 leases of Bloomberg's terminals. At the time, the terminals cost around \$21,000 each per lease, per year, or approximately \$210 million being forked over by JPMorgan Chase to Michael Bloomberg's company annually. Bloomberg's data terminals are the cash cow of the company.

During JPMorgan Chase's London Whale scandal in 2012 and 2013, where the bank gambled with bank depositors' money in its federally-insured bank by making exotic derivative trades in London and losing at least \$6.2 billion, Michael Bloomberg was Mayor of New York City. Instead of condemning this outrageous risk-taking with federally-insured deposits, Mike Bloomberg was quoted in the Wall Street Journal calling Dimon "a very smart,

honest, great executive,” adding “The controls failed. He’ll look at that and fix it.” That statement appeared in May of 2012. The five felony counts brought by the Justice Department and admitted to by the bank, followed from 2014 to 2020.

Related Article:

The Craziest Video You’ll Ever Watch on JPMorgan’s Jamie Dimon

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- Regulatory issues stalled the merger for more than two years
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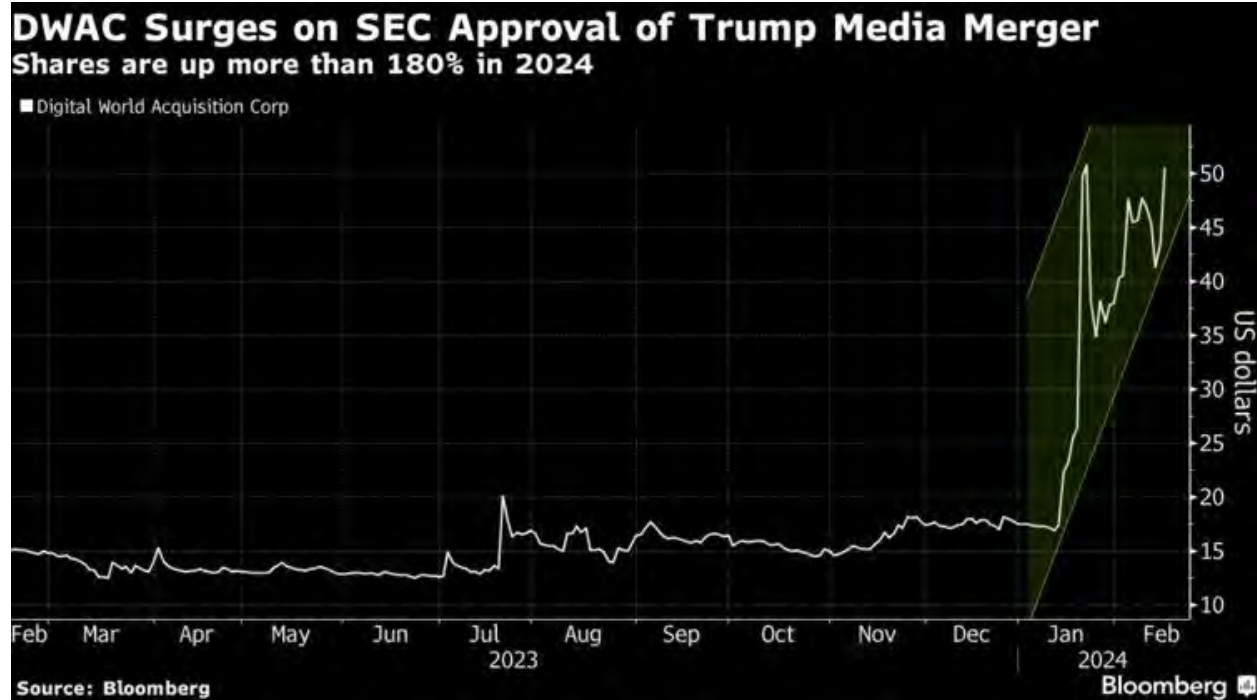
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- Shares of Digital World have more than tripled this year

The blank-check firm that's been looking to take Donald Trump's media company public soars after receiving a long-awaited nod from the US Securities and Exchange Commission.

Shares of Digital World Acquisition rose 16% Thursday to close at \$50.56 a share after the SEC declared the registration statement for its proposed business combination with Trump Media & Technology Group effective.

Regulatory issues have held up the special purpose acquisition company's merger with Trump's media company, which owns the social media platform Truth Social, for more than two years.

The "biggest hurdle for the merger is now passed," said **Matthew Tuttle**, the chief executive officer of Tuttle Capital Management, adding that all that's needed now is a shareholder vote.



Digital World expects to announce the date of the special meeting of its stockholders within two business days, the company said in a Wednesday statement.

“Truth Social was created to serve as a safe harbor for free expression and to give people their voices back. Moving forward, we aim to accelerate our work to build a free speech highway outside the stifling stranglehold of Big Tech,” Devin Nunes, chief executive officer of Trump Media & Technology Group, said in a press release.

This week Digital World also amended its registration statement to announce new proposed board members. Among them are former officials who served under the Trump administration, Robert Lighthizer, who was US trade representative, and Linda McMahon, the former head of the Small Business Administration and one-time CEO of World Wrestling Entertainment Inc.

Read more: Trump Fuels Meme-Like Rallies in Stocks Tied to 2024 Bid

Shares of Digital World are up 189% so far this year, lifted in part by Trump’s campaign for the Republican presidential nomination, where he’s long been seen as the front-runner.

In addition to the stock rally, high call volume traded in Digital World — led by action in out-of-the-money contracts seeking added upside. Leading the activity was a call that expires on Friday and requires an added 19% rally to be worth something. The number of calls outnumbered puts four to one on Thursday, with investors bidding up the former more than the latter — signaling added demand for short-term upside exposure, relative to downside protection.

Other stocks tied to Trump that were also higher Thursday include video platform Rumble Inc., and Phunware Inc., a software company that designed the app for Trump's 2020 campaign. Shares for each company jumped more than 12% before paring gains, closing up 6.7% and 1.6%, respectively.

(Updates stock moves at market close throughout and penultimate paragraph on options.)

--With assistance from **Carly Wanna**.

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Judge Tosses Credit Suisse Investors' RICO Suit

By **Jessica Corso**

Law360 (February 15, 2024, 9:04 PM EST) -- A New York federal judge has thrown out a proposed class action lawsuit filed against Credit Suisse AG subsidiaries and the bank's auditor, KPMG, in the wake of the Swiss bank's sudden takeover, saying that suing investors could not skirt an earlier state ruling that found the case did not belong in the U.S.

U.S. District Judge Colleen McMahon on Wednesday dismissed the lawsuit against the bank, the auditor and dozens of individual officers and directors accused of violating Swiss law as well as the federal Racketeer Influenced and Corrupt Organizations Act.

According to Wednesday's 92-page opinion, the current suit was filed by shareholders Gregory Stevenson and Nicole Lawtone-Bowles after New York State Supreme Court Justice Andrea Masley threw out similar claims in a derivative lawsuit against the bank in April 2023. Justice Masley ruled that the case belonged in Switzerland where Credit Suisse was incorporated.

"In a patent and blatant effort to circumvent that ruling, plaintiffs — different individuals than who had sued in state court, but members of the same class who are represented by the same lawyers — have brought these actions, alleging strikingly similar violations of Swiss law against largely the same defendants," Judge McMahon said.

"I do not sit as a court of appeal over Justice Masley, but I believe her decision was correct," Judge McMahon said, dismissing the shareholders' breach of duty claim "because it is a claim that should be litigated in Switzerland, where Credit Suisse was incorporated and whose laws governed the bank's internal corporate affairs."

The dismissal of that claim was conditioned on KPMG and some individual defendants agreeing to Swiss jurisdiction.

The RICO claims, on the other hand, "are deficient on a number of grounds," Judge McMahon said.

The injury that the investors allege — a drop in the price of their stock — is also an injury to the corporation and the case should have been brought as a derivative claim, the judge said.

The claims are more properly brought as securities fraud claims, but with several of those already pending, Stevenson and Lawtone-Bowles needed a "hook to get into federal court" and found it in RICO, Judge McMahon said.

"They allege a twenty-year scheme of mismanagement carried out through a variety of criminal acts, only some of which qualify as predicate acts under the RICO statute and none of which is pleaded with particularity, despite the prolix 272-page amended class action complaint they filed," she said.

