

How one Ohio lawsuit could quell legitimate shareholder activism in the state

 financialregnews.com/how-one-ohio-lawsuit-could-quell-legitimate-shareholder-activism-in-the-state

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A pending legal decision is expected any day now that could alter the business climate for publicly traded companies in Ohio.



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The litigation in Franklin County, Ohio Court of Common Pleas concerns alleged violations of the state's so-called "anti-greenmail" statute — Ohio Revised Code Section 1707.043 — and raises issues about Ohio state securities law.

The Ohio Division of Securities defines "greenmail" as a "manipulative practice" of "staging a hostile takeover bid in order to manipulate a firm into repurchasing its own common stock at a premium above current [market] price."

Ohio's anti-greenmail statute aims to thwart greenmail campaigns and prevent manipulative practices by an entity that proposes to acquire control of an Ohio corporation.

Specifically, the statute authorizes Ohio corporations and their shareholders "to recover any profits realized by a person from the sale of the corporation's shares when the shares are sold within 18 months after such person proposed to acquire control of the corporation or publicly disclosed the intention or possibility of making such proposal," the statute says.

The securities case in question was brought back in 2021 by Robbins Geller Rudman & Dowd LLP, a California plaintiff firm representing the Corpus Christi Firefighters' Retirement System against Macellum Capital Management and Ancora Holdings, the Ohio-based asset manager that recently made news by purportedly nominating former Ohio Governor John Kasich to the board of Norfolk Southern.

The case stems from Ancora and Macellum's active shareholder engagement in 2020 with Columbus, Ohio-based Big Lots Inc., one of America's largest home discount retailers.

The lawsuit claims that Macellum and Ancora engaged in an unlawful greenmail campaign designed to affect the market trading of Big Lots' publicly traded common stock. The Macellum/Ancora defendants did so to increase the profits they received, or might receive, from publicly proposing to acquire control of Big Lots, which they did on March 6, 2020, and then selling their Big Lots stock at inflated prices within 18 months thereafter, which commenced in August 2020, the lawsuit says.

"Ohio Revised Code Section 1707.043 outlaws precisely this type of greenmailing," allege the plaintiffs, who seek a jury trial. "The Macellum/Ancora defendants violated Ohio law and must now disgorge the profits they derived from their unlawful conduct."

Bunk, say numerous sources.

Under the definition of greenmailing, experts say there was no greenmail in this case because Ancora and Macellum did not attempt to take control of Big Lots, and Big Lots did not buy shares from Ancora and Macellum at a premium above market price.

Rather, Ancora and Macellum submitted mostly independent director nominees for shareholder consideration and all of Ancora and Macellum's transactions occurred on the open market.

This case involves "a plain vanilla proxy contest" in which the defendants' goal was to persuade management to sell and lease back some of its properties, which they thought would help Big Lots' financial position, according to Phillip Goldstein, a co-founder of Bulldog Investors, a principal of the firm, and its lead investment strategist.

"As anyone familiar with securities law knows, greenmail occurs when a corporation buys the shares of a "greenmailer" at a premium to the market price to avert a takeover threat," Goldstein told Financial Regulation News. "As far as I know, that did not occur here, and no one has alleged that the defendants ever proposed to sell their shares to Big Lots."

Goldstein also pointed out that the state's Anti-Greenmail statute does not define a manipulative practice, "but in my opinion, it would require some sort of deception, which has not been alleged," he said.

On the contrary, the defendants seem to have been candid about their plans, said Goldstein.

"And, without a definition, no one would know what is legal or illegal, which seems very unfair," he said. "How can you punish someone for an action that he had no reason to think was improper?"

In fact, other sources also think that the Ohio statute may be written too broadly, and therefore provided an opening for just such a lawsuit to be filed.

And because the activists sold their Big Lots shares within 18 months of purchasing them — a time restriction that's part of the statute — the plaintiffs also thought they had some foundation for filing a lawsuit.

The Ohio Department of Commerce's Division of Securities, for instance, filed an amicus brief stating that Section 1707.043 was enacted for the specific purpose of preventing a particular manipulative practice called "greenmailing."

"The legislature intended that the statute be applied to prevent only this manipulative practice," the Division of Securities said. "Construing this statute beyond its stated purpose and its intended scope would very likely chill healthy market behaviors that are neither manipulative nor greenmail by design, behaviors like good faith proxy campaigns that specifically inure to the benefit of an Ohio corporation."

Likewise, the Greater Cleveland Partnership filed an amicus brief in support of Ancora and Macellum, and asked the court to adopt the Ohio Division of Securities' interpretation of Ohio's anti-greenmail statute.

"Further, the Greater Cleveland Partnership respectfully requests that this court reject plaintiff's vague and open-ended interpretation of the anti-greenmail statute because it would chill investment in corporations located in Ohio, create the risk of more litigation, and harm the state's economy," the partnership said.

Luke Milligan, a law professor and director of the Ordered Liberty Program at the University of Louisville's Louis D. Brandeis School of Law, also made the case that there needs to be more clarity and certainty in Ohio regulatory law, particularly as it pertains to the anti-greenmailing statute.

In an article Milligan published by the Ohio Alliance for Civil Justice, he also noted that the statute does not include a definition of the term "manipulative practices," nor does it spell out specific types of conduct covered by that term.

"The breadth and open texture of the term 'manipulative practices' in the context of Section 1707.043 litigation is cause for concern, raising the question: How can Ohioans (and those doing business with Ohioans) have confidence that their business actions will not be recast as a 'manipulative practice'... by a court in a future, high-stakes Section 1707.043 litigation matter?" Milligan wrote.

Shareholders and corporate actors are entitled to clarity and certainty, he continued.

“A you-know-it-when-you-see-it approach to construing Section 1707.043 provides neither,” wrote Milligan. “Moreover, a broad and unbounded understanding of “manipulative practices” in the context of Section 1707.043 litigation could invite challenges to the statute’s constitutionality on grounds of vagueness and overbreadth.”

A narrower understanding of “manipulative practices,” similar to that of the Ohio Division of Securities, would ease these concerns, Milligan said, and provide welcomed clarity and certainty, and ensure a proper degree of uniformity in future litigation matters.

The case is in front of Judge Daniel Hawkins at the Franklin County Court of Common Pleas, a Republican candidate for the Ohio Supreme Court who is set to rule on summary judgment soon, though when contacted his office did not say precisely when.

Having read the court filings, Goldstein thinks the judge should dismiss the case. “But I have seen enough bad decisions by judges to be reluctant to make a prediction,” he added.

Goldstein does think the case “is driven by a law firm that purports to advocate on behalf of shareholder rights.”

And when asked why the Corpus Christi Firefighters’ Retirement System, which is an owner of Big Lots common stock, would file this lawsuit, Goldstein said he’s not sure.

Goldstein doesn’t see any reason to pursue this lawsuit, which he said will provide no benefit whatsoever to the pension fund if it wins.

“If I were a firefighter or retiree, I would question why the trustees are willing to have the fund serve as a figurehead plaintiff or devote any fund resources to this lawsuit,” he added.

Samsung Must Face Mass Arbitration of Biometric-Privacy Claims

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Samsung Electronics America Inc. must arbitrate more than 800 biometric-privacy claims and pay administrative filing fees to the Arbitration Association of America to get the arbitrations underway, a federal court ruled.

Claimants who alleged that Samsung violated the Illinois Biometric Information Privacy Act by collecting their biometric information when they took pictures of themselves using Samsung phones showed that a valid arbitration agreement existed and that Samsung refused to arbitrate, Judge Harry D. Leinenweber of the US District Court for the Northern District of Illinois said Thursday.

The judge granted their motion to compel arbitration for the remaining 804 petitioners. For the original 1,044 cases that were filed, the administrative filing fees totaled \$311,000, the AAA said.

The case is similar to another mass arbitration case involving 50,000 petitioners with BIPA claims against Samsung that is currently on appeal before the US Court of Appeals for the Seventh Circuit, Wallrich v. Samsung Electronics of America Inc.

Mass arbitration—the simultaneous filing of thousands of arbitration claims in an effort to put settlement pressure on companies by threatening them with enormous filing fees—is an emerging tactic being employed by plaintiffs against companies using arbitration clauses to reduce their exposure to class actions.

Businesses have criticized mass arbitration as an abusive practice that seeks to weaponize filing fees against defendants, but plaintiffs' attorneys defend it as a necessary response to recent business-friendly court rulings.

Refusal to Arbitrate

Samsung's refusal to pay the arbitration filing fees in the case before Leinenweber constituted a "classic refusal to arbitrate" in violation of the Federal Arbitration Act, the judge said.

The petitioners paid their share of the fees, \$38,600, but Samsung's non-payment of its far larger share resulted in the AAA's decision to administratively close the cases, he said.

The company said that the motion to compel should be denied as premature in light of the closing of the cases by the AAA. But Leinenweber said the company's argument was an attempt to set up a "never ending game of cat and mouse" in which the petitioners would file arbitration claims and pay their fees, only to have Samsung force their closure by refusing to pay its share, to be followed by a repetition of the same process.

"This clever scheme to game the rules of arbitration has already been disavowed by federal courts," he said.

Arbitration Agreement

Samsung also said that the petitioners failed to submit evidence that they agreed to the arbitration provision, but Leinenweber said Samsung had it backwards. The party opposing arbitration was required to provide evidence challenging the existence of a valid agreement, which Samsung failed to do, he said.

"Samsung has failed to identify a triable issue of material fact that an agreement to arbitrate existed and, as a consequence, is not entitled to a trial on the matter," the judge said.

Leinenweber also rejected Samsung's challenge to venue in the Northern District of Illinois, and dismissed co-defendant Samsung Electronics Co. Ltd., which he said had not been named in the petitioners' arbitration demands.

Milberg Coleman Bryson Phillips Grossman PLLC and Robbins Geller Rudman & Dowd LLP represent Hoeg and the other claimants.

Donohue Brown Mathewson & Smyth LLC, Kopecky Schumacher Rosenberg LLC, O'Melveny & Myers LLP, and Skadden, Arps, Slate, Meagher & Flom LLP represent Samsung.

The case is Hoeg v. Samsung Elecs. Am. Inc. , N.D. Ill., No. 1:23-cv-01951, 2/15/24 .

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

To contact the editor responsible for this story: Amy Lee Rosen at
arosen@bloombergindustry.com

FirstEnergy forges ahead even as former execs are indicted

ohiocapitaljournal.com/2024/02/20/firstenergy-forges-ahead-even-as-former-execs-are-indicted

By Kathiann M. Kowalski, Energy News Network

February 20, 2024



Former FirstEnergy CEO Chuck Jones (top left), former FirstEnergy VP Michael Dowling (top right), former PUCO Chair Sam Randazzo (bottom middle). Graphic by WEWS.

The first criminal charges have been filed against two former FirstEnergy executives, nearly four years after the initial arrests of former Ohio House speaker Larry Householder and others in Ohio's ongoing House Bill 6 corruption scandal. The company says it has taken significant steps to move forward. Yet issues related to HB 6 continue to play a role in the company's push to raise ratepayer charges, ongoing shareholder litigation and more.

A flurry of filings over the last several weeks reflects additional developments:

- Sam Randazzo, the former head of Ohio's utilities commission, was also named in the state of Ohio's indictment against former FirstEnergy executives Chuck Jones and Michael Dowling. Randazzo now faces criminal charges in both state and federal courts.

- Ohio's consumer advocate wants to freeze a FirstEnergy grid modernization case until questions are resolved about Randazzo's tenure at the Public Utilities Commission of Ohio.
- Briefing wrapped up in an Ohio regulatory case that could let FirstEnergy collect \$1.4 billion or more in added rider charges over an eight-year period.
- FirstEnergy continues to be under fire in shareholder litigation, where opponents say it has dragged its feet on providing its internal HB 6 investigation and other disclosures.
- FirstEnergy has dropped its pledge to cut greenhouse gas emissions 30% by 2030, just three years after making that commitment.
- Former Ohio House Speaker Larry Householder and lobbyist Matt Borges continue to pursue appeals from their criminal sentences. Borges filed his appellate brief in January, and the government's reply is due next month.