Attorneys for the parties didn't immediately respond to a request for comment.

The investors **alleged** in the May 2023 complaint that KPMG and the Credit Suisse defendants allowed a "common course of misconduct and civil conspiracy" to go on for more than a decade at the bank, which ultimately caused Credit Suisse to suffer over \$30 billion in losses, write-offs, penalties and fines, and significant harm to shareholders as its stock declined to \$2 per share.

Credit Suisse **was bought out** by UBS for \$3.2 billion last year following intervention by Swiss authorities who feared that uneasiness in the banking sector would engulf its second-largest bank.

Stevenson and Lawtone-Bowles are represented by Francis Bottini, Michelle Lerach and Albert Chang of Bottini & Bottini Inc., Byron Georgiou of Georgiou Enterprises and Alfred Yates of the Law Office of Alfred G. Yates Jr. PC.

Credit Suisse is represented by Herbert Washer, Jason Hall, Edward Moss, Tammy Roy, Britney Foerter and Philip McAndrews of Cahill Gordon & Reindel LLP.

KPMG is represented by Jamie Wine, Stephen Barry, Jason Hegt, Corey Calabrese and Scott Rothstein of Latham & Watkins LLP.

The case is Stevenson v. Thornburgh et al., case number 1:23-cv-04458, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Katryna Perera. Editing by Emily Kokoll.

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'Body Sculpting' Device Co. Faces Investor Suit Over Pricing

By **Emilie Ruscoe**

Law360 (February 15, 2024, 10:12 PM EST) -- Cosmetic medical device maker InMode Ltd. and certain members of its brass face claims in California federal court that they hurt investors, after trading prices for InMode shares sank because they allegedly misrepresented its product pricing and its U.S. Food and Drug Administration regulatory compliance.

In a putative class action **complaint** filed Tuesday in Los Angeles federal court, institutional investor the Cement Masons and Plasterers Local No. 502 Pension Fund alleged that InMode shares were artificially inflated between June 2021 and October 2023 due to the company's alleged misstatements about its prices and compliance.

Specifically, the pension claimed, InMode distorted the price points and demand for the medical equipment it sells, which includes so-called body sculpting devices.

"Despite making representations to the contrary throughout the class period, InMode heavily discounts almost every device it sells," the investor claimed, alleging InMode's sales employees are expected to give its dermatologist and medical spa clients discounts off list prices ranging from 16% to 40%.

The pension fund also claimed that the company's statements about compliance with FDA regulations were misleading. For one thing, it said, the company promoted off-label use of certain products in apparent violation of the FDA's prohibition against such marketing.

The fund also pointed out that for most of its history, the company didn't file device malfunction and injury reports with the FDA as required despite facing "dozens" of personal injury suits over its devices during that time.

According to the investor, reports in February and October of 2023 revealed some of the alleged misstatements. The February reports allegedly pushed down trading prices for InMode shares by \$1.21, from \$37.02 to \$35.81. In October, trading prices slid \$7.24, or nearly 26%, from \$27.99 to \$20.75.

On Monday, market records showed InMode closing out trading at \$23.77, up from the \$20.75 trading price at the end of the investor's proposed class period.

Alongside the company, the complaint names InMode's CEO Moshe Mizrahy, its Chief Financial Officer Yair Malca, its North American division president Shakil Lakhani, and its Chief Medical Officer Spero Theodorou.

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

The investors are represented by Jonathan D. Uslaner, Avi Josefson and Scott R. Foglietta of Bernstein Litowitz Berger & Grossmann LLP.

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

The case is Cement Masons and Plasterers Local No. 502 Pension Fund v. InMode Ltd. et al, case number 2:24-cv-01219, in the U.S. District Court for the Central District of California.



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Generac Brass Hid Inflation's Impact On Sales, Suit Says

By **Sydney Price**

Law360 (February 15, 2024, 7:07 PM EST) -- Executives and directors of generator company Generac have been hit with a shareholder derivative suit alleging they understated the damage inflation had on consumer spending and demand for the company's products.

According to the suit filed by Jeffrey Nykerk in Wisconsin federal court Wednesday, Generac Holdings Inc., which manufactures generators for residential and commercial customers, was damaged when it revealed in August 2023 that residential sales had dropped due to a weaker-than-expected demand environment though the company had previously issued an optimistic sales outlook.

In addition to nominal defendant Generac, the suit lists 11 individual defendants, including CEO Aaron Jagdfeld, Chief Financial Officer York A. Ragen and several directors.

The relevant period begins May 3, 2023, the day Generac told investors during an earnings call that gross sales from residential energy technology products and services were to deliver between \$300 million and \$350 million in sales growth for 2023. The company also gave investors the impression that investor sales should remain stable due to increasing power outages despite deteriorating economic conditions globally, the suit alleges.

However, a few months later, on Aug. 2, 2023, Generac revealed that residential sales had dropped about 44%. That day, the company revealed that "residential products were lower than expected as a result of a softer consumer spending environment that impacted shipments of home standby generators." The company's admission contradicted previous statements that emphasized macroeconomic conditions had no impact on Generac's generator sales, the suit states.

Following the announcement, Generac's shares fell \$42.61 per share, or about 28%, to close at \$110.77 per share on Aug. 3, 2023, according to the suit.

Additionally, the suit accuses CEO Jagdfeld of engaging in insider trading by selling 20,000 shares of common stock between June and August 2023 on inside information, receiving approximately \$2.6 million.

The suit further claims that during the relevant period, Generac overpaid by nearly \$1.5 million on common stock share repurchases.

Generac is facing a related securities class action pending in Wisconsin federal court, which also names Jagdfeld and Ragen as defendants, the complaint notes.

"As a direct and proximate result of the individual defendants' misconduct, Generac has lost and expended, and will lose and expend, many millions of dollars," the suit contends.

Nykerk accuses the individual defendants of violating the Exchange Act, breaching fiduciary duties, wasting corporate assets and of unjust enrichment.

Counsel for Nykerk declined to comment on Thursday. A representative of Generac did not immediately respond to a request for comment.

Nykerk is represented by Timothy Brown of The Brown Law Firm PC, and Peretz Bronstein and Eitan

Kimelman of Bronstein Gewirtz & Grossman LLC.

Counsel information for Generac and the individual defendants was not immediately available on Thursday.

The case is Nykerk v. Jagdfeld et al., case number 2:24-cv-00208, in the U.S. District Court for the Eastern District of Wisconsin.

--Editing by Kristen Becker.

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Investor In Battery Co. Microvast Sues Over De-SPAC Merger

By **Leslie A. Pappas**

Law360 (February 15, 2024, 7:51 PM EST) -- Leaders of lithium-ion battery maker Microvast Holdings Inc. and the blank-check company that took it public in July 2021 were so "personally hellbent on completing the merger" for their own benefit that they deceived public investors into approving it, a shareholder alleges in a new Delaware Chancery Court suit.

In a 124-page derivative complaint filed late Wednesday, Microvast shareholder Denish Bhavsar accuses 11 of the company's current and former officers of breach of fiduciary duty, unjust enrichment, abuse of control, gross mismanagement, waste of corporate assets and other claims related to the 2021 deal.

"The company has been substantially damaged as a result of the individual defendants' knowing or highly reckless breaches of fiduciary duty and other misconduct," the complaint says.

Founded in 2006 and headquartered in Stafford, Texas, Microvast designs and manufactures battery components and systems for electric vehicles and large energy-storage systems.

The company's battery separator plant was among one of 21 projects the Biden administration selected in a \$2.8 billion plan to boost battery production in the U.S., but the administration **canceled negotiations with the company** in May 2023 after Republican lawmakers accused the tech firm of links to the Chinese Communist Party.

The cancellation **sparked a class action** in the Southern District of Texas from shareholders who alleged the company knew the deal had fallen through months before it was made public. Bhavsar also filed a **derivative complaint** on behalf of Microvast in the Southern District of Texas earlier this year against many of the same defendants as his new Delaware Chancery Court case.

Microvast went public in July 2021 through a merger with Tuscan Holdings Corp., a special-purpose acquisition company that was founded in 2018 and **raised \$240 million in an initial public offering** in 2019.