Former FirstEnergy execs face charges

The state of Ohio's Feb. 9 indictment against former FirstEnergy executives Chuck Jones and Mike Dowling marks the first time anyone from the company has been criminally charged in connection with the corruption scandal surrounding Ohio's 2019 nuclear and coal bailout law.

Sam Randazzo, the former chair of the Public Utilities Commission of Ohio, was also charged, along with two pass-through companies linked to him. The story told by the 27-count indictment centers around the three men's alleged "joint enterprise to hijack Ohio's regulatory structure for the benefit of FirstEnergy," Ohio Attorney General David Yost said.

The charges include multiple counts of bribery, theft, money laundering, telecommunications fraud, record tampering, and a pattern of corrupt activity. The allegations relate to House Bill 6 but also include other actions reaching back more than a decade.

The first criminal charges against Jones and Dowling are "critical and long-overdue steps forward in bringing justice for the people of Ohio," said Rachael Belz, CEO of advocacy group Ohio Citizen Action. Federal charges against former Ohio House Speaker Larry Householder and others were filed nearly four years ago. Yet the state's criminal prosecution seemed to be in slow gear until last spring, when the Ohio Organized Crime Investigations Commission began looking into the matter.

"Ohioans continue to bear the cost of corruption," Ohio Consumers' Counsel Maureen Willis said in response to the charges. She called for an immediate end to HB 6's coal plant subsidies and a refund of all amounts paid.

The indictment also spurred the Ohio Environmental Council to renew its call for a full investigation into PUCO activities during Randazzo's tenure. Beyond the 2019 law's nuclear and coal plant subsidies, Randazzo played a role in HB 6's gutting of Ohio's clean energy standards. The charges have implications for current energy policy, too.

"Just this month, Ohio legislators debated allowing investor-owned utilities to own more generation under the guise of 'reliability,'" said Nolan Rutschilling, managing director of energy policy for the group. "How can we justify giving our utilities more control over our energy system?"

The defendants have pled not guilty.

Read more:

- *Ohio AG Yost announces additional indictments in House Bill 6 bribery scandal (Spectrum News)*
- *Ohio AG announces indictments for ex-FirstEnergy execs, Randazzo in House Bill 6 scandal (Columbus Dispatch)*
- *New indictments announced in House Bill 6 scandal (19 News)*

Randazzo charged in two cases

The state's indictment means Randazzo now faces charges in two criminal cases. The federal government indicted him in December on 11 counts of bribery, embezzlement and other crimes. It's unclear whether both cases will proceed against Randazzo at the same time, or whether one case will be put on hold while the other moves ahead.

A Feb. 13 notice in the state's civil RICO lawsuit arising out of HB 6 told Judge Christopher Brown about the new criminal charges against Jones, Dowling, Randazzo and his companies. It's possible the court might put the civil case against those defendants on hold, but let it continue against FirstEnergy, Energy Harbor and other defendants.

Just weeks before the new indictment, the Ohio Supreme Court said the Ohio Attorney General's office could continue to freeze millions of dollars of Randazzo's assets, which could be used to satisfy a judgment against him in the state case.

On Feb. 9, Randazzo asked the U.S. District Court for the Southern District of Ohio to transfer his criminal case from Cincinnati to Columbus. He cited health issues and inconvenience to himself, witnesses and family members as reasons for the shift.

The Feb. 9 filing also said likely witnesses in the federal case include current and former PUCO commissioners and staff, members of the Ohio executive branch, former state lawmakers, and current and representatives of FirstEnergy and Industrial Energy Users-Ohio (now called the Ohio Energy Leadership Council).

The state's indictment, filed that same day, alleges Randazzo told Gov. Mike DeWine's chief of staff, Laurel Dawson, he got a \$4.3 million payment from FirstEnergy due to a "consulting agreement." DeWine and Lt. Gov. Jon Husted dined with Dowling and Jones the same day the FirstEnergy executives visited with Randazzo and finalized details of that payment.

Read more:

- *Ex-First Energy executives, Ohio utility regulator charged by state in bailout and bribery scandal (Ohio Capital Journal)*
- *DeWine's chief of staff testified to grand jury in bribery case, spokesman says (Cleveland.com)*
- *Ohio Supreme Court OKs freeze on millions from ex-state official Randazzo after bribery accusation (Cleveland.com)*
- *Ex-PUCO Chair Sam Randazzo requests to move criminal trial from Cincinnati to Columbus (WOSU)*

Raising rider charges

Corporate spokesperson Jennifer Young said FirstEnergy can't comment on the indictment against its former executives, but added that the company "has taken significant steps to move forward, including reconstituting our senior leadership team and instilling a culture of ethics, integrity and accountability at every level."

FirstEnergy continues to push forward on its request for roughly \$1.4 billion in added rider charges. The case now rests with the PUCO after the company and other parties filed reply briefs on Feb. 9.

The case stands out because it would extend one of the riders involved in the PUCO's frozen HB 6-related cases, where a prior audit found millions of dollars of the reviewed charges were improper. The Ohio Manufacturers' Association Energy Group has challenged the hearing examiners' ruling to keep evidence about HB 6 out of the current case.

Multiple challengers have argued the company's request for riders should be denied altogether or otherwise considered in the company's full rate case later this year. The PUCO staff urged the commission to modify some riders and shorten the length of the company's plan.

The Ohio Environmental Council, Citizens Utility Board of Ohio and Environmental Law & Policy Center did support a proposed rider for energy efficiency programs. Utility-run energy efficiency programs can cut greenhouse gas emissions when designed well.

However, the PUCO has generally not allowed ratepayer-funded energy efficiency programs since 2020, after HB 6 took effect.

HB 6 gutted Ohio's prior energy efficiency standard, which had been paused and weakened by a 2014 law. FirstEnergy began pushing to suspend the standard back in 2012.

In a separate proceeding, the Office of the Ohio Consumers' Counsel asked the PUCO to freeze FirstEnergy's case to collect more grid modernization money. The federal and state criminal cases against Randazzo include allegations that relate to a side deal in another case that gave rise to the grid modernization case. And Randazzo played a role in letting the case move ahead while he was at the PUCO.

Read more:

- *HB 6 updates: A new bill and fuzzy math (Energy News Network)*
- *How a Koch-linked group stalled a bipartisan Ohio energy efficiency bill at the last minute (Energy News Network)*

Shareholder litigation continues

Pre-trial fact-finding remains temporarily on hold in shareholder class actions against FirstEnergy and others, as the trial court considers whether to hold such discovery in limbo while an appeals court reviews class certification issues. Lawyers for both sides presented arguments to Special Master Shawn Judge on Jan. 4.

Since then, FirstEnergy has opposed a motion by plaintiffs for the court to clarify its class certification order. Class certification matters because it lets a large group of similarly situated shareholders move ahead with claims that otherwise might not merit the costs of litigation.

Other filings continue FirstEnergy's objections to turning over its internal investigation on HB 6, as ordered by the special master last fall.

It's unclear how soon the court will rule on the stay and other issues. On Feb. 13, however, the court did overrule Energy Harbor's privilege objections to providing materials the special master said it should provide to plaintiffs in response to a subpoena.

Read more:

FirstEnergy scolds shareholders for meddling ahead of key class action appeal (Reuters)

Continuing with coal

FirstEnergy has abandoned its 2020 pledge to cut greenhouse gas emissions 30% by 2030. FirstEnergy's about-face comes as many companies operating in Ohio have stepped up work to reduce greenhouse gas emissions.

FirstEnergy's Feb. 8 securities filing announced the change just over three years after the company made its commitment for cuts by 2030. At the time FirstEnergy had just ousted Jones, Dowling, and some other executives in the wake of the federal government's arrests of Householder, Borges and others.

FirstEnergy's updated website statement says the about-face is necessary so it can keep two aging coal plants in West Virginia running longer, consistent with that state's coal-dependent energy policy. The company also cites resource adequacy in the PJM transmission region and changing market conditions. It claims it still plans to be carbon neutral by 2050.

FirstEnergy doubled down on coal power a dozen years ago, even as the boom for fracked oil and gas was underway. Bailout efforts in Ohio led to nearly half a billion dollars in ratepayer charges. The Supreme Court of Ohio ultimately held those charges unlawful, but they were not refunded. FirstEnergy similarly spent years lobbying to make West Virginia ratepayers cover costs for coal power there.

Read more:

Borges and Householder appeals

Appealing his conviction in the federal government's HB 6 criminal case, lobbyist Matt Borges filed his appellate brief on Jan. 9. Among other things, Borges took issue with the trial court's jury instructions and rulings on evidence. He also argued the evidence does not support the government's sole charge under the federal Racketeer Influenced and Corrupt Organizations Act.

Appellate courts generally defer to trial courts on weighing evidence, and here jurors found Borges guilty beyond a reasonable doubt. Yet some recent federal cases have tried to scale back what counts for a pattern of criminal activity under the RICO statute. Whether Borges' case fits into any exceptions is unclear.

The government's response in the Borges appeal is due March 8. Former Ohio House speaker Larry Householder's appeal is a separate case. His brief is due Feb. 26.

Borges has so far served seven-and-a-half months of his five-year sentence at a federal prison in southeastern Michigan. Householder is serving a 20-year sentence and is at a federal prison in Lisbon, Ohio.

Read more:

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FirstEnergy indictments allege corruption went back more than a decade

E energynews.us/2024/02/16/firstenergy-indictments-allege-corruption-went-back-more-than-a-decade/

By Marty Schladen / Ohio Capital Journal

February 16, 2024



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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FirstEnergy's \$180 Million Derivative Settlement Gets Appeal Nod

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Litigation



Signage is displayed at the FirstEnergy Corp. Bruce Mansfield coal-fired power plant in Shippingport, Pa., on Dec. 6, 2017.

Photographer: Justin Merriman/Bloomberg

- Sixth Circuit affirms district's approval of historic recovery
- Shareholder's appeal argued another judge should weigh in

FirstEnergy Corp.'s \$180 million recovery from a shareholders derivative suit settlement—one of the largest such accords ever, plaintiffs said in their settlement proposal—has been upheld by a US appellate court.

The US Court of Appeals for the Sixth Circuit on Friday rejected shareholder Todd Augenbaum's objection to the trial court's approval of the accord, which came without an OK from the judge presiding over a concurrent suit involving alleged misrepresentations by FirstEnergy's leadership.

Augenbaum had argued that the US District Court for the Northern District of Ohio needed to weigh in because it was the first venue where shareholders brought derivative claims against the power company's executives and directors, related to the firm's admission that it had conspired with public officials to pay millions of dollars in bribes tied to nuclear subsidies.

He also raised other issues with the settlement including inadequate notice for shareholders and excessive attorney's fees.

Circuit Judge Jane Branstetter Stranch said in an unpublished opinion, however, that Auguenbaum forfeited each of his arguments by raising them for the first time in his appeal, and that FirstEnergy was pursuing recoupment of damages through the settlement, not public interests that might have been fulfilled through more extensive discovery.

The deal's approval was within Southern District of Ohio Judge Algenon L. Marbley,, and Augenbaum failed to show that the existence of another similar suit elsewhere undermined the validity of the deal, according to the panel's ruling.

Joining in the opinion were judges Alice Moore Batchelder and Stephanie Dawkins Davis.

Abraham, Fruchter & Twersky and Markovits, Stock & DeMarco represent Augenbaum.

Debevoise & Plimpton LLP and Giffen & Kaminski LLC represent FirstEnergy.

The case is Empl Ret Sys of the City of St. Louis v. Jones , 6th Cir., No. 23-03512, 2/16/24 .

To contact the reporter on this story: Ben Miller in New York City at
bmiller2@bloombergindustry.com

To contact the editor responsible for this story: Andrew Harris at aharris@bloomberglaw.com
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This Week in Chancery Court: Chegg, Deloitte, Texas Pacific

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Education technology company Chegg Inc.'s board—as well as its auditors at Deloitte LLP—will ask the Delaware Court of Chancery this week to dismiss investor litigation over allegations that company leaders made millions of dollars on stock sales, while keeping shareholders in the dark about a business model based on academic cheating. Meanwhile, major shareholders who opposed a Texas Pacific Land Corp. plan to issue additional shares will seek a reversal of a Chancery court ruling against them.