Led by CEO Stephen Vogel and CFO Ruth Epstein, Tuscan Holdings Corp. told investors at the time it planned to do a business combination with a company in the cannabis industry. Instead, Tuscan **announced in February 2021** that it would combine with Microvast in a deal that valued the electric-vehicle battery designer at more than \$3 billion.

Microvast's senior leadership, including co-founder and CEO Yang Wu, were expected to retain their positions as company executives. Vogel and Dr. M. Stanley Whittingham, a chemistry professor, would join the new Microvast board of directors, the merger announcement said.

When the deal closed in July 2021, the combined company got approximately \$822 million in cash — made up of approximately \$282 million in cash held in trust by Tuscan and the proceeds of a \$540 million common-stock private investment in public equity, or PIPE, from leading institutional investors, according to press releases and regulatory filings at the time.

Vogel and Epstein are named as defendants in Bhavsar's complaint, along with former Tuscan directors Stefan M. Selig, Richard O. Rieger and Amy Butte.

Wu and Whittingham are included in the list of legacy Microvast defendants, along with legacy Microvast CFO Yanzhuan Zheng and directors Arthur Wong, Craig Webster and Wei Ying.

The complaint alleges the business combination was conflicted from the start, with all Tuscan defendants beset with conflicts of interest through their involvement with numerous other SPACs.

The joint press announcement about the merger in February 2021 included representations about Microvast's business that were "patently false" and factually inaccurate, the complaint says.

The proxy statement told investors that Microvast had a "robust, and probability weighted, pipeline estimated at \$4.1 billion through 2025" and had signed contracts worth more than \$1.5 billion through 2027, but in reality, Microvast had "abandoned these outrageous projections weeks earlier yet chose not to inform the Tuscan defendants, who chose not to inquire," the complaint says.

Unbeknownst to shareholders approving the merger, Microvast's business "was close to non-operative and offered little in the way of financial growth or success," the complaint says.

The complaint seeks to remedy alleged wrongdoing committed from November 2020 through the end of March 2022, when Microvast revealed that it missed its financial projections for the 2021 fiscal year by \$78 million.

The complaint notes that a former Tuscan shareholder and current Microvast investor Matt Jacob filed a class action in Delaware's Court of Chancery in July 2022 in response to the merger, while filing an amended complaint in the case earlier this month.

None of the parties immediately responded Thursday to Law360's requests for comment.

Bhavsar is represented by Timothy Brown of The Brown Law Firm PC, Peretz Bronstein and Eitan Kimelman of Bronstein Gewirtz & Grossman LLC, and Brian E. Farnan and Michael J. Farnan of Farnan LLP.

Counsel information for the individual defendants was not immediately available.

The case is Denish Bhavsar v. Stephen A. Vogel et al., case number 2024-0137, in the Court of Chancery of the State of Delaware.

The earlier-filed class action is Matt Jacob v. Stephen A. Vogel et al., case number 2022-0600, in the Court of Chancery of the State of Delaware.

The Texas case is Bhavsar v. Microvast Holdings Inc. et al., case number 4:24-cv-00372, in U.S. District Court for the Southern District of Texas.

--Additional reporting by Tom Zanki, Caleb Drickey, Peter McGuire and Sydney Price. Editing by Philip Shea.



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Citadel Securities, Others Beat Biotech Spoofing Suit, For Now

By **Katryna Perera**

Law360 (February 15, 2024, 9:00 PM EST) -- A New York federal judge has adopted in full a magistrate judge's recommendation to toss a suit accusing several broker-dealers, including Citadel Securities LLC and Virtu Americas LLC, of carrying out a spoofing scheme that repeatedly drove a biotechnology company's share price down, saying he agrees with the report's finding that the suit fails to show that the alleged scheme caused lower stock prices in every instance.

U.S. District Judge Gregory H. Woods issued an **order** on Wednesday saying he was adopting U.S. Magistrate Judge Gary Stein's "thoughtful and well-reasoned" **report** and recommendation and would dismiss the suit with leave to amend.

Northwest Biotherapeutics Inc. **filed suit** in 2022 against eight broker-dealers, alleging they engaged in a "high-speed bluffing" scheme to drive the biotechnology company's share price down, violating federal securities laws and constituting fraud under New York state common law.

Northwest, which is developing a drug for brain cancer patients, said the brokers' alleged market manipulation has impaired its ability to raise funds from public markets and could affect its ability to get "life-saving" cancer treatments quickly to market.

But the broker-dealer defendants, which also include Canaccord Genuity LLC, Susquehanna International Group LLP and its unit G1 Execution Services LLC, Instinet LLC, Lime Trading Corp. and GTS Securities LLC, last year moved to dismiss the action, arguing the suit fails to plead a manipulative act, scienter, loss causation and reliance.

Following the brokers' motion to dismiss, Judge Stein issued his report and recommendation in December and concluded that while Northwest adequately pled most of its claims, it did not show loss causation.

"At most, plaintiff's allegations suggest a theoretical possibility of a long-term price impact from spoofing. That is not enough," Judge Stein wrote. "Plaintiff must allege sufficient facts to 'nudge[] their claims across the line from conceivable to plausible.'"

The judge said the suit's allegations sufficiently plead that the alleged spoofing scheme drove down the price of Northwest's stock in at least 30 identified instances but that the company has failed to provide a sufficient explanation as to "how the various stock sale prices were 'formulaically derived' from the closing prices on the days when spoofing episodes took place."

With exception to the 30 identified instances directly related to stock sales, Judge Stein said other sales of shares are too far removed from the alleged spoofing episodes to plead loss causation.

"By plaintiff's own definition (as indicated by the fact that plaintiff did not designate any of these [other] entries on its chart with an asterisk), the alleged spoofing episodes connected to these sales did not take place in the final hour of trading," the report states. "For most of these stock sales, the spoofing episodes took place in the morning, from four to more than six hours before the end of the trading day. This is too far removed from the corresponding sale to be considered 'close.'"

Counsel for Northwest declined to comment on Thursday and counsel for the defendants did not immediately respond to requests for comment.

Northwest Biotherapeutics is represented by Laura H. Posner, Raymond M. Sarola and Michael B. Eisenkraft of Cohen Milstein Sellers & Toll PLLC.

The defendants are represented by Quinn Emanuel Urquhart & Sullivan LLP, Morrison Foerster LLP, Katten Muchin Rosenman LLP, Greenberg Traurig LLP, Keesal Young & Logan, Paul Weiss Rifkind Wharton & Garrison LLP and Ballard Spahr LLP.

The case is Northwest Biotherapeutics Inc. v. Canaccord Genuity LLC et al., case number 1:22-cv-10185, in the U.S. District Court for the Southern District of New York.

--Editing by Vaqas Asghar.

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Del. Segway Dismissal Suggests Execs Not Liable For Biz Risk

By **Richard Horvath, Stephen Leitzell and Taylor Jaszewski** (February 15, 2024, 4:35 PM EST)

The Delaware Chancery Court **granted** a motion to dismiss on Dec. 14, 2023, in Segway Inc. v. Cai where plaintiff Segway alleged a Caremark oversight claim against Judy Cai, the former president of the company.[1]

In the court's succinct memorandum opinion, Vice Chancellor Lori Will forcefully rejected Segway's theory that everyday business problems could constitute a fiduciary's breach of the duty of oversight or that there is a lower pleading standard when a Caremark claim is brought against an officer, as opposed to a director.

Instead, the court confirmed the "enduring principles" of the Caremark doctrine that "liability can only attach in the rare case where fiduciaries knowingly disregard [their] oversight obligation and trauma ensues." [2]

Segway continues an ongoing debate within the Court of Chancery over whether the duty of oversight, which historically has required directors and officers to have in place and monitor controls related to mission-critical legal compliance, can give rise to liability for a failure to oversee business risk.

For example, in Construction Industry Laborers Pension Fund v. Bingle in 2022, Vice Chancellor Sam Glasscock III noted "it is possible ... to envision an extreme hypothetical involving liability for bad faith actions of directors leading to such liability." [3]

By contrast, in In re: ProAssurance Corp. Stockholder Derivative Litigation in October 2023, Chancellor Will drew a distinction between business risk and unlawful conduct, explaining that "so long as the challenged conduct is lawful, directors have broad discretion to advance the corporation's interests as they see fit." [4]

The Segway decision adds to this discussion, supporting the idea that — even assuming oversight liability can arise from the failure to oversee business risk — the burden for a plaintiff to establish such liability should be substantial.