Here's a look at more from the calendars for the Chancery Court and the Delaware Supreme Court this week:

Monday: Golden Rule Fin. Corp. v. S'holder Rep. Servs. LLC, Del. Ch., No. 2022-0065, trial 2/19/24.

At issue: A UnitedHealth Group Inc. unit filed suit in 2022 against the former owners of USHealth Group Inc., a business it bought in 2019, accusing them of breaching the sale agreement by relying on nonstandard accounting metrics when they initially calculated the size of an eight-figure post-closing adjustment. Last year, Shareholder Representative Services LLC—the legal entity that won an earlier, related case on behalf of USHealth Group's former owners and shareholders—sought a partial summary judgment in the case. Vice Chancellor Paul Fioravanti Jr. partly granted that motion regarding pre-judgment interest. The parties now go to trial, with the UnitedHealth unit arguing the acquired company's error “required the buyer to make a \$38.3 million true-up payment that reflected no increase in the company's true economic value,” according to a pre-trial brief. The defendants argue, in their own pre-trial brief, that the plaintiffs’ “theory is built on a house of cards.”

Court action: A three-day trial opens Monday in Wilmington, Del.

UnitedHealth Unit Reopens Fight Over \$750 Million Insurer Deal

Tuesday: Cleveland-Cliffs Burns Harbor LLC v. Boomerang Tube LLC, Del. Ch., No. 2022-0378, telephonic hearing 2/20/24.

At issue: An affiliate of Black Diamond Capital Management LLC, the investment firm run by billionaire Stephen Deckoff, faces fraudulent transfer claims stemming from a fast-tracked auction that handed over virtually the entire business of Boomerang Tube LLC, an oil-rig tubing manufacturer also controlled by Black Diamond. Vice Chancellor Lori Will previously ordered that the claims against PTC Liberty Tubulars LLC could proceed, though she dismissed claims against Black Diamond. Now the plaintiffs, affiliates of steelmaker Cleveland-Cliffs Inc., have filed a motion for partial default judgment, alleging Boomerang has failed to “timely answer or otherwise respond” to the litigation.

Court action: Oral arguments on the motion for partial default judgment will be heard via teleconference.

Black Diamond Capital Affiliate to Face Sham-Auction Claims

Wednesday: City of Sarasota Firefighters’ Pension Fund v. Inovalon Holdings Inc., Del., No. 305, 2023, oral argument 2/21/24.

At issue: Last July, Inovalon Holdings Inc. and founder Keith Dunleavy defeated shareholder litigation in the Chancery Court over the health analytics company’s \$7.3 billion sale to a private equity consortium led by Nordic Capital. The pension funds behind that litigation now ask the Delaware Supreme Court to reverse the ruling from Chancellor Kathaleen St. Jude McCormick, arguing the lower court “erred in holding that the stockholder vote was fully informed despite three material disclosure violations,” among other errors. Inovalon wants the Chancery Court’s ruling upheld, arguing in a reply brief that McCormick “correctly held that Plaintiffs did not sufficiently plead that the operative proxy statement failed to disclose material facts.”

Court action: Oral arguments before the Delaware Supreme Court will be heard in Dover, Del.

Inovalon, Founder Beat Challenge to \$7 Billion Take-Private Sale

Wednesday: Horizon Kinetics LLC v. Texas Pacific Land Corp., Del., No. 478, 2023, oral argument 2/21/24.

At issue: Last December, Vice Chancellor J. Travis Laster sided with Texas Pacific, ruling that its major shareholders should have followed the Permian Basin land giant’s board recommendation and voted to increase the number of authorized shares of common stock at the company’s 2022 annual meeting. Those shareholders have appealed to the state’s highest court, arguing in a brief that Laster’s opinion disenfranchised them “by judicial fiat on a hugely consequential change to TPL’s charter that eliminated a key feature of the company’s capital structure that had been in place since its establishment in 1888.” The high court should affirm Laster’s ruling, Texas Pacific said in an answering brief. The company

argues the shareholders “now purport to champion the rights of ‘all TPL stockholders,’ but they themselves tainted the stockholder vote with their wrongful campaign against Proposal Four. Neither law, policy, nor equity can relieve Defendants of their broad Voting Commitment.”

Court action: Oral arguments before the Delaware Supreme Court will be heard in Dover, Del.

Texas Pacific Wins Lawsuit Against Leading Shareholders

Thursday: Stansell v. Rosenweig, Del. Ch., No. 2023-0180, oral argument 2/22/24.

At issue: Both Chegg and Deloitte seek to dismiss the lawsuit that accuses Chegg’s directors, with Deloitte’s help, of soliciting investor votes for important corporate decisions with misleading claims about the company’s ethical standards and its practice of “helping” students. The investor argues the case should proceed, writing in an answering brief that Deloitte “aided and abetted” the Chegg directors’ breach of fiduciary duties, and if Chegg’s directors “disclosed that Chegg primarily supplies answers to textbooks and exam questions, stockholders could then decide if they want to continue their investments given the attendant risks of such a business model and make decisions regarding election of directors accordingly.”

Court action: Oral arguments on the motions to dismiss will be heard in Wilmington, Del.

Chegg’s Core Business Is Academic Cheating, Investor Suit Claims

Friday: Newman v. Sports Ent. Acquisition Holdings LLC, Del. Ch., No. 2023-0538, oral arguments 2/23/24.

At issue: An investor filed a lawsuit in May against the architects of the blank-check merger between online gambling company Super Group (SGHC) Ltd. and a shell entity, claiming they duped shareholders into approving a lousy deal that made insiders rich. The lawsuit targets the finance and sports industry veterans—including former senior executives at Goldman Sachs & Co. and the NFL—who sponsored Sports Entertainment Acquisition Corp., the special purpose acquisition company that combined with Super Group to take it public. Super Group operates the digital sports betting platform Betway and Spin, an online casino. The defendants filed a motion to dismiss, arguing the investor hasn’t adequately alleged a failure to disclose information or an “unfair dealing” in a case where “seasoned sports and entertainment executives founded a single SPAC, appointed two independent directors with a wealth of senior management experience to its board, and negotiated a merger with an already-profitable, cash-generating online sports betting and gambling

platform.” The investor argues in an answering brief that the complaint’s unjust enrichment claim should proceed because “each defendant was positioned to profit handsomely from his or her founder share windfall resulting from a fiduciary breach.”

Court action: Oral arguments on the motion to dismiss will be heard in Wilmington, Del.

Super Group’s Blank-Check Backers Hit With SPAC Deal Challenge

To contact the reporter on this story: Jennifer Kay in Philadelphia at jkay@bloomberglaw.com

To contact the editors responsible for this story: Stephanie Gleason at sgleason@bloombergindustry.com; Alex Clearfield at aclearfield@bloombergindustry.com
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Walgreens Board Beats Claims It Ignored Insulin Pen Price Scheme

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Litigation

A sign sits in front of a Walgreens store on Nov. 10, 2023, in Wheeling, Ill.

Photographer: Scott Olson/Getty Images

Feb. 20, 2024, 9:31 AM PST

Peter Hayes

Reporter

- Shareholders failed to show board members acted in bad faith
- Overfilled orders led to settlement with Justice Department

The board of Walgreens Boots Alliance Inc. shook off a shareholder derivative lawsuit alleging it exposed the pharmacy giant to hundreds of millions of dollars in legal liability and lost goodwill by looking the other way while it overcharged the federal government for insulin pens.

The suit accused the board of ignoring “red flags” related to the insulin scheme after abandoning reforms put in place a decade earlier, as part of an unrelated settlement of overbilling charges.

“Even if one could, through squinted eyes, perceive a red flag from the patchwork of events raised in the Complaint,” the claim for breach of duty of oversight fails, Vice Chancellor Lori W. Will of the Delaware Chancery Court said, granting the defendants’ motion to dismiss.

The shareholders “must adequately plead bad faith,” Will said. But the complaint “lacks particularized allegations indicating that any of the director defendants operated with this state of mind,” she said.

The plaintiffs alleged that Walgreens’ software was set to dispense a minimum of five insulin pens—the amount in the manufacturer’s box. Because a patient might need fewer than five pens, this resulted in unnecessary refill reminders and overbilling of third-party payers, including the federal government.

The shareholders argued that the board’s awareness of a civil investigative demand issued to Walgreens by the US Department of Justice in 2016 put it on notice that Walgreens’ insulin pen dispensing practice violated the False Claims Act.

The claim “collapses considering that the problem was remediated,” Will said.

Within months of learning about a related whistleblower action in 2017, the company “changed its software to allow individual insulin pens to be dispensed,” Will said. “The plaintiffs’ grievance that the board’s response came too late and did too little is incompatible with bad faith,” she said.

Walgreens reached a \$209 million settlement with the Justice Department in 2019.

The investors are represented by Cooch and Taylor PA, Robbins LLP, and Morris Kandinov LLP. Walgreens and its board members are represented by Abrams & Bayliss LLP and Ropes & Gray LLP.

The case is *Clem v. Skinner*, 2024 BL 52969, Del. Ch., No. 2021-0240, 2/19/24 .

To contact the reporter on this story: Peter Hayes in Washington at PHayes@bloombergindustry.com

To contact the editor responsible for this story: Blair Chavis at bchavis@bloombergindustry.com

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When Investors Rush In: The Close of Sam Bankman-Fried's Criminal Case Signals More Lawsuits Against Private Equity Firms to Recoup Losses

LAW [law.com/newyorklawjournal/2024/02/20/when-investors-rush-in-the-close-of-sam-bankman-frieds-criminal-case-signals-more-lawsuits-against-private-equity-firms-to-recoup-losses](https://www.law.com/newyorklawjournal/2024/02/20/when-investors-rush-in-the-close-of-sam-bankman-frieds-criminal-case-signals-more-lawsuits-against-private-equity-firms-to-recoup-losses)

By Dave Curran and Madhuri Pavamani

In this courtroom sketch, FTX founder Sam Bankman-Fried, background center, is cross examined while Judge Lewis Kaplan listens, background second left, in Manhattan federal court, Monday, Oct. 30, 2023, in New York. (Elizabeth Williams via AP)

EXPERT OPINION

The authors expect a wave of lawsuits against private equity firms by investors in the wake of private actions brought against the collapsed crypto platform FTX.

February 20, 2024 at 10:00 AM

By Kevin B. Frankel, Molly M. White and Alex J. Scandroli | February 20, 2024 at 10:00 AM

Private equity funds continue to bear the collateral consequences of FTX's sudden collapse last November. The fallout from the collapse initially catalyzed regulatory scrutiny throughout federal and state agencies, principally from the Securities and Exchange Commission (SEC).

Kevin B. Frankel of McGuireWoods. Courtesy photo

Now, a wave of private plaintiffs' lawsuits is cresting over the elite firms that funded FTX's various

business ventures. Looking around the corner, investors in those same firms will likely bring a new phase of litigation against private equity funds that put investor money into FTX deals, allegedly without adequate due diligence.

The current lawsuits are

predicated on the theory that by financing FTX, private equity

Molly White, partner at McGuireWoods. Courtesy Photo.

funds provided the cryptocurrency exchange with an 'air of legitimacy,' thereby attracting customers to trade on FTX's platform and to purchase its proprietary stablecoin.

The onset of these class-action-styled suits was, to a large degree, staved off while the Department of Justice mounted its criminal case against the FTX principals responsible for the exchange's multibillion-dollar fraud scheme.

. Alex J. Scandroli is an associate at McGuireWoods. Courtesy Photo FTX founder Sam Bankman-Fried (a.k.a. SBF), was
the chief holdout who refused to accept a plea among FTX's executives. On November 3, 2023, after a jury trial, SBF was convicted on all charges, including seven federal fraud and money laundering counts, for being the lynchpin in one of the largest fraud schemes in history. The conviction came nearly a year after it was exposed that FTX's main market maker and alter-ego, Alameda Research, misappropriated billions of dollars of customer assets.

In the aftermath and throughout early 2023, FTX investors have filed sprawling lawsuits against FTX and its related entities, in an effort to recoup their lost assets. The majority of these actions were consolidated into a multidistrict litigation pending in the Southern District of Florida. See *In re: FTX Cryptocurrency Exchange Collapse Litig.*, No. 1:23-md-3076 (S.D. Fla. February 2023).

Due to the parallel criminal proceedings, federal prosecutors in the Southern District of New York obtained a stay of the consolidated Florida litigation during SBF's criminal case. Now, with SBF's criminal conviction secured, the dam holding back these civil suits is being removed. This, in turn, will motivate the plaintiffs' bar to accelerate litigation against FTX's erstwhile business partners.

Suing deep-pocketed finance titans is an attractive strategy when compared to the uncertainty of creditor priorities in the FTX bankruptcy proceedings. Instead, plaintiffs can obtain recovery likely well beyond their investment loss in FTX—given the potential for compensatory, punitive, and statutory damages—by targeting FTX's financiers and imposing vicarious liability for FTX's fraud. To do so, these putative class actions allege that private equity funds created the market ecosystem for FTX's scheme to occur, and, as a corollary, enabled the scheme by fueling FTX's soaring growth.

The seminal case employing this legal theory came from a putative class action filed in the Northern District of California. See *Girshovich v. Sequoia Capital Operations LLC, et al.*, No. 3:23-cv-00945-JCS (N.D. Cal. March 2023).

The class complaint named three private equity funds as defendants that collectively invested over \$500 million in FTX before its demise. The complaint asserts claims against those funds for statutory violations of California's Unfair Competition Law and False Advertising Law, in addition to common law claims of negligent misrepresentation, intentional misrepresentation, fraudulent inducement, civil conspiracy, and aiding and abetting.

With respect to the conspiracy and aiding and abetting claims—the claims most vital for imposing vicarious liability—the complaint alleges that institutional investors were motivated by their stakes in FTX to promote the exchange to retail traders, despite apparent red flags concerning FTX's financial liabilities and other indicia of fraud.

Where FTX is known to have concealed certain facts from investors, the putative class overcomes this by alleging that but-for the firms' lack of due diligence, FTX's scheme would have otherwise been exposed.

Other class-styled suits have gone so far as to claim that private equity funds had direct knowledge of material misrepresentations when they promoted FTX, which, in effect, created a duty for those firms to disclose the misrepresentations directly to FTX's investors. See *O'Keefe v. Tiger Global Mgmt., LLC*, No. 1:23-cv-6336 (S.D.N.Y. July 2023). This novel claim is structured to impute the duties that FTX owed to its investors and those buying its cryptocurrency onto private equity investment firms. If successful, these claims could set new precedent for finding a private equity fund liable to parties financially injured by the entity receiving capital investments.

But there is another layer coming soon to this legal free-for-all. The individual investors who capitalized the private equity funds that invested in FTX are likely to file suits against those funds for alleged breaches of fiduciary duties.

To illustrate this threat, in January of 2023, reports surfaced that the SEC is formally investigating whether FinTech investment funds followed proper due diligence procedures when investing in FTX entities. FTX as a rule refused to provide standard diligence to investors. Notwithstanding the lack of diligence, these funds invested massive amounts of capital into FTX in the zeal to participate in the growth saga that SBF manufactured. The existence of the SEC investigation suggests that the FinTech funds' diligence practices were inadequate.

Against this backdrop, individual investors who put their money—and trust—into FinTech investment funds will likely sue those funds alleging that but for shoddy diligence, the investors' money would still be safe.

Whether brought as a putative class or as individual suits, these actions pose existential threats to vulnerable investment funds that bet big on cryptocurrency. And the anticipation of new and on-going litigation has already had a chilling effect on investments in the cryptocurrency industry at large—an industry still reeling from mounting SEC enforcement actions, investigations by state attorneys general, and FTX's shock to crypto traders.

The initial lawsuits have targeted the largest private equity funds, but if successful, the plaintiffs' bar will continue to identify other players on the periphery of FTX to enlarge the pot available for damages. Private equity funds that made investments with FTX, whether

directly or indirectly, should prepare now to address class claims or individual suits as they arise.

This includes: (1) identifying the claims that can be dismissed as a matter of law to chip away at the scope of the lawsuit, with a particular eye to assailing allegations concerning knowledge and/or conspiracy; and (2) analyzing the disparities and other vulnerabilities related to the putative class members.

Kevin B. Frankel is a partner at McGuireWoods and chairs the firm's State Attorneys General practice. He was formerly a prosecutor and New York assistant attorney general. **Molly M. White**, a former SEC prosecutor, is a partner at McGuireWoods' and leads its fintech practice group. **Alex J. Scandroli** is an associate at the firm in its government investigations & white collar litigation department.

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- Latest
- Trending
- **Litigation Surge**

Oil and natural gas producer Hess Corp. was hit with a surge of class actions last week. At least three federal class actions were filed, including two antitrust suits in Nevada District Court accusing Hess and other oil producers of conspiring to limit domestic production to keep prices artificially high; Hess has tapped Wachtell Lipton Rosen & Katz for defense. Meanwhile, an ERISA class action filed in Texas Northern District Court accuses administrators of the company's retirement plan of breaching fiduciary duties to plan participants by offering a suite of T. Rowe Price target date funds that, according to the suit, perform worse than similar mutual fund alternatives. The suit was brought by Foulston Siefkin and Figari + Davenport.

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FTX Investors Sue Sullivan & Cromwell, Say Firm Aided Fraud (1)

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FTX investors sued Sullivan & Cromwell, accusing the law firm of aiding illicit schemes that helped advance a multi-billion dollar fraud before the crypto exchange's collapse.

Sullivan & Cromwell's services "went well beyond those a law firm should and ordinarily provides," the investor complaint said. "Lawyers were eager to craft not only creative but misleading strategies that furthered FTX's misconduct."

The lawsuit filed Feb. 16 on behalf of a proposed class of FTX customers adds to scrutiny of the elite Wall Street law firm that has acknowledged working on 20 legal matters for FTX and its founder Sam Bankman-Fried in the 16 months before the exchange's 2022 implosion amid reports of a liquidity crisis.

Sullivan & Cromwell declined to comment. The firm has previously said it had a "limited" relationship with FTX and that it reported concerns to federal law enforcement after learning of the exchange's problems.

The Moskowitz Law Firm, which is behind actions against Tom Brady and other celebrity endorsers of FTX, brought the suit in Miami federal court. Sullivan & Cromwell "actively participated" in the FTX fraud through legal work that gave it deep insight into the exchange's inner workings, investors allege. Firm lawyers knew where customer money was held and about the "untruthful and fraudulent conduct and misappropriation" of the money, the investors claim.

The lawsuit makes Sullivan & Cromwell the second law firm to face an investor lawsuit over allegedly aiding and abetting the FTX fraud.

Fenwick & West, a Silicon Valley law firm which worked as the crypto exchange's main corporate counsel, is facing a separate action along with venture and private equity firms such as Sequoia Capital, Thoma Bravo and Paradigm.

Bankman-Fried in November was convicted of fraud and conspiracy for siphoning customer money into an affiliated hedge fund for risky investments, political donations, and expensive real estate.

Embracing Crypto

Sullivan & Cromwell, founded in 1879, is among the biggest law firms in the US. It has embraced work with entities in the digital assets arena, advising Coinbase, the largest exchange in the US, in its fight with Securities and Exchange Commission. The firm is poised to be appointed Binance Holdings Ltd.'s independent monitor following the exchange's multibillion-dollar settlement with the US.

The firm became an outside counsel to FTX in 2021 after FTX.US hired Ryne Miller as its general counsel. According to the investor complaint, Miller, who came to FTX from Sullivan & Cromwell, immediately made it his priority to send business to his former firm.

The matters Sullivan & Cromwell worked on included FTX's proposed acquisition of crypto exchange Voyager's assets in bankruptcy and regulatory representations before the Commodity Futures Trading Commission. The firm also represented Bankman-Fried in his personal capacity in relation to his position in the stock trading app company Robinhood Markets Inc.

The firm's restructuring group, led by Andy Dietderich, has since served as FTX's main bankruptcy counsel, a job for which it has already billed at least \$150 million. Dietderich told a judge overseeing the insolvency case on Jan. 31 that FTX plans to repay customers in full.

A federal appeals court, however, has also ordered an independent examiner to investigate the FTX case, citing in its decision the potential conflicts issues raised over Sullivan & Cromwell's work for the exchange prior the bankruptcy.

The case is Edwin Garrison et. al. v. Sullivan & Cromwell, S.D.Fla., No. 1:24-cv-20630, 2/16/2024

(Adds Sullivan & Cromwell declining to comment and previous law firm statement in fourth paragraph.)

To contact the reporter on this story: Justin Wise at jwise@bloombergindustry.com

To contact the editors responsible for this story: John Hughes at jhughes@bloombergindustry.com

Litigation

Feb. 16, 2024, 9:41 AM PST

NYCB Board, CEO Sued for Not Disclosing Lending, Signature Risks

By Ben Miller

- **COURT:** E.D.N.Y.
- **TRACK DOCKET:** [1:24-cv-01207](#)

Bloomberg Law News 2024-02-20T10:51:3626461544-05:00

NYCB Board, CEO Sued for Not Disclosing Lending, Signature Risks

By Ben Miller 2024-02-16T12:41:31000-05:00

- **COURT:** E.D.N.Y.
- **TRACK DOCKET:** [1:24-cv-01207](#)

New York Community Bancorp's top brass allegedly concealed detrimental information about the bank's deteriorating commercial real estate portfolio and its heightened operating risks following its acquisition of Signature Bridge Bank's assets and liabilities, a shareholder lawsuit says.

NYCB CEO Thomas Cangemi and board members delayed disclosing that the bank's financial results would be negatively impacted by higher net charge-offs and losses on its loans to office buildings, violating federal securities laws, according to the complaint filed Thursday in the US District Court for the Eastern District of New York.

They also used positive statements in press releases and company disclosures to distract investors for nearly a year from the ill effects the purchase of Signature's assets and liabilities would have on NYCB's banking risks and costs, according to the complaint. NYCB took on more than \$100 billion in assets sooner than shareholders anticipated as a result of the Signature transaction, subjecting the bank to higher banking standards and requirements, the complaint said.

The officers and directors told shareholders publicly that the Signature transaction would transform NYCB from a multi-family lender into a full-service commercial bank and build upon its 2022 acquisition of Flagstar Bank to diversify NYCB's loan portfolio away from commercial real estate loans, according to the complaint.

Signature, a casualty of several banking failures early last year precipitated by Silicon Valley Bank, and the third-largest bank failure in US history, was closed by regulators over solvency fears in 2023 and liquidated its holdings to buyers such as NYCB.

The commercial real estate lender, which specializes in rent-regulated and non-luxury apartment buildings in the New York City area, was also sued last week in the same court for allegedly misleading shareholders about the health of its commercial real estate loan portfolio. That proposed class action highlights several instances when NYCB assured shareholders of the quality of its commercial real estate loans and downplayed expected losses.



The class action filed Thursday seeks to recover damages for shareholders affected between March 1, 2023, when the alleged misrepresentations began, and Jan. 31, 2024, the day after NYCB released its financial results for the fourth quarter of 2023. NYCB reported a \$252 million net loss in the quarter, citing for the first time higher net charge-offs and a \$552 million provision for loan losses due primarily to the bank's commercial real estate portfolio.

NYCB shares experienced their biggest single-day drop of all-time on Jan. 31, falling more than 37% to close at \$6.47 per share, according to data compiled by Bloomberg. Shares continued to slide on Feb. 1, falling more than 11% to close at \$5.69 per share, and they experienced another significant dip on Feb. 6, falling more than 22% to close at \$4.15 per share.

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

Gainey McKenna & Egleston represents the plaintiff.

The case is Hauser v. Cangemi, E.D.N.Y., No. 1:24-cv-01207, complaint filed 2/15/24.