Background

Plaintiff Segway is a producer of personal mobility vehicles. In April 2015, Segway was acquired by the Chinese startup Ninebot Tech Co. Ltd. but maintained its own board of directors and officers and largely continued operations as they had existed premerger. Judy Cai became president of the company in December 2015, but she also maintained the responsibilities from her prior role as Segway's in-house accountant.

After the Ninebot acquisition, Segway's business prospects declined, leading to layoffs and ultimately the closing of the company headquarters in Bedford, New Jersey, in 2020. Due to the company's decline in performance, Cai was terminated as president later that year.

After Cai's departure, Segway discovered that there were discrepancies in the financial data that



Richard Horvath



Stephen Leitzell



Taylor Jaszewski

Segway had provided to Ninebot, including "an excess of \$5 million in accounts receivable that were 'not properly recorded and/or booked.'"[5]

Segway filed suit against Cai asserting a Caremark claim that she breached her fiduciary duty of loyalty to Segway by "consciously disregarding certain financial discrepancies," and that she willfully ignored issues in the company's accounts receivable records.[6] Notably, Segway did not claim that Cai breached her fiduciary duty of care.

Segway further argued that officers could be found liable for a Caremark oversight breach merely for failing to recognize business risk without any allegations of bad faith.

Cai moved to dismiss. In its 12-page memorandum opinion, the court granted the motion, wholly rejecting Segway's arguments.

The Court's Decision

Relating to Segway's argument that Cai's conduct implicated the duty of oversight, the court held that Segway failed to plead facts that suggested Cai "consciously failed to act after learning about evidence of illegality — the proverbial 'red flag' within her areas of responsibility." [7]

The court noted Segway's reliance on the January 2023 **decision** of *In re: McDonald's Corp. Shareholder Derivative Litigation*, where Vice Chancellor J. Travis Laster held corporate officers have a duty of oversight, but the court found that even under that framework, Segway had failed to allege an "oversight violation ... within Cai's sphere of corporate responsibility." [8]

Indeed, the court noted that Segway's allegations "are an ill fit for a Caremark claim," particularly because Segway failed to allege any "potential wrongdoing (much less within Cai's purview)." [9]

For example, absent from the complaint were allegations that "Cai overlooked accounting improprieties, fraudulent business practices, or other material legal violations." [10] Accordingly, the accounts receivable issue constituted "generic financial matters [which] are far from the sort of red flags that could give rise to Caremark liability if deliberately ignored." [11]

The court also highlighted the lack of allegations that Cai acted in bad faith and reiterated the heightened standard required for a Caremark claim. Quoting the Delaware Supreme Court's seminal 2006 decision in *Stone v. Ritter*, the court explained that a Caremark claim is intended to address only "the extraordinary case where fiduciaries' 'utter failure' to implement an effective compliance system or 'conscious disregard' of the law gives rise to a corporate trauma." [12]

To establish bad faith, the court noted that Segway must plead that Cai "consciously failed to act" in response to a red flag. [13] Segway's claim relied too heavily on hindsight to suggest that Cai's alleged bad faith was responsible for the company's decrease in sales and increase in accounts receivable. In other words, the court explained, "bad things can happen to corporations despite fiduciaries exercising the utmost good faith." [14]

The court further rejected Segway's argument that a lower standard should apply to officers. It expressly held that for officers, like directors, a Caremark claim requires a showing that "the officer failed to make a good faith effort to monitor central compliance risk within her remit that pose potential harm to the company or others." [15]

Segway failed to make any such showing here, and its complaint was dismissed in its entirety.

Takeaways

Segway confirms that a Caremark claim requires a plaintiff to establish that a director or officer must knowingly disregard their obligations to the company in a way that causes damage far beyond "unexceptional financial struggles." [16]

In addition, plaintiffs must establish the nexus between the alleged damage and the director or officer's specific oversight responsibility, including how the oversight failure amounts to bad faith on the part of the fiduciary. Here, the court found Segway did not satisfy either requirement, leading to

a summary denial of Segway's Caremark claim.

Segway is an important addition to the current debate within the Court of Chancery over whether Caremark oversight claims extend from matters of legal compliance to matters of business risk. Extending Caremark liability to matters of pure business risk, as opposed to legal risk, could undermine the important principles at the heart of the business judgment rule and the deference given to fiduciaries in running an entrepreneurial organization.

While this debate continues, Segway offers a powerful rejoinder to any argument that directors and officers should be liable for failing to oversee day-to-day business risks.

Moreover, while potential plaintiffs may have viewed *In re McDonald's* as an invitation to bring Caremark claims against a new class of defendants, Segway demonstrates that such claims are still reserved only for extraordinary scenarios.

Officers, being more involved in a company's day-to-day affairs, are closer to the decisions that dictate a corporation's performance. Nonetheless, Segway suggests that the court has no interest in making corporate officers "guarantors of negative outcomes from imperfect business decisions,"^[17] which is a position that we believe to be entirely consistent with long-standing principles of Delaware corporate law.

Richard Horvath and Stephen Leitzell are partners, and Taylor Jaszewski is an associate, at Dechert LLP.

Dechert associate Christopher Merken contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Segway Inc. v. Cai, C.A. No. 2022-1110-LWW (Del. Ch. Dec. 14, 2023).

[2] Id. at 3.

[3] Construction Industry Laborers Pension Fund v. Bingle, 2022 WL 4102492, at *7 (Del. Ch. Sept. 6, 2022).

[4] *In re ProAssurance Corp. Stockholder Derivative Litigation*, C.A. No. 2022-0034-LWW, at 36 (Del. Ch. Oct. 2, 2023).

[5] Segway, C.A. No. 2022-1110-LWW, at 6.

[6] Id. at 9 (cleaned up).

[7] Id.

[8] Id.

[9] Id. at 10.

[10] Id.

[11] Id.

[12] Id. at 11 (quoting *Stone v. Ritter* , 911 A.2d 362, 370 (Del. 2006)).

[13] Id. at 9.

[14] Id. at 11.

[15] Id. at 12.

[16] Id. at 1.

[17] Id. at 12.

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Med Monitoring Claims In Philips MDL Sent Back For Review

By **Matthew Santoni**

Law360 (February 15, 2024, 5:39 PM EST) -- The judge overseeing multidistrict litigation over Koninklijke Philips NV's recalled breathing machines has declined a special master's recommendation to trim claims seeking medical monitoring for some users, instead sending the case back for a deeper look at which states would allow such claims or whether they required proof of physical injury.

In consolidated cases with separate "master complaints" for plaintiffs with personal injuries, economic damages, and no immediate injuries but an allegedly heightened risk meriting long-term medical monitoring, Senior U.S. District Judge Joy Flowers Conti on Wednesday declined to adopt special master Thomas Vanaskie's Sept. 28 recommendation to ax tort claims for the medical monitoring plaintiffs in 30 states.

Instead, the judge sent the case back to Vanaskie for a more detailed reconsideration, including looking state by state at the elements of the plaintiffs' various claims and weighing whether each state would say that the yet-to-be-detected, "subcellular" injury that allegedly results from repeated exposure to the degrading foam in the recalled CPAP machines satisfies that state's requirements for sustaining a claim.

"States have taken different approaches to medical monitoring. At the motion to dismiss stage, a thorough survey of the pertinent elements of each claim asserted in the Med Mon Master complaint and each state's law must be conducted to determine whether a stand-alone claim is plausibly stated for medical monitoring or if any other claim is plausibly stated for which medical monitoring may be obtained as a form of relief," Judge Conti wrote in her **opinion** Wednesday. "The time invested now in precisely identifying the applicable claims and law in each state will pay dividends in guiding discovery and narrowing the disputes."

Philips had recalled 10.8 million of its CPAP, BiPAP and ventilator products over the breakdown of sound-insulating foam inside them, which customers claimed led to them inhaling harmful chemicals and particles through their machines.

After the cases **were consolidated into an MDL** in Pittsburgh's federal court, the plaintiffs filed master complaints for each different type of harm alleged — those who had purely economic losses due to buying new machines; those who claim they suffered physical injuries from using an affected machine; and those who did not have an immediate injury but wanted Philips to cover medical monitoring to make sure they didn't develop health issues later on as a result of their exposure.