To contact the reporter on this story: Ben Miller in New York City at bmiller2@bloombergindustry.com

To contact the editor responsible for this story: Ada Hui at ahui@bloombergindustry.com

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Class Action

Feb. 20, 2024, 9:34AM PST

Allergan Investors Lose Appeal Over Breast Implant Statements

By Martina Barash

Documents

 Court Opinion

2d Cir. Docket

Bloomberg Law News 2024-02-20T14:16:41147165885-05:00

Allergan Investors Lose Appeal Over Breast Implant Statements

By Martina Barash 2024-02-20T12:34:43000-05:00

Allergan PLC's public statements about its breast implants weren't misleading "half-truths," the Second Circuit said Tuesday in affirming a judgment against investors who represented a securities class.

A statement in a Securities and Exchange Commission filing, and two statements to the press, about breast implant safety studies were literally true and didn't imply that Allergan's textured devices had a closer link to a form of lymphoma than other manufacturers', the appeals court said in an unsigned, unpublished opinion.

- The investors said in their suit, which was dismissed in December 2021, that the pharmaceutical company downplayed the strength of the cancer connection ahead of a European recall
- A reasonable investor wouldn't have interpreted statements about both smooth and textured implants "to mean that Allergan's *textured* products were not more closely associated" with the lymphoma "than the *textured* products of other manufacturers," the US Court of Appeals for the Second Circuit said
- Nor can Allergan be held liable for alleged "pure omissions" in the securities fraud case, Judges Susan L. Carney, Richard J. Sullivan, and Eunice C. Lee said

Faruqi & Faruqi LLP represented the investors. Cleary Gottlieb Steen & Hamilton LLP represented Allergan.

The case is *In re Allergan PLC Sec. Litig.*, 2d Cir., No. 23-59, unpublished 2/20/24.

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

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PLDT Reaches \$3 Million Settlement in Expenditure Overrun Suit

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Class Action

Signage at the PLDT Inc. headquarters in Makati City, Metro Manila, the Philippines, on Monday, Dec. 19, 2022.

SeongJoon Cho/Bloomberg

- Deal would end yearlong litigation over unrecorded spending
- Class members include ADS holders between 2019 and late 2022

The Philippine telecommunications provider PLDT Inc. has agreed to a \$3 million deal to settle allegations that it delayed disclosing a \$872 million capital expenditure overrun and prompted the biggest stock drop for the company's American Depositary Shares in 35 years.

The settlement would put an end to a yearlong litigation over the company's disclosure of costs associated with unrecorded purchases, which allegedly prompted a stock drop in 2022, according to the complaint filed in US District Court for the Central District of California last February.

PLDT, formerly known as the Philippine Long Distance Telephone Co., had announced a capital expenditure program in 2019, touting an intent to invest in broadband infrastructure and enhance its network advantage. The company, its directors, and executives allegedly concealed budget overruns and the weaknesses that enabled the spending issues for nearly two years, the complaint said.

An internal audit revealed the cost overrun, which the company said at the time amounted to 12% of the total project's expected costs, drawing an inquiry from the Philippines' Securities and Exchange Commission.

PLDT issued a disclosure on Dec. 16, 2022, revealing the probe into the budget issues. Articles in

and Light Reading detailing the agency action were published three days later. On that day, the company's share price fell more than 23% to close at \$18.81 on Dec. 19, 2022, the stock's biggest drop since 1987, according to data compiled by Bloomberg.

The pact would benefit a class of hundreds or thousands of investors who acquired American Depositary Shares of PLDT between Jan. 1, 2019 and Dec. 19, 2022, according to an unopposed motion for preliminary approval, filed Feb. 16. The parties are seeking a March 18 hearing.

Levi & Korsinsky LLP represents the plaintiff and the proposed class.

Milbank LLP represents PLDT, the directors, and executives.

The case is Douglas v. PLDT Inc. , C.D. Cal., No. 2:23-cv-00885, 2/16/24 .

To contact the reporter on this story: Ben Miller in New York City at

bmiller2@bloombergindustry.com

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Court Gives Preliminary Nod to Athira Class Action Settlement

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThkLWlzOTktZDU1NS1hYmJmLWlWzOWlxZmFhMDAwMSIsImN0eHQiOiJTTE5XliwidXVpZCI6InNzbERsNmZMN2o1TVlYM0F6WGhNVXc9PVFKNU1XZ3NOQk1yd3RUY0ZCUW9uUXc9PSIsInRpbWUiOiIxNzA4NDMxMjc4MjU2Iiwic2lnIjoia2pWMmtxQnJsYnhjMXVrT1pNNkJSWDVGdzd3PSIsInYiOiIxIn0=

Litigation

Feb. 16, 2024, 3:28 PM PST

Mike Vilensky

Athira Pharma Inc. and investors who had alleged claims against the company in a class action lawsuit persuaded a federal judge to preliminarily approve a roughly \$10 million settlement, bringing the litigation closer to an end.

Investors alleging the biopharmaceutical company failed to disclose altered images in its Alzheimer's research sued in the U.S. District Court for the Western District of Washington. Judge Thomas S. Zilly denied preliminary approval of a settlement last year, citing concerns that the lead plaintiffs could not bring claims that other members of the class could.

- The revised proposed settlement adds a third lead plaintiff who could bring both Securities Act claims and Exchange Act claims, and it divides the class members into a Securities Act subclass and Exchange Act subclass based on when they acquired Athira stock, Zilly said
- The total class is estimated to include 30,000 or more members, each of which acquired Athira's shares during the relevant period, the court said
- Zilly deferred approving the claim form for class members wishing to opt in, saying the proposed form "seems designed to discourage putative class members from participating in the settlement" and suggested "a more user-friendly, streamlined claim form"

Labaton Keller Sucharow LLP and Glancy Prongay & Murray LLP represent the plaintiffs and the class. Wilson Sonsini Goodrich & Rosati represent Althira.

The case is Nacif et al v. Athira Pharma Inc , 2024 BL 50224, W.D. Wash., 2/15/24 .

To contact the reporter on this story: Mike Vilensky at mvilensky@bloombergindustry.com

To contact the editor responsible for this story: Martina Stewart at mstewart@bloombergindustry.com

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@annmlipton@esq.social
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Corporations can leave Delaware, it turns out, but they may have to pay damages:

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

9:17 AM · Feb 20, 2024 · 3,426 Views



3



10



16



4



Post your reply

Reply



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Has anyone yet tried suing Snap/Fox for money damages due to adoption of officer exculpation? Although, Laster will later say, damages may be based on market reaction and I doubt there was one

The plaintiffs can only state a claim on which relief can be granted because (1) the corporation has a stockholder controller, and (2) the board did not implement any protective provisions. The defendants also did not make any effort to compensate the stockholders for the reduction in their litigation rights. Change any of those variables and the outcome could be different.



1



1



257



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Laster will later go on to say that damages may be measured by stock price reaction; the beauty of a Tesla move is that Musk muddied the waters with his advance Tweet, at a time the stock price was diving in reaction to the Torretta decision



1



2



392



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Curses, foiled again by bad tweets



1



618



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Anyway, in light of the fact that Laster finds it significant that most of the unaffiliated s'holders rejected the reincorporation plan, it's odd to me he'd place so much weight on stock price to assess damages - shouldn't s'holders votes matter too?



349





Professor Eric Rasmusen  @erasmuse · 55m

Looks like an interesting case. They are allowed to reincorporate in Nevada even tho their procedure was bad, but they have to pay damages. Why the split? Well, I guess I should read the decision to find out.



26



@annmlipton@esq.social @AnnMLipton · 25m

because injunctive relief is only available when monetary is not sufficient - general principle - and he held he could craft a damages remedy here



3



earthactionglobal  @earthglobalact

Ad

"..Fentanyl drug cartels are laundering their money using tax havens such as Dubai." @bostonherald - Lawyer Rhys Davies #fentanyl #overdose



146K



Robert Anderson @ProfRobAnderson · 1h

So many issues. Getting really interesting (and timely!)



121



@annmlipton@esq.social @AnnMLipton · 1h

i thought you'd enjoy the part where he says delaware liability standards have value to s'holders. i gather you'd dispute that empirically? except i'm reasonably confident no delaware court will agree with you



146



Robert Anderson @ProfRobAnderson · 1h

I haven't read it, but if all it says is that Delaware law provides more/different litigation options/rights, I wouldn't disagree. My point is simply about Delaware law creating shareholder value. And to my knowledge nobody has brought any empirical evidence against the point.



71



Roundup MDL Leads Defend Fee Allocations: 'Limited Funds Available'

 [law.com/therecorder/2024/02/16/roundup-mdl-lead-counsel-defend-fee-allocations-limited-funds-available](https://www.law.com/therecorder/2024/02/16/roundup-mdl-lead-counsel-defend-fee-allocations-limited-funds-available)

By Amanda Bronstad

Aimee Wagstaff of Wagstaff Law Firm. Photo: Jason Doiy/ALM

Roundup MDL Lead Counsel Defend Fee Allocations: 'Limited Funds Available'

The fee committee, which is comprised of the three lead plaintiffs' firms in the Roundup multidistrict litigation, allocated 81% to themselves, but three firms objected to their allocations.

February 16, 2024 at 03:31 PM

Fee Disputes

Amanda Bronstad
staff reporter

The original version of this story was published on Law.com

What You Need to Know

- The common benefit fund in the Roundup multidistrict litigation totaled \$20.23 million, far less than the estimated \$800 million originally requested
- Among the objecting firms were co-liaison counsel Andrus Anderson and two firms who helped obtain the first Roundup verdicts: Moore Law Group and Wisner Baum

Lawyers doling out fees in Roundup litigation stood by their decisions on how to allocate the funds, despite objections raised by other firms.

The fee committee, which is comprised of the three lead plaintiffs firms in the Roundup multidistrict litigation, allocated 81% to themselves and the rest to four other firms, including those who helped win the only bellwether trial, which ended in an \$80 million verdict in 2019.

Three of those firms objected to their share of the so-called common benefit fund, which totaled \$20.23 million.

Lead counsel originally had sought an order that would have granted about \$800 million in common benefit fees, enough for the firms to “each afford to buy their own island,” U.S. District Judge Vince Chhabria wrote in a 2021 order significantly trimming the scope of common benefit fees in the Roundup litigation.

Several firms had objected to the original request, which they called a “money grab,” but lead counsel insisted that Bayer, which owns Monsanto, would not have entered into settlements but for their work. In 2020, Bayer announced it planned to settle about 125,000 Roundup claims for an estimated \$10.9 billion, but thousands of cases remained unsettled.

The significant reduction in the common benefit fund appeared to influence the committee’s allocation amounts. For instance, San Francisco’s Andrus Anderson, whose partner Lori Andrus served as co-liaison counsel in the Roundup multidistrict litigation, had wanted closer to \$550,000, the amount the firm actually billed, rather than the allocated \$200,000, or 1% of the common benefit fees.

The committee, in a response on Friday, acknowledged that Andrus Anderson’s request was reasonable.

“But, unfortunately, the limited funds available for distribution in this litigation do not allow this to happen,” the committee wrote.

The committee members are co-lead counsel Aimee Wagstaff, of Wagstaff Law Firm in Denver; Robin Greenwald, of New York’s Weitz & Luxenberg; and David Dickens, who took over following partner Michael Miller’s 2021 death, at the Miller Firm in Orange, Virginia. Among the fee committee members, Wagstaff Law Firm is set to receive the most, with 30%.

‘Thousands of Hours of Common Benefit Work’

Common benefit fees are used in multidistrict litigation to compensate lead counsel for costs and fees associated with discovery, trials and settlements, while preventing “free riders,” or lawyers who collect fees on cases they generate but don’t necessarily litigate.

Lawyers with related state court cases, in past years, have challenged common benefit fees, which are funded through assessments against their settlements.

Judge Vince Chhabria of the U.S. District Court for the Northern District of California.

Chhabria, in the Northern District of California, called common benefit fees in multidistrict litigation “totally out of control,” sending shock waves through the mass tort bar. In his Roundup order, he excluded a large amount of the legal work, including state court cases, from being reimbursed through common benefit fees.

Los Angeles-based Wisner Baum and its predecessor, Baum Hedlund Aristei & Goldman, focused heavily on Roundup cases in California state courts, where partner R. Brent Wisner won verdicts of \$289 million, in 2018, and \$2 billion, in 2019. But the firm is set to receive 10% of the fees because “no other firm contributed more to the common benefit of the MDL,” according to the committee’s response, filed on Friday.