The economic damages track reached a settlement agreement in September 2023, with Philips agreeing to pay upwards of \$495 million to compensate customers and pay them extra to return recalled machines if they hadn't done so already. The court is still considering approval of that settlement.

Philips sought to dismiss the medical monitoring complaint in its entirety, and the motion to dismiss was assigned to Vanaskie for his report and recommendation. He recommended trimming out the tort claims from plaintiffs in 30 states that he said adhered to the requirement of a "manifest physical injury."

After considering both sides' objections to the recommendation, Judge Conti said she was not yet ready to accept, given the broad variation of states' approaches to claims seeking medical

monitoring.

"The majority of the highest courts in the states have not addressed medical monitoring. Some states recognize a separate, stand-alone claim for medical monitoring. Other states view medical monitoring as a kind of relief that may be obtained for a separate claim," she wrote.

"Some states require a plaintiff to show the existence of physical harm; other states do not. In this case, plaintiffs and Respironics dispute whether subcellular change can satisfy the need to show physical harm. Some states require that manifest personal injury be alleged. Some states require proof of an increased risk of future injury; other states require proof of a 'significantly' increased risk of future injury. Some states require that treatment for the plaintiff's ailment exist; other states have expressly eliminated that requirement."

For each state that hadn't explicitly had its supreme court consider medical monitoring claims, the special master and the court would have to predict, based on lower appellate and district court rulings, what that state might do, but could not go so far as to "expand state law," the judge said.

The judge also said the parties should consider another MDL case in their briefs to the special master, **In re: Valsartan, Losartan, & Irbesartan Products Liability Litigation** , which had also involved a separate track for medical monitoring cases, though the New Jersey federal court overseeing that case had surveyed states' approaches to medical monitoring in the context of a motion for class certification, rather than a motion to dismiss.

The plaintiffs had argued that under Valsartan, the court should err on the side of allowing claims to survive in states that may lack prior rulings on medical monitoring but otherwise had a history of following the Second Restatement of Torts, which recommends that expenses for medically necessary testing could count as an "actual injury" for tort claims. But Judge Conti was more cautious.

"Where there are such divergent policies among the states, the complete absence of authority in a disputed jurisdiction probably will not serve as 'clear indication' that the relevant state would abandon the traditional rule and expand tort liability with respect to medical monitoring," she wrote.

In all, she said, the special master and the parties all had more work ahead for them.

"It will be important for the court and parties to know exactly which of the 15 counts (and claims stated in them) in the Med Mon Master complaint remain in the case, and which claims apply to which states," the opinion said. "The special master should clarify for each relevant state: (a) whether medical monitoring is a stand-alone claim (and whether or not a manifest physical injury is required); and (b) whether any other claim provides a basis for medical monitoring relief."

Counsel for Philips did not immediately respond to requests for comment Thursday.

"Patients exposed to toxic chemicals while using recalled Philips devices, including formaldehyde and other carcinogens, face increased risks of developing serious physical injuries and diseases," the plaintiffs' co-lead counsel said in a statement. "We look forward to the opportunity to provide further briefing to the special master on our medical monitoring claims."

Philips is represented by Wendy West Feinstein, John P. Lavelle Jr. and Lisa C. Dykstra of Morgan Lewis & Bockius LLP, Erik T. Koons and Andrew T. George of Baker Botts LLP, and Michael H. Steinberg, Tracy Richelle High, William B. Monahan and Elizabeth N. Olsen of Sullivan and Cromwell LLP.

The plaintiffs are represented by Sandra L. Duggan and Keith Verrier of Levin Sedran & Berman LLP, Christopher A. Seeger, Caleb Seeley, David R. Buchanan of Seeger Weiss LLP, Kelly K. Iverson of Lynch Carpenter LLP, Steven A. Schwartz of Chemicles Schwartz Kriner & Donaldson-Smith LLP, D. Aaron Rihn of Robert Peirce & Associates PC, Michael F. Ram of Morgan & Morgan PA and Peter S. Wolff of Pietragallo Gordon Alfano Bosick & Raspanti LLP.

The case is In re: Philips Recalled CPAP, Bilevel PAP and Mechanical Ventilator Products Litigation, case number 2:21-mc-01230, in the U.S. District Court for the Western District of Pennsylvania.

--Editing by Patrick Reagan.

Update: This article has been updated with a response from the plaintiffs' counsel.

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NJ Town Looks To Stay 'Historic' \$393M PFAS Settlement

By **George Woolston**

Law360 (February 14, 2024, 9:02 PM EST) -- A New Jersey town is looking to pause the final approval of a proposed \$393 million settlement between the Garden State and the American arm of Belgian chemical company Solvay over "forever chemical" contamination, arguing the state and its outside counsel have ignored the law in order to settle quickly.

Carneys Point Township on Monday filed a **motion to intervene** in New Jersey's case against Solvay Specialty Polymers USA LLC to ask the court to stay the approval of the **settlement** pending the resolution of two lawsuits it filed — also on Monday — against the state and Solvay.

The township alleges in its suit against the state that the law requires Solvay to establish a \$315 million secure cash remediation trust fund for affected communities. Instead, Carneys Point claims the state unlawfully allowed Solvay to post \$214 million of the settlement in the form of a self-guarantee or other non-cash alternatives, along with \$101 million in a cash escrow account the state can use in its sole discretion. It claimed that the state did not provide notice on the decision to disregard Solvay's obligation to post a cash remediation trust fund.

It further alleges the retainer agreement between the state and its outside counsel handling the case is illegal, claiming that the parties improperly agreed to allow counsel to pool natural resource damages and remediation funds in the Solvay case and seven other PFAS contamination matters it is handling for the state to pay contingency fees, when the law only allows 10% of natural resource damages to be used to pay attorney fees.

Counsel for Carneys Point, Albert Telsey of Meyner and Landis LLP, said in a statement to Law360 on Wednesday that the New Jersey Department of Environmental Protection "believes that its administrative discretion allows them to ignore New Jersey laws, regulations, the state constitution, and even unethical conflicts of interest if it leads to a settlement that benefits lawyers. That's crazy."

A spokesperson for Solvay said in a statement to Law360 on Wednesday that it supports approval of the proposed settlement, and that "we are hopeful this will occur in a timely manner."

The New Jersey Office of the Attorney General and spokespersons for two of the state's outside counsel firms named in the suit — Cohn Lifland Peralman Herrmann & Knopf LLP and the Law Offices of John K. Dema PC — declined to comment on Wednesday. A representative for Kelley Drye & Warren LLP, the state's third outside counsel named in the suit, did not immediately respond to a request for comment.

In the suit against Solvay, the township alleged violations of New Jersey's Industrial Site Recovery Act when, in December, it spun off into a new company called Syensqo SA without posting a trust fund to financially backstop the PFAS cleanup.

It claimed it raised those concerns to the state during the proposed settlement's public comment period, but received no response.

"The state and outside counsel claim they have administrative discretion to disregard the law in exchange for the expediency of settling a lawsuit. We disagree," the township said in its motion to intervene.

State officials announced the proposed settlement with Solvay in June, hailing the tentative agreement as "historic" and that, if approved, it would be the largest financial agreement for a single contaminated site in state history.

The settlement is meant to remediate per- and polyfluoroalkyl substances, or PFAS, contamination, in the area of Solvay's facility in West Deptford, which manufactured industrial plastics, coatings and other chemicals for more than 30 years.

The proposed settlement required Solvay to post \$214 million to ensure funds are available should it fail to meet its remediation obligations; \$100 million to the DEP to address PFAS effects on certain public water systems and private potable drinking water wells in Camden and Gloucester counties; \$75 million to compensate the public for natural resource damages; and \$3.7 million to the DEP for costs addressing the contamination.

The state filed a motion to approve the settlement on Jan. 31. Carneys Point has asked for a hearing on its motion to intervene on Friday, the day the motion to approve the settlement was scheduled to be heard.

On Wednesday, counsel for the state, David Reap of Kelley Drye & Warren LLP, said in a letter in response to the township's motion that it was "fundamentally flawed" and "deeply misguided in that they will delay significant relief to the New Jersey towns actually alleged to have been impacted by releases of PFAS from the site."

While the state "strongly" opposes the motions, it proposed that if the court were to hear them, they should be made returnable on March 1, and the state should be permitted to respond by Feb. 22. New Jersey would consent to a continuance of its settlement approval motion for one cycle, until March 1, Reap said in the letter.

Carneys Point is represented by Albert Telsey of Meyner & Landis LLP.

In the state's case against Solvay, the DEP is represented by Carley A. Doyle of the New Jersey Attorney General's Office, David M. Reap and Valerie L. Sheaffer of Kelley Drye & Warren LLP, Scott E. Kauff of the Law Offices of John K. Dema, and Leonard Z. Kaufmann of Cohn Lifland Pearlman Herrmann & Knopf LLP.

In the state's case against Solvay, Solvay is represented by Daniel J. Toal, Theodore V. Wells Jr., Jaren Janghorbani and Crystal Lohmann Parker of Paul Weiss Rifkind Wharton & Garrison LLP.

In Carneys Point's case against the state, counsel information for the DEP and Solvay was not immediately available.

The cases are New Jersey Department of Environmental Protection et al. v. Solvay Specialty Polymers USA LLC, case number GLO-L-001239-20, in the Superior Court of New Jersey, County of Gloucester; and Township of Carneys Point v. New Jersey Office of the Attorney General et al., case number SLM-L-000030-24, and Township of Carneys Point v. Solvay Specialty Polymers USA LLC et al., case number SLM-L-000031-24, in the Superior Court of New Jersey, County of Salem.

--Editing by Adam LoBelia.



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Court Overrides Objectors, OKs \$80M Wells Fargo Repo Deal

By **Matthew Santoni**

Law360 (February 15, 2024, 9:15 PM EST) -- A Pennsylvania federal court gave its final approval Thursday to an \$80 million settlement of wrongful repossession claims against Wells Fargo, despite objections from a Pittsburgh couple who wanted to continue their own proposed class action against the company.

U.S. District Judge Gerald J. Pappert signed off on the deal, which would pay approximately 22,000 class members from Pennsylvania from a \$15 million settlement fund, and forgive \$65 million in disputed "deficiency balances," where repossessed vehicles were sold for less than what was remaining on the original loan. Wells Fargo will also ask credit reporting agencies to delete the deficiencies from customers' credit reports, the settlement said.

"Of the over 22,000 class members only two, Shawn Hummel and his wife Jennifer, object to the settlement," Judge Pappert wrote in his **opinion** Thursday on the motion for final approval. "After reviewing all relevant submissions and holding a hearing, the court overrules the Hummels' objections and grants the motion."

The suit had claimed Wells Fargo failed to send **reasonable and authenticated notices** to customers whose vehicles were repossessed, in some cases failing to provide the correct information about the repossession, the pending sale of the vehicle, and what the customers could do to get their vehicles back.

Judge Pappert said the proposed settlement satisfied all the criteria for final approval, and the relief it provided — including the deletion of the "tradelines" from customers' credit reports — was good enough when weighed against what they might have gotten if they went through with a trial.

"Plaintiffs acknowledge they would face the uncertainty of proving each element of their case, all of which Wells Fargo aggressively contests," the opinion said. "Specifically, they note that neither the Third Circuit Court of Appeals nor Pennsylvania appellate courts have considered whether the equitable remedies plaintiffs seek — including the deletion of credit tradelines — are available under the [Uniform Commercial Code]."

Seven pages of the court's 31-page opinion were dedicated to overruling the Hummels' objections to the settlement, noting that the only other objector had withdrawn her opposition to the deal.

After allegedly learning of the settlement during their bankruptcy proceedings in the Western District of Pennsylvania, the Hummels and their attorney, Aurelius Robleto, filed to intervene in the case along with other proposed intervenors whom the judge said were not actually members of the settlement class.

The Hummels said they were pursuing their own lawsuit against Wells Fargo based on similar but distinct conduct, yet they did not opt out of the class, the opinion said.

"At this case's final approval hearing, counsel told the court that while he read the preliminary approval order, he was unaware of the provision barring him from pursuing any claims covered by the release in the settlement agreement," Judge Pappert wrote. "Counsel's statement was not credible and, among other things, taints the Hummels' objections. And when explaining why he both objected and filed a separate class-action asserting related claims — counsel said the quiet part out loud: he

believes the class members 'should be joining in our class action.'"

The Hummels had objected to the settlement for being "overbroad," but Judge Pappert said they could not tailor the releases in the settlement so they could join one case while continuing to pursue their own claims for the same conduct in another suit.

The Hummels' objections to the debt forgiveness — calling it "illusory" if it results in third parties still trying to collect, leads to tax liability for class members, or gives Wells Fargo a tax write-off worth more than the settlement fund — were also dismissed as "at best speculative and at worst nonsensical."

"These concerns are as inherently contradictory and vacuous as they sound," the judge wrote. "They offer no evidence that either (a) Wells Fargo will derive tax benefits to begin with or (b) that those tax benefits will exceed the benefits conferred to class members. Furthermore, the court is tasked with considering the benefit to the class, not conjectural benefits to Wells Fargo."

And the individual benefits to the class members — payments of about \$97 each, plus forgiveness of any remaining balance and the clearing of the debt from their credit reports — were not as small as the Hummels claimed, the court said.

Judge Pappert said the plaintiffs' attorney fee request of \$6 million was reasonable compared to the size of the settlement fund, whether weighing it against the \$15 million fund or when factoring in the additional \$65 million debt forgiveness. The judge dismissed the objectors' "bomb-throwing" accusation that since Wells Fargo did not object to the fee award, there must have been collusion or less-than-arm's-length negotiations over the fees.

Counsel for the plaintiffs, Wells Fargo and the Hummels did not immediately respond to requests for comment Thursday.

The borrowers are represented by Richard Shenkan of Shenkan Injury Lawyers LLC, and Lawrence F. Stengel of Saxton & Stump PC.

Wells Fargo is represented by Jarrod D. Shaw and Karla L. Johnson of McGuireWoods LLP.

The Hummels are represented by Aurelius Robleto of Robleto Kuruce PLLC.

The case is Sorace et al. v. Wells Fargo Bank NA, case number 2:20-cv-04318, in the U.S. District Court for the Eastern District of Pennsylvania.

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



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Gerber, Others Fight Bid For MDL On Baby Food Heavy Metals

By **Mike Curley**

Law360 (February 15, 2024, 9:19 PM EST) -- A group of baby food manufacturers, including Gerber Products Co., The Hain Celestial Group Inc. and Beech-Nut Nutrition Co., is urging the Judicial Panel on Multidistrict Litigation not to consolidate suits alleging that heavy metals in their products cause autism spectrum disorder and other conditions, saying there's no benefit to grouping them in an MDL.

In a **response brief** filed Tuesday, Beech-Nut and the other defendants in the suits said the JPML should follow its own example from three years ago, when it **decided** the companies' marketing and manufacturing were too different to warrant consolidation.

The suits stem from a congressional report issued **three years ago** that seven baby food manufacturers had allowed high levels of arsenic, lead, cadmium and mercury to make it into finished foods, and the current litigation blames ASD, ADHD and other conditions on the heavy metals.

In Tuesday's brief, however, Beech-Nut and other manufacturers wrote that no scientific studies support this claim, pointing to other similar cases, such as one in which Hain Celestial got a **mid-trial win** when the judge found that the evidence didn't support the claims.

The manufacturers argued that many of the same factors that led the JPML to reject consolidation three years ago still apply and that centralization won't prompt efficient conduct of the litigation because pre-suit discovery is already 98% completed for them, and there are already agreements to share evidence between the suits.

There are also a small number of federal actions involved, the companies argued, noting that all of them have been filed by the same small number of attorneys, and all the company manufacturer defendants are represented by the same counsel in those cases, so coordination among the attorneys isn't an issue absent consolidation.

The companies also criticized the apparent "gamesmanship" of pushing for an MDL, saying the plaintiffs' attorneys are already highly coordinated and seem to be trying to "shroud" their existing coordination.

The one legitimate question, the companies wrote, is the central issue of general causation, and Beech-Nut and the other companies argued that there's no reliable science supporting the theory that the heavy metals in baby foods can cause ASD or ADHD.