The allocation, the committee wrote, is based on Wisner Baum’s “good faith effort” to estimate its time. But the firm didn’t have adequate billing records that divided up the hours tied to the multidistrict litigation versus state court cases. The fee committee, as a result, was forced to reduce Wisner Baum’s requested amount.

“Applying such a reduction is consistent with how courts typically handle attorney fee determinations for firms that have failed to submit time records,” the committee wrote.

Jennifer Moore, of Moore Law Group, based in Louisville, Kentucky, was co-lead counsel with Wagstaff in the bellwether trial, which Monsanto appealed all the way to the U.S. Supreme Court.

Moore had argued that 6% was not enough given her work in that case or the \$3.4 million her firm contributed to the common benefit fund, but the fee committee countered that the Miller Firm and Weitz & Luxenberg, both lead counsel firms, also anticipate receiving less than they paid.

“Moore Law contributed to the advancement of this MDL. There is no question about that,” the committee wrote on Friday. “But Moore Law also greatly benefitted from the thousands of hours of common benefit work that was done before it had any involvement in this MDL.”

Another objection came from David Diamond, of Diamond Law in Tucson, Arizona, who insisted he did not rely on lead counsel’s work in his Roundup cases. He was joined by David Bricker, of Thornton Law Firm in Beverly Hills, California. Diamond suggested returning the money to lawyers, like them, who took their own risks.

But the committee, on Friday, disputed his characterization.

“Diamond Law was able to resolve 300 MDL cases without having to draft and issue general discovery, brief and argue preemption and other general dispositive motions, depose a single Monsanto employee, or retain general experts in epidemiology, toxicology,

pathology, and regulatory affairs,” the committee wrote. “With this backdrop, it is difficult to comprehend how Diamond Law can boldly declare that it received no assistance from MDL leadership.”

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[Environmental, Social & Governance \(ESG\)](#)

Feb. 20, 2024, 2:00 AM PST

'100%' Sustainable Claims Pose Mounting Legal Risk for Companies

By Clara Hudson

Deep Dive

- Consumers target ambitious environmental and social claims
- Recent suits question Hershey, Mondelez sourcing pledges

Bloomberg Law News 2024-02-20T10:47:13713890439-05:00

'100%' Sustainable Claims Pose Mounting Legal Risk for Companies

By Clara Hudson 2024-02-20T05:00:55000-05:00

- Consumers target ambitious environmental and social claims
- Recent suits question Hershey, Mondelez sourcing pledges

A new crop of lawsuits is targeting bold marketing claims like "100% sustainable" as companies from Hershey to United Airlines make increasingly ambitious environmental and social marketing assertions on their products or services.

The consumer suits are driven by increased skepticism over broad corporate promises surrounding eco-friendly practices and ethical sourcing that plaintiffs say go too far and are nearly impossible for businesses to back up. In the past month alone, consumers sued food and beverage provider Mondelez International Inc. and The Hershey Co. for touting the cocoa used in Oreos as well as organic and plant-based chocolate bars as "100% sustainable."

Presenting corporate efforts as entirely sustainable or ethical—loose terms that aren't easily measurable—can be risky, attorneys say.

"We generally recommend that our clients avoid these absolute claims because they're very, very easy to pick apart, unless you have full substantiation," said Emily Lyons, a partner at Husch Blackwell that focuses on lawsuits in the food industry.

There are few legislative or regulatory guardrails for such marketing, but the latest lawsuits follow a rise in consumer-led litigation targeting businesses for alleged greenwashing. As companies are keen to spotlight their environmental and social efforts to stay competitive, it's the courts that will ultimately provide them with more clarity about what could be deemed misleading. This will be especially important as environmental and social disputes rise: 73% of organizations say ESG disputes are the top litigation risk to them in 2024, according to a Backer McKenzie report that surveyed 600 senior lawyers at large corporations.

The consumer confusion over the "100%" claims comes in part because business don't always thoroughly explain their statements on packaging, said Jeffrey Greenbaum, an advertising lawyer and managing partner of Frankfurt Kurnit Klein & Selz.

"It's very hard to talk about a company's sustainability program on a tube of lipstick," Greenbaum said.

Rise in Litigation

Greenwashing suits have increased in the past few years: there were more than seventeen cases concerning allegedly misleading sustainability claims brought between June 2021 and June 2023 according to law firm Mintz. Advertising lawyers say they expect to see even more litigation over 100% claims.

"Because you see more and more of these absolute claims, it continues to raise consumers' eyebrows," Lyons said. "If you were saying '100% American cheese' or 'American produced cheese,' that would be a little bit easier to readily verify."

Hershey was sued in mid-January over its assertion that it has "achieved 100 percent certified and sustainable cocoa" in part by sourcing through Rainforest Alliance certified cocoa farms. The Rainforest Alliance, an international non-governmental organization that certifies companies' environmental and social efforts, is also a defendant in the case. The lawsuit cited reports about child labor in the cocoa farming industry and that the industry is a driver of deforestation. The suit said Hershey only has 68% sourcing visibility "by cocoa volume," and therefore it can't make any promises about tracking the rest.

"The simple fact is that Hershey does not know whether 32 percent of its cocoa volume is sustainable—or not," the lawsuit said. "Without the ability to trace 100 percent of its cocoa, Hershey cannot substantiate its claims that the cocoa used in its Products is 100 percent sustainable and thus, the statement in Hershey's consumer marketing materials is false."

Mondelez, known for snack brands including Oreos, was sued over similar claims later in January for assertions about its "100% sustainably sourced cocoa." Similar to the Hershey case, the lawsuit also said that deforestation and child labor in the cocoa industry should negate any claims of entirely sustainable sourcing.

Starbucks was sued in early January for a similar claim, but the coffee giant's assertion had a caveat: it said it has a "commitment to 100% ethical coffee sourcing" rather than claiming that its current efforts have already reached that goal. The Starbucks case was also notable because it was brought by the National Consumers League, a nonprofit, rather than individual plaintiffs.

"On every bag of coffee and every box of K-cups sitting in our grocery store shelves Starbucks is telling consumers a lie," said Sally Greenberg, CEO of the National Consumers League, at the time the suit was filed.

A Starbucks spokesperson said in an email that the company takes "allegations like these extremely seriously" and is actively engaged with farms to ensure they adhere to its standards. "Additionally, we plan to aggressively defend against the asserted claims that Starbucks has misrepresented its ethical sourcing commitments to customers," the spokesperson said.

Greenwashing Court Cases Ramp Up

Several new suits target '100%' environmental or social claims

Company	Lawsuit filed	Marketing claim	Status
Mondelez	January	100% sustainably sourced cocoa	Ongoing
Hershey	January	100% certified and sustainable cocoa	Ongoing
Starbucks	January	Commitment to 100% ethical coffee sourcing	Ongoing
United Airlines	November	Commitment to be 100% green	Ongoing
Etsy	July	Shipping is 100% offset	Etsy won in October

Source: Court documents

Bloomberg Law

Outside of the food industry, United Airlines was sued in November for allegedly misleading consumers over its commitments to be "100% Green." At the time, United said the lawsuit "is without merit," adding that it intends to defend itself "vigorously."

There have been some corporate successes so far: Etsy fended off a lawsuit in October accusing the company of falsely representing that it offsets 100% of carbon emissions generated by its shipping. The California federal court said at the time that the lawsuit didn't plausibly link the carbon offset assertions to customers paying a price premium.

Tipping Point

Companies are more inclined to make bold statements like "100% sustainable" because they know customers are eager to buy products that they think are better for the planet.

The International Food Information Council found in a study last year that more than 40% of consumers said it's important for them to know that workers who produce or distribute their food are treated fairly. The same study, based on responses from 1,022 consumers surveyed during April 2023, found that 35% of consumers say the "climate friendliness" of a product has an impact on their purchasing decisions. Broken down by age, Millennials were the generation that cared about the environmental impact of a product the most, the study said.

"I think that companies are increasingly incentivized to make these claims," said Camille Sippel, an attorney at environmental law charity ClientEarth. She pointed out that this practice is going to become more commonplace as younger generations earn more purchasing power. Sippel said claims like "100% sustainable" or "100% green" aren't necessarily beneficial for companies in the long run, however, as there's going to be a "tipping point when you just lose consumer trust."

While many companies currently follow the Federal Trade Commission's Green Guides for guidance on when environmental marketing can be misleading, the non-binding standards are about 12 years old. They're currently being reviewed for an update, and the FTC has indicated that it could issue guidance on how best to use the term "sustainable," for example, but has not provided a timeframe for when the revisions will be released.

Until then, companies will be looking to these "100%" claim cases and other greenwashing suits to direct them on how to talk about their environmental efforts.

"I think we are still in a transitional period right now," said Greenbaum, the advertising lawyer. He noted that there are different interpretations issued by various judges on what's misleading and what's not. "Not only are the rules not clear, but even when the government or judges interpret those rules, they're not necessarily interpreting them in the same way," he said.

—With assistance from Abigail Gampher

To contact the reporter on this story: Clara Hudson in Washington at chudson@bloombergindustry.com

To contact the editors responsible for this story: Amelia Gruber Cohn at agrubercohn@bloombergindustry.com; Jeff Harrington at jharrington@bloombergindustry.com

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B



US Supreme Court weighs bid to challenge debit card 'swipe fee' rule

 [reuters.com/legal/us-supreme-court-weighs-bid-challenge-debit-card-swipe-fee-rule-2024-02-20](https://www.reuters.com/legal/us-supreme-court-weighs-bid-challenge-debit-card-swipe-fee-rule-2024-02-20)

John Kruzel, Andrew Chung

Bank debit and credit cards are photographed in this illustration picture at an office in Frankfurt, Germany, March 17, 2016. REUTERS/Kai Pfaffenbach Purchase Licensing Rights , opens new tab

WASHINGTON, Feb 20 (Reuters) - The U.S. Supreme Court on Tuesday was set to hear a bid to revive a lawsuit aimed at invalidating a contentious debit card "swipe fee" rule in a case with the broad potential to make federal regulations more vulnerable to legal challenges.

A convenience store called Corner Post in Watford City, North Dakota is asking the justices to restore its lawsuit - thrown out by lower courts - targeting a 2011 U.S. Federal Reserve regulation governing how much businesses pay to banks when customers use debit cards to make purchases.

These swipe, or interchange, fees reimburse banks for costs involved in offering debit cards. The fees are determined by Visa (V.N) , opens new tab, MasterCard (MA.N) , opens new tab and other card networks, with a cap of 21 cents per transaction set under the Fed's rule. At issue in the case is whether Corner Post was too late when it brought a legal challenge in 2021 to the Fed's regulation. Corner Post has argued that it should not be bound by the six-year statute of limitations that generally applies to such lawsuits because it opened for business in 2018, after that deadline had passed.

Corner Post, backed by various conservative and corporate interest groups including billionaire Charles Koch's network and the U.S. Chamber of Commerce, contends that businesses should have wide latitude to challenge regulations they consider unlawful and burdensome. The company argues that the six-year time limit should not start running until a business is adversely affected - which for Corner Post would be March 2018 when it accepted its first debit-card payment.

President Joe Biden's administration, representing the Federal Reserve Board of Governors, has argued that adopting Corner Post's legal position "would substantially expand the class of potential challengers" to government regulations and threatens to "increase the burdens on agencies and courts."

A group of small business associations filed a court brief urging the justices to maintain a strict statute of limitations that begins tolling at the time a regulation is finalized. They said that allowing lawsuits beyond this deadline "would create chaos, uncertainty and inconsistent

regulatory regimes for the nation's regulated industries and the American people the regulations seek to serve."

Banks and merchants had long wrestled over the swipe fees. Before Congress intervened, retailers paid as much as 44 cents per transaction, which they said made it hard for small businesses to accept debit cards.

In 2010, the U.S. Congress directed the Fed to cap the fees in a bid to reduce prices for consumers. The fee cap was included in the Dodd-Frank Wall Street reform law in a provision called Durbin amendment, after its chief supporter, Democratic Senator Richard Durbin.

After the law passed, the Fed capped fees at 21 cents per transaction. The move prompted litigation by retailers who expected a much lower cap and criticized the Fed's interpretation of Dodd-Frank. But the Supreme Court in 2015 declined to hear that challenge, leaving intact a lower court's 2014 ruling that the Fed's regulation was appropriate.

In 2021, Corner Post sued the Federal Reserve in a North Dakota federal court, arguing that the rule defied congressional intent and was "arbitrary and capricious" under a federal law called the Administrative Procedure Act.

U.S. District Judge Daniel Traynor in 2022 dismissed Corner Post's lawsuit, finding that the company's lawsuit missed the six-year statute of limitations that began running after the regulation was finalized in 2011.

On appeal, the St. Louis-based 8th U.S. Circuit Court of Appeals affirmed Traynor's decision, prompting Corner Post's appeal to the Supreme Court. A decision in the case is expected by the end of June.

The Fed last year proposed cutting the current cap to 14.4 cents per transaction, with the change now in the midst of a public comment period.

Reporting by John Kruzel; Editing by Will Dunham

JPMorgan Says Its "Trading Venues" Are Under Investigation While It's Still on Probation for Prior Trading Crimes

 wallstreetonparade.com/2024/02/jpmorgan-says-its-trading-venues-are-under-investigation-while-its-still-on-probation-for-prior-trading-crimes

By Pam Martens and Russ Martens: February 20, 2024 ~

Last Friday, ahead of a three-day weekend when bad news could be expected to evaporate into the ether by the next news cycle, JPMorgan Chase dropped a bombshell in its 10-K (annual report) filing with the Securities and Exchange Commission. The bank, which has admitted to an unprecedented five criminal felony counts since 2014, said its "trading venues" were under investigation by three unnamed regulatory bodies.

This is a very serious matter for this particular bank because three of its prior felony counts involved rigging markets. The bank admitted to rigging foreign exchange markets in 2015 and to rigging, for more than eight years, the precious metals and U.S. Treasury markets in an agreement with the U.S. Department of Justice in September 2020.



Jamie Dimon Sits in Front of Trading Monitor in his Office (Source: 60 Minutes Interview, November 10, 2019)

Two of the precious metals traders involved in the 2020 case, Gregg Smith and Michael Nowak, are sitting in federal prison today in Otisville, New York. Smith, of Scarsdale, New York, was sentenced to two years in prison and is scheduled for release on June 13, 2025. Nowak, of Montclair, New Jersey, was sentenced to one year and one day. Nowak is scheduled for release on July 30 of this year. Jamie Dimon, the Chairman and CEO of JPMorgan Chase, whose tenure has seen an unprecedented crime wave at the bank, received a \$50 million bonus. (See our report: [After JPMorgan Chase Admits to Its 4th and 5th Felony Charge, Its Board Gives a \\$50 Million Bonus to Its CEO, Jamie Dimon.](#))

In the 2020 criminal case, the bank was put on probation under a Deferred Prosecution Agreement for three years, starting with the date the "Information" (formal charging document) was filed. That document was filed on the court docket in the U.S. District Court

for the District of Connecticut on September 29, 2020, meaning it should have expired on September 29, 2023. But in JPMorgan's Friday 10-K filing for the period ending December 31, 2023, the bank states as follows:

"The Firm is subject to a Deferred Prosecution Agreement entered into with the Department of Justice on September 29, 2020, relating to precious metals and U.S. Treasuries markets investigations, as well as a cooperation obligation under a related order issued by the CFTC [Commodity Futures Trading Commission]."

Under the 2020 Deferred Prosecution Agreement, the U.S. Department of Justice had the right to extend the probation period on the following basis: "...in the event the Fraud Section and the Office determine, in their sole discretion, that the Company or the Related Entities have knowingly violated any provision of this Agreement or have failed to completely perform or fulfill each of their obligations under this Agreement, an extension or extensions of the Term may be imposed...."

The exact statement the bank made in its Friday filing with the SEC about the current investigations of its "trading venues" is as follows:

"Trading Venues Investigations. The Firm has been responding to government inquiries regarding its processes to inventory trading venues and confirm the completeness of certain data fed to trade surveillance platforms. The Firm self-identified that certain trading and order data through the CIB [Corporate and Investment Bank] was not feeding into its trade surveillance platforms. The Firm has completed enhancements to the CIB's venue inventory and data completeness controls, and other remediation is underway. The Firm has also performed a review of the data not originally surveilled, which is nearly complete, and has not identified any employee misconduct, harm to clients or the market. While the identified gaps represent a fraction of the overall activity across the CIB, the data gap on one venue, which largely consisted of sponsored client access activity, was significant. The Firm is dedicated to maintaining rigorous controls and continuously enhancing the reliability of its trade infrastructure. The Firm expects to enter into resolutions with two U.S. regulators that will require the Firm to, among other things, complete its remediation, engage an independent consultant, and pay aggregate civil penalties of approximately \$350 million. The Firm is also in advanced negotiations with a third U.S. regulator, but there is no assurance that such discussions will result in a resolution. The Firm does not expect any disruption of service to clients as a result of these resolutions."

There are two key points to note about the above statement: (1) The bank jumped the gun on waiting for its regulators to notify the public as to just how helpful JPMorgan was in reporting the problem to regulators and whether it, indeed, "self-identified" the problem as it claims. (This is, after all, the bank that laundered money for Bernie Madoff for years without filing the required Suspicious Activity Reports and is alleged by the Attorney General of the

U.S. Virgin Islands to have done the same thing for sex trafficker Jeffrey Epstein. Self-reporting is not exactly Jamie Dimon's strong suit.) (2) The bank fails to specify the regulator that it has *not* come to an agreement with. If that's the criminal division of the U.S. Department of Justice, that's a big problem for a bank that is an unrepentant recidivist.

Exactly which "trading venues" are under investigation for not properly reporting trading activity is another dicey area for Jamie Dimon. In 2012, the bank was investigated by the FBI for using deposits from its federally-insured bank, JPMorgan Chase Bank, N.A., to make dangerous bets in derivatives in London and lose \$6.2 billion. The bank was not criminally charged but suffered serious reputational damage. The U.S. Senate's Permanent Subcommittee on Investigations released a 300-page report on the so-called "London Whale" case and held hearings. The bank paid its regulators \$920 million to settle the matter.

During Senate hearings on the case, the late Senator Carl Levin, Chair of the Senate Permanent Subcommittee on Investigations, said JPMorgan Chase "piled on risk, hid losses, disregarded risk limits, manipulated risk models, dodged oversight, and misinformed the public." The late Senator John McCain, Co-Chair of the Subcommittee at the time, had this to say:

"This case represents another shameful demonstration of a bank engaged in wildly risky behavior. The 'London Whale' incident matters to the federal government because the traders at JPMorgan were making risky bets using excess deposits, portions of which were federally insured. These excess deposits should have been used to provide loans for main-street businesses. Instead, JPMorgan used the money to bet on catastrophic risk."

The woman overseeing these massive, risky trades for JPMorgan Chase, Ina Drew, didn't even have a trading license. (See Jamie Dimon's Top Women and Their Missing Licenses.)

JPMorgan's Dark Pools should be part of this current investigation. *Wall Street On Parade* has been questioning for years the legality of JPMorgan Chase (and other Wall Street mega banks) trading *their own* stock-exchange listed bank stock in their own Dark Pools. (See The SEC Is Allowing 5-Count Felon JPMorgan Chase to Trade Its Own Bank Stock in its Own Dark Pools.)

Another bombshell that was included in last Friday's 10-K filing by the bank is that it had legal expenses in 2023 of an astounding \$1.4 *billion*. That was a 426 percent increase over its legal expenses in 2022.

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Feb. 20, 2024, 10:30 AM PST

Matt Levine's Money Stuff: Bill Ackman's Stocks Went Up

By Matt Levine

Opinion

Bloomberg Law News 2024-02-20T14:28:35213236263-05:00

Matt Levine's Money Stuff: Bill Ackman's Stocks Went Up

By Matt Levine 2024-02-20T13:30:55460-05:00

Inactive Man

A [couple of times](#) recently, I have contrasted Bill Ackman's old-school approach to managing a hedge fund – he's a famous guy, he makes concentrated high-conviction bets on stocks, he doesn't hedge much – with the more scientific modern approach of multimanager multistrategy "pod shop" funds, which hire many portfolio managers to make distinct bets, hedging out factor exposure and isolating only their alpha, their skill, their excess returns that are not correlated to the broader market. I noted that the old-school approach seems to have become less popular with institutional investors, and that the pod shops have an advantage in raising money and [charging fees](#) these days. Ackman's simple legible approach, meanwhile, appeals to retail investors, and he's out raising money from ordinary investors and offering lower fees.

But I neglected to mention one incredibly important advantage of Ackman's approach, which is that if you do it right, you don't have to *do* much. Pick like 10 stocks that are going to go up, buy them all, and then chill. Oh, if the stocks go *down*, that creates a lot of work for you: You might have to sell them and buy other stocks (that will go up), you might have to reevaluate your process and rethink your life choices, maybe you have to fire an analyst and hire a new one, plus you are going to be spending a lot of time calling up your investors and reassuring them so they don't withdraw their money. But you are trying to pick stocks that go *up*, ideally ones that go up more than the rest of the market, and if you succeed then you're done for the year. Pick stocks, buy them, watch them go up, go to the beach. Or go on Twitter! (Or, now, X.) Spend your days getting in fights online, because your lavishly gainful employment only requires like 45 minutes of work per year.

Oh, no, I'm exaggerating; obviously the people who pick 10 good stocks usually spend most of their waking hours analyzing their stocks, worrying about them, thinking about which ones they should drop and which other stocks they should substitute, etc. You don't become a professional picker of 10 stocks without putting a lot of work into that list of 10 stocks. Still, I have always admired and envied that old-school model of hedge fund management. It just strikes me as the purest possible way to turn intellect – or something, anyway, luck maybe – into money. If some region of your brain is wired to know what stocks will go up, that's *almost* all you need; hard work and people skills and a rigorous investing process are just nice bonuses.

Anyway Bloomberg's [Tom Maloney and Hema Parmar report](#) :

Perhaps no other hedge fund manager has perfected the art of having their money work for them while they sleep – or tweet – like Bill Ackman.

The Pershing Square Capital Management founder made \$610 million last year, after barely touching his portfolio of just 10 stocks. The total landed Ackman at No. 7 on Bloomberg's annual list of the best-paid hedge fund founders, his highest-ever position. He failed to crack the top 15 in 2022.

The haul validates Ackman's shift two years ago from a swashbuckling shareholder activist to taking "a quieter approach" and bringing in a chief investment officer to help run his fund. In a year when US stocks soared, his eight-person investment team's stolid approach of holding shares in big companies racked up a 26.7% gain. ...

That exceeds the returns for hedge funds including Citadel's main Wellington strategy (15.3%) and Millennium Management (almost 10%), though their founders earned well in excess of Ackman. Millennium's Izzy Englander nabbed the top spot in Bloomberg's pay ranking with \$2.8 billion, while Citadel's Ken Griffin placed second at \$2.6 billion.

I mean, sure, right, the S&P 500 index was up 24.2% last year, and Pershing Square owns basically a long-only portfolio of large-cap US stocks. It had better have been up 26.7%! Its investors got S&P 500 exposure with a little bit better performance. Meanwhile, Citadel and Millennium investors were paying more for somewhat lower returns that are less correlated to the stock market: That particular thing, uncorrelated returns, is an attractive product for many investors, and Citadel and Millennium work very hard to give them that. You have to pay for all that effort. You can pay a bit less for Ackman's Zen repose.

Incidentally, these "best-paid" lists are [always a little debatable](#) ; they measure how much money these managers made, but that includes returns on their own money in their funds as well as fee income. Ackman made a lot of money last year because he bought stocks that went up. Decent way to do it!

Children's Place

We talked [last Thursday](#) about a weird little acquisition of The Children's Place Inc., a children's apparel retailer with an equity market capitalization of \$363 million as of last Friday. The Children's Place got acquired last week in the simplest and yet most unusual possible way: Someone just went to the stock exchange and kept buying stock until they owned a majority of it. Then they sent the company a letter saying "hi we're your new owners now." It's the way you would buy a public company if you had a lot of money and knew nothing about mergers and acquisitions. Just keep hitting the Buy button on your Robinhood app until you control the company.