The companies further argued that the plaintiffs don't point to any specific product or products, but instead base their claims on trace levels of heavy metals that may be found in dozens of different formulas from seven different companies' products.

Should the JPML conclude that consolidation is necessary, Beech-Nut and the other manufacturer defendants argued that the Southern District of New York is the appropriate forum, as it is central to all the defendants, who are all based in either New York or New Jersey, and the forum has the experience and capacity to handle multidistrict litigation of this type.

Alternatively, they requested the District of Nevada, Northern District of California, Central District of California and Eastern District of Louisiana.

In a separate **motion**, Nurture LLC joined Beech-Nut and the other manufacturer defendants in opposing centralization but argued that if the cases are consolidated, *Watkins v. Nurture Inc.*, in the Eastern District of Louisiana, should be included despite plaintiffs in the proposed MDL urging its exclusion as being too far procedurally advanced.

Nurture argued that the case is not so far along that it would not benefit from any efficiency an MDL could create and that the JPML has included cases even further advanced than it in MDLs in the past.

Whole Foods Market Services Inc.'s **response** also focused on *Watkins*, as it is the only case involved in which Whole Foods is a defendant, and the retailer urged the JPML not to include it in any potential MDL because discovery is nearly complete and the questions in that suit do not line up with those involved in the other cases.

Amazon.com Services LLC, likewise only named as a defendant in the *Watkins* case, joined Whole Foods's response with a **short brief** also filed Monday.

An attorney for Hain Celestial declined to comment Thursday.

Representatives for the other parties could not immediately be reached for comment Thursday.

Beech-Nut is represented by Livia M. Kiser of King & Spalding LLP.

Walmart is represented by Michael L. Resch of King & Spalding LLP.

Hain Celestial is represented by Michael X. Imbroscio of Covington & Burling LLP.

Plum PBC is represented by Hope S. Freiwald of Dechert LLP.

Campbell Soup Co. is represented by Peter M. Ryan of Cozen O'Connor.

Gerber is represented by Bryan A. Merryman of White & Case LLP.

Sprout Foods Inc. is represented by Nancy Erfle of Gordon Rees Scully Mansukhani LLP.

Nurture is represented by Loren Brown of DLA Piper.

Amazon is represented by P. Andrew McStay Jr. of Davis Wright Tremaine LLP.

Whole Foods is represented by Steven F. Griffith Jr., Brian M. Ballay, Alexandra B. Rychlak, K. Kordell Caldwell and Samuel L. Felker of Baker Donelson Bearman Caldwell & Berkowitz PC.

The plaintiffs seeking consolidation are represented by Pedram Esfandiary of Wisner Baum LLP.

The case is *In Re Baby Food Marketing, Sales Practices and Products Liability Litigation (No. II)*, case number 3101, in the Judicial Panel on Multidistrict Litigation.

--Additional reporting by Emily Field and Lauren Berg. Editing by Rich Mills.



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GM Fuel Pump Class Can't Take Second Go At Multistate Cert

By **Danielle Ferguson**

Law360 (February 15, 2024, 5:47 PM EST) -- A Michigan federal judge has ruled that drivers alleging General Motors sold them vehicles with faulty fuel pumps cannot toll some of their claims or try for a second round of certifying a multistate class, concluding that the "unusual" request was not supported by case law.

In an **order** issued Wednesday, U.S. District Judge Terrence D. Berg said the drivers cannot take a "second bite of the class-certification apple" by trying to get a multistate class approved after state-specific classes have already been certified. He pointed to a recent Sixth Circuit decision finding that plaintiffs cannot bring claims in states where they didn't make a purchase.

"Of course, plaintiffs are masters of their claims and free to change their strategy in any way they wish. But without advance leave, they did so here at their own risk. They are not entitled to a second bite at the class-certification apple," the judge wrote.

Judge Berg pointed to the Sixth Circuit's ruling last year in *Fox v. Saginaw County*, which he said provided important guidance about class certification and standing. That case clarified that standing must be addressed at the beginning of the case and that there must be a named plaintiff to pursue each claim.

The *Fox* decision came after Judge Berg's 2021 decision not to grant GM's motion to dismiss the drivers' multistate claims based on standing. However, Judge Berg recognized at the time that there was still ambiguity about when and how to evaluate standing in such a large-scale class action, he said.

In the *Fox* case, one plaintiff alleged a Michigan county violated the takings clause when he was not reimbursed for the difference between his delinquent taxes and the profits made after selling his home after foreclosure. The plaintiff named 26 other counties and asked to move forward with the case on behalf of taxpayers in those other counties, but the Sixth Circuit determined the homeowner **could only sue in his county**.

On Wednesday, Judge Berg rejected the GM vehicle owners' argument that because they said all the harm came from GM, the *Fox* case doesn't apply in this one.

"The court is not persuaded that *Fox* can be so narrowly cabined," the order read.

The judge said the proposed multistate plaintiffs could not meet the burden that they have standing to proceed under the Magnuson-Moss Warranty Act. Looking toward *Fox*, the drivers can't bring warranty claims in states where they didn't make a purchase, Judge Berg found.

In August 2022, Judge Berg said he was concerned about the proposed multistate warranty class and nine state classes because of variations in state law and managing a multistate class. The drivers asked to redraw their class definitions.

Judge Berg said what came next was a "surprise." In redrawing their class definitions, the vehicle owners also altered the scope of the certification request, he noted. The drivers wanted the court to certify nine state classes and revisit the certification of a multistate class after bellwether trials involving the state classes.

The court **certified seven state classes in March 2023** but did not give an opinion on the vehicle owners' requested second certification step of later certifying a multistate class.

Two months later, the drivers moved to toll statutes of limitation for some of the claims in their multistate warranty class, and, alternatively, asked to try again for class certification for a multistate class.

The drivers relied on *American Pipe & Construction Co. v. Utah*, in which the U.S. Supreme Court found that the timely filing of a class action tolls the limitations period for claims in the complaint, according to Judge Berg's order. In that case, the justices also emphasized that a court should determine whether an action should be a class action "as soon as practicable," according to the order.

Judge Berg said the drivers' request to toll some claims for the multistate class now is "unusual," saying there is no case law to support it.

"The situation in which their request arises is atypical, and the equities do not appear to weigh in favor of granting it," the judge wrote.

The order still allows the plaintiffs to proceed under the nine state classes certified last year for people who bought an affected vehicle in California, Florida, Illinois, Iowa, New York, Pennsylvania and Texas.

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

The drivers are represented by Hagens Berman Sobol Shapiro LLP, Hilliard Law LLP and The Miller Law Firm PC.

GM is represented by April N. Ross and Rachel P. Raphael of Crowell & Moring LLP, and Jeffrey K. Lamb and Adam M. Wenner of Honigman LLP.

The case is *Chapman et al. v. General Motors LLC*, case number 2:19-cv-12333, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Emily Field and Brent Godwin. Editing by Covey Son.

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From Farm Tiffs To Time-Warner Battles, Glasscock Saw It All

By **Jeff Montgomery**

Law360 (February 15, 2024, 7:05 PM EST) -- Vice Chancellor Sam Glasscock III, due to retire later this year, presided over a wide-ranging caseload during his long Court of Chancery career. Since joining the court, initially as a master in chancery — a position now dubbed magistrate in chancery — he took on litigation that included disputes involving some of the country's largest corporations, while also juggling cases as local as illegal junkyard disputes and, in one instance, a deep dive into colonial-era land records in a dueling deeds lawsuit.

The **retiring jurist's** docket, as is the case for the court's six other members, included calls to "equity" large and small, serving individual state residents and multinational corporations alike.

Among the more notable:

Charter v. Time Warner Merger Scrum

A nearly eight-year court battle over a stockholder challenge to the \$55 billion Charter Communications Inc.-Time Warner Cable Inc. merger that started in 2015. The case settled for \$87.5 million in 2023. In one 82-page example of the many rulings along the way, the often self-effacing vice chancellor described the ruling as one that attentive readers "will no doubt find a slog."

Jilted Pipeline Giant Suit

More than seven years of litigation that ended in 2023 with Delaware's Supreme Court finding that the vice chancellor got it right when he ordered Energy Transfer to pay more than \$600 million for backing out of a \$38 billion merger with The Williams Companies after a long trial and multiple court proceedings.

DuPont Toxic Baggage Claims

The dismissal of a Chemours Co. stockholder class suit seeking derivative damages from top officers and directors for decisions that led to more than \$1.7 billion in disputed dividends and stock buybacks. In a thinly related case, the vice chancellor at one point referred to a dispute between DowDuPont Inc. and its spun-off former Chemours affiliate Chemours Corp. as a "chaos-derby." The two battled over a suit attempting to block DuPont's arbitration demands over a multibillion-dollar environmental cleanup tab that Chemours claims was low-balled at the time of the spinoff.

Uber Tech Control Battle

A 2017 decision to put on hold a Benchmark Capital Partners LP suit to oust former Uber Technologies Inc. CEO Travis Kalanick from the ride-hailing company's board and undo its 2016 expansion, citing "clear and frankly overwhelming evidence" that a director arbitration agreement applied. The suit ended with a settlement.

Venue Vexations

A globe-spanning decision upheld by Delaware's Supreme Court that obliged private investors to sue Allied Irish Banks PLC in Bulgaria to enforce a \$41 million tender offer right. The decision upheld AIB's litigation forum choice right for claims that AIB ignored the investors' right to tender its shares of Bulgarian American Credit Bank when AIB bought a 49.99%, \$319 million stake in the bank in 2008.

How Long Ago?

A deed and land-ownership dispute filed in 2009, revolving around a large, environmentally sensitive

tract in southern Delaware claimed both by the state and by developers, both of whom held deeds for the property. The suit touched off a saga that sent attorneys poring through land records dating to before the country's founding, ending only in 2022 with a settlement that kept the land with the state and paid the developers \$1.5 million. In a letter to attorneys, the vice chancellor noted: "Thus ends one of the oldest sagas in Chancery, in my experience, at least. I found this a very interesting and edifying matter to litigate, aided by the near Homeric efforts of the attorneys to present a record before the court that stretched back to the Eighteenth Century."

--Editing by Adam LoBelia.

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X Corp. Nears Toss Of Breach Suit Over 200M Users, For Now

By **Dorothy Atkins**

Law360 (February 15, 2024, 10:18 PM EST) -- A California magistrate judge said Thursday she plans to toss a proposed class action alleging the social media giant X Corp. failed to protect the data of 200 million Twitter users whose information was exposed following a data breach, but said she'll let plaintiffs amend the complaint and try again.

During a hearing held via Zoom, U.S. Magistrate Judge Kandis A. Westmore told counsel for the consumers that she's concerned that the current rendition of the complaint doesn't include specific allegations about the purported unconscionability of X Corp.'s terms of service.

The consumers' counsel, Joseph P. Guglielmo of Scott + Scott Attorneys at Law LLP, told the judge that he could amend the complaint to add more specifics and address unconscionability arguments raised by X Corp. in its motion to dismiss. The attorney also offered to drop for good a claim asserted under California's Unfair Competition Law, which appeared to please the judge.

"Thank you, that gives you a lot of credibility," Judge Westmore replied.

The ruling is the latest in a **lawsuit** that was filed in January 2023 and amended the following month by lead plaintiffs Stephen Gerber, Eric Cohen and Casey Weitzman, accusing X Corp., the successor in interest to Twitter Inc., of failing to do enough to prevent a vulnerability in its application programming interface, or API, that purportedly led to a security breach from June 2021 through January 2022.

The breach allegedly exposed Twitter users' usernames, email addresses and phone numbers associated with specific Twitter accounts, including accounts that intended to remain anonymous, according to the complaint.

The users also allege that X Corp. "seemingly buried its head in the sand" about the scope of the data breach and may have even knowingly misled users about its magnitude when it announced the vulnerability in August 2022 and stated that no one took advantage of the vulnerability on the site.

The lawsuit claims that cybercriminals have been selling and disseminating leaked user data on the dark web since 2022, but Twitter failed to timely notify any users of the breach.

In June, X Corp. filed a **motion to dismiss**, arguing that the suit is "rife with legal defects." The company argued that its terms of service, which state that Twitter cannot guarantee the security of users' information, barred the users' claims, and the users also failed to state a claim for breach of contract and adequately allege causation and damages, as Twitter didn't breach any explicit promises, according to the motion.

"Plaintiffs allege a litany of potential harms they claim may befall them — such as spear phishing attacks, blackmail, stalking, doxing, social media hacking, or identity theft — but they do not allege that they experienced any of these harms," the motion said.

X Corp. additionally argued that it's unclear whether the named plaintiffs' accounts were actually anonymous before the incident, and that even without the bug, some accounts were still searchable by using email addresses or phone numbers due to a default feature that users must actively opt out of.

During a hearing on the motion Thursday, Judge Westmore observed that the parties disagree over whether X Corp. was responsible for the users' personal information.

"I think there's a disconnect between the parties about what the data breach was," she said.

X Corp.'s counsel argued that the complaint disproves the consumers' own theory by citing certain news articles that suggest the source of the leaked personal information is unknown, and they don't allege they've actually been harmed.

But Guglielmo disagreed with the defense team's position, arguing that the attorneys were cherry-picking portions of the complaint to make their arguments instead of accepting the pleadings as a whole.

At the end of the hearing, the judge told the parties she plans to dismiss the complaint with leave to amend.

The plaintiffs are represented by Joseph P. Guglielmo of Scott + Scott Attorneys at Law LLP.

X Corp. is represented by Stephen A. Broome, Viola Trebicka and Casey Adams of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Stephen Gerber v. Twitter Inc., case number 4:23-cv-00186, in the U.S. District Court for the Northern District of California.

--Additional reporting by Henrik Nilsson. Editing by Dave Trumbore.

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SpaceX Heads To Texas After Musk's Tesla Pay Package Axed

By **Lauren Berg**

Law360 (February 15, 2024, 10:01 PM EST) -- Elon Musk announced Wednesday that he is taking SpaceX's business incorporation from Delaware to Texas, after Delaware's chancellor last month struck down his proposed \$55 billion Tesla pay package.

In a brief post on his social media platform X, formerly Twitter, the SpaceX and Tesla CEO said he is moving SpaceX's state of incorporation from Delaware to Texas, and encouraged others to do the same.

SpaceX has moved its state of incorporation from Delaware to Texas!

If your company is still incorporated in Delaware, I recommend moving to another state as soon as possible. pic.twitter.com/B7FLByL2dY

— Elon Musk (@elonmusk) February 15, 2024

"If your company is still incorporated in Delaware, I recommend moving to another state as soon as possible," Musk wrote.

The move comes after Delaware Chancellor Kathaleen St. J. McCormick's **first-of-its-kind ruling scuttling** Musk's proposed \$55 billion Tesla pay package late last month.

Chancellor McCormick found that disclosure failures, murky terms, conflicted director architects and Musk's own hand on the tiller warranted an order to roll back the award. She said Tesla shareholders who challenged Musk's pay package had "demonstrated that rescission is reasonable, appropriate, and practicable," and struck down the entire amount.

The plan went to a weeklong trial in November 2022 after it was challenged by stockholders opposing the 10-year compensation scheme, which included 12 tranches or performance milestones that Musk had to meet before qualifying for a portion of the total, once estimated at as much as \$56 billion.

The plan was designed to incentivize Musk with equity awards for achieving "breathtakingly difficult milestones," Tesla's general counsel testified, adding that the board never considered requiring Musk to work a certain number of hours as part of the package.

The deal had been in the works since 2018, but was tripped up by **stockholder claims** of multiple disclosure and fairness breaches. Aside from Musk, the suit named current and former Tesla board members.

Chancellor McCormick found that "Musk dictated the timing of the process, making last-minute changes to the timeline or altering substantive terms immediately prior to six out of the ten board or compensation committee meetings during which the plan was discussed."

Although the defendants argued that Musk was "uniquely motivated by ambitious goals" and Tesla desperately needed him to succeed, "these facts do not justify the largest compensation plan in the history of public markets," the opinion said.

The day the judge's order came down, Musk posted on X, "Never incorporate your company in the

state of Delaware."

He also called for a shareholder **vote to transfer** Tesla's state of incorporation from Delaware to Texas.

--Additional reporting by Jeff Montgomery and Madeline Lyskawa. Editing by Alanna Weissman.

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