The buyer is "the Al-Rajhi family, the founders of Saudi Arabia's largest private bank," through vehicles including Mithaq Capital SPC and the wonderfully named Snowball Compounding Ltd. Last Friday, Mithaq filed a Schedule 13D explaining their trades and plans. Apparently they own just over 7 million shares of The Children's Place, or about 56.1% of the stock, and "are proud to be majority owners of the Issuer, are enthusiastic about its long-term prospects and look forward to helping it thrive and deliver top quality products to families." They were trading the stock starting at least in early January, but they bought and sold; they didn't start accumulating it in earnest until about Feb. 7, and went from a small stake to a majority in five trading days.

Also they weren't *just* aimlessly buying stock: On Saturday, Feb. 10, when Mithaq had accumulated about 3.1 million shares (about 25%), Snowball Compounding sent the company a notice that it intended to replace the board of directors with its own nominees. On Wednesday, Feb. 14, when they had gotten to 54%, Mithaq and Snowball sent another letter to the board, asking "to meet with you as soon as possible so that we can discuss an orderly transition of the governance of the Company, as well as the provision of financing to assist the Company with its liquidity needs." So they definitely had a plan to take control of the company. They just figured that the most efficient way to do that was to buy in the open market.

And that was clearly correct! The stock was trading above \$20 for most of the last few months, but then crashed below \$13 on Friday, Feb. 9, after the company announced terrible earnings. Mithaq paid about \$97.8 million for its 7 million shares, an average of about \$13.97 per share. That's lower than the lowest the stock had traded over the previous year. Meanwhile, *after* Mithaq's interest got out, the stock shot up; it closed last Friday at \$29.12. The bad earnings left investors worried that The Children's Place might run out of money; the arrival of a deep-pocketed buyer solved that problem and squeezed the stock up. Mithaq saved a lot of money by buying quickly but *quietly*. Some more formal process – sending the board a merger proposal, launching a tender offer – would have betrayed its interest and pushed up the price.

If you were The Children's Place, and you got that nomination notice on Feb. 10, might you have wanted to make it public? Put out a press release like "hey, we got a letter from somebody named Snowball saying that they own 25% of our stock and want to replace our board"? I get that that's a somewhat weird thing to announce; for all I know the company had never heard of Mithaq before and didn't know how seriously to take the nomination. But if the company had publicized the letter, I suppose the shareholders would have had some warning that there was some interest, and journalists could have, like, called Mithaq and said "what's up?" As it is, the stock closed at a low of \$11.29 last Tuesday, just before Mithaq started disclosing its ownership. Mithaq bought almost a million shares that day.

Mithaq had no obligation to disclose what it was doing – or, rather, it *did* have obligations to disclose, but with some delay, and it followed those obligations scrupulously. It disclosed its purchases as soon as it was obligated to, but by the time it disclosed them it had more or less completed its buying. It might have been nice, for The Children's Place's existing shareholders, if *the company* had told them about the mysterious buyer. But it didn't, so Mithaq was able to buy most of the stock without anyone noticing.

What happens to the rest of the shareholders? Mithaq bought control of the company for less than \$14 per share; presumably it doesn't want to buy the remaining 44% for \$29 per share. If you're a minority shareholder, you're kind of along for a weird ride now.

By the way, I said last week, and again above, that this is a pretty unusual way to acquire a public company. "I'm sure someone has done this before," I wrote, "but it is very much not normal practice." That is perhaps too modern a view, and some readers pointed out that some flavor of "buy in the open market until you hit 51%" *used* to be a bit more normal in US M&A practice.

For instance, in hostile M&A deals in the 1980s, the "street sweep" was a fairly common takeover practice. This was a form of open-market buying to get a majority of the stock, though it's a bit different from the approach with The Children's Place in that it was typically done *after* a public takeover contest was announced. The idea is that you launch a tender offer or other hostile bid, and that attracts attention from merger arbitrageurs. The stock turns over: The normal long-term investors sell, and the arbitrageurs buy. Then a potential buyer goes out to the arbitrageurs and buys their stock from them directly, getting a big chunk of shares – perhaps a majority – without messing around with a tender offer.

But even the approach with The Children's Place – buying in the open market *without* any public contest or negotiated purchases – has happened before. In particular, that is how Warren Buffett acquired control of Berkshire Hathaway Inc. in the 1960s: As he once put it, he was a smallish shareholder, but then the company "made me very mad, so I just started buying more stock"; eventually "I bought enough so we controlled the company, and we changed the management." It's entirely possible that that's what just happened at The Children's Place, too.

Pre-capitalizations

Meanwhile in more normal M&A, a common form of acquisition is the leveraged buyout (LBO) by a private equity firm: Some company puts itself up for auction, a few private equity firms bid, and one of them wins and buys the company. The buyer generally borrows a lot of the money needed to buy the company, with that borrowing coming either from bonds and loans underwritten by one or more big banks, or (more recently) from private credit lenders. Traditionally that lending business is a huge (though risky) source of revenue for the banks, who can make more on the fees from the financing than they do on mergers-and-acquisitions advisory fees.

And so a certain amount of M&A structuring is built around banks' desire to get financing fees. For instance, traditionally, the company selling itself will hire a bank as an adviser, and the potential buyers will each hire their own bank, who will advise them on the deal and also provide their financing (if they win the auction). But this means that the company's bankers won't get any financing fees, which is a bummer for them. So some deals come with "stapled financing," in which the seller's bankers offer to provide financing for the winning bidder: This perhaps makes the auction more competitive, but it also means that the seller's bankers have a chance to get financing fees.

I guess another option would be to do the financing first and *then* sell the company? Like, if you are a company that might want to sell itself (or the company's banker), you can probably build an LBO model yourself and estimate roughly what sort of capital structure – how much borrowing, what kind and at what rates – a private equity borrower might want. And then you go do the borrowing yourself. And then you run the auction, and say to potential buyers "hey this capital structure is already set up so nice for you, all we need is your equity check."

Why not. Bloomberg's [Eleanor Duncan and Michael Tobin report](#) that big banks are trying to win business back from private credit, both by sort of lowering their standards and by offering "pre-capitalizations":

Traditional lenders are so keen to win leveraged buyout financing that some are pitching for subordinated debt deals – the riskiest type of underwriting which they mostly avoided during a bruising past few years. At least one bank is offering payment-in-kind options, which allow interest payments to be deferred, and others are talking to borrowers about so-called pre-capitalizations, which give companies financing before a deal has even gone on the block, according to people familiar with the matter. ...

The quest to win fees is driving some banks, including Bank of America, to pitch pre-capitalizations to companies that aren't even for sale yet, according to a person familiar with the matter. In these deals, lenders refinance a firm's debt and add a portability clause, allowing a new buyer to keep the existing debt package in place. Bankers say it makes it easier for companies to be sold at a later date because the new owner doesn't have to find financing.

Presumably this makes the most sense for companies with private equity owners (who might shop them to new private equity owners), which already have LBO-ish capital structures that they just want to be portable.

Shadow trading

If you worked at Pfizer Inc. in 2021, and you got early notice of Pfizer's successful clinical trial of Paxlovid, its Covid-19 treatment, you could have bought call options on Pfizer's stock and made a lot of money when the results were announced and the stock went up. And then you would have gotten very arrested, because that's illegal insider trading. And in fact a Pfizer employee allegedly did do that, and [got arrested](#) .

Or you could have bought call options on Royal Caribbean Cruise Ltd.'s stock and made a lot of money when the Paxlovid results were announced. Because Royal Caribbean's stock did go up 8% that day. It was maybe not *the most obvious thing in the world* that Royal Caribbean would go up because Paxlovid worked, but nor was it all that surprising; if you were paying attention to the world, you could have had some thought process like "few businesses were hit harder by Covid than cruises, and a cure for Covid is going to make it easier for people to go back on cruise ships, so Royal Caribbean should go up a lot." And you would have been right and made a lot of money.

This is sometimes called "shadow trading," using your inside information about one company (say, your employer) to make informed trades on some other company that will also be affected by the news.

But would you have gotten arrested? Well! Well. We have [talked](#) a few [times](#) about the US Securities and Exchange Commission's insider trading case against Matthew Panuwat, who is accused of shadow trading on merger news. (He allegedly knew his employer was getting acquired, so he bought options on a competitor, whose stock also went up on the acquisition news.) Today the Wall Street Journal covers the case:

The case, which goes to trial next month, has become the latest test of insider-trading law. Congress has never defined what it means, leaving regulators and courts across the country to decide what qualifies, a volatile process that sometimes leads appellate courts to rein in what they see as excesses.

Defense lawyers have dubbed Panuwat's case the first involving "shadow insider trading," a label that describes executives making well-timed bets in the shares of other companies. ...

No court has ever tackled the idea that executives can go too far when they deploy their specialized knowledge or expertise to trade in the shares of rivals, said Karen Woody, a professor at the Washington and Lee University School of Law.

"I do think this is a push of the law and they are seeing if they can get a court to bless what is a bit of a stretch of the existing parameters," Woody said of the SEC's case.

I mean, on the one hand, that's true, but on the other hand, imagine if the court said "nah that just isn't insider trading"? (I don't think that's likely, since the judge has declined to dismiss the case. The SEC might still lose at trial, but if it does, that will probably be an inscrutable jury verdict that doesn't really define the law for future cases. But if the SEC *wins* at trial, Panuwat could appeal, and then an appeals court could still say "nah, not insider trading.") Then every *sophisticated* corporate insider – also, sorry, every Money Stuff reader – would have a blueprint for how to do insider trading legally. You find out your company's news and you go trade the most correlated stock.

I have said this before, but for years readers have emailed me with some variation on this idea. "If I have inside information about my company, can I trade our competitor's stock, knowing that the news is probably good for them too?" My general thoughts on this question used to be (1) nothing here is ever legal advice, (2) the SEC wouldn't like it and (3) the law is arguably a little unclear, since there are no real precedents. That state of affairs probably deterred at least some people from doing shadow trading: Why do something the SEC thinks is illegal, even if the law is unclear?

But now the SEC has brought a case, which has the advantage and disadvantage that it might resolve the ambiguity. On the one hand, now you *definitely* know that the SEC doesn't like shadow trading, which might be an additional deterrent. On the other hand, what if the SEC loses? What if the answer is "not legal advice, the SEC won't like it, but courts say it's allowed so there's nothing the SEC can do about it"? I suspect that will mean much more shadow trading.

Rogue chatbot

Oh, robots:

On the day Jake Moffatt's grandmother died, Moffatt immediately visited Air Canada's website to book a flight from Vancouver to Toronto. Unsure of how Air Canada's bereavement rates worked, Moffatt asked Air Canada's chatbot to explain.

The chatbot provided inaccurate information, encouraging Moffatt to book a flight immediately and then request a refund within 90 days. In reality, Air Canada's policy explicitly stated that the airline will not provide refunds for bereavement travel after the flight is booked. Moffatt dutifully attempted to follow the chatbot's advice and request a refund but was shocked that the request was rejected.

He sued and won his refund:

Tribunal member Christopher Rivers, who decided the case in favor of Moffatt, called Air Canada's defense "remarkable."

"Air Canada argues it cannot be held liable for information provided by one of its agents, servants, or representatives – including a chatbot," Rivers wrote. "It does not explain why it believes that is the case" or "why the webpage titled 'Bereavement travel' was inherently more trustworthy than its chatbot."

The funny thing is that the chatbot is *more* human than Air Canada. Air Canada is a corporation, an emergent entity that is made up of people but that does things that people, left to themselves, would not do. The chatbot is a language model; it is in the business of saying the sorts of things that people plausibly might say. If you just woke up one day representing Air Canada in a customer-service chat, and the customer said "my grandmother died, can I book a full-fare flight and then request the bereavement fare later," you would probably say "yes, I'm sorry for your loss, I'm sure I can take care of that for you." Because you are a person! The chatbot is decent at predicting what people would do, and it accurately gave that answer. But that's not *Air Canada's* answer, because Air Canada is not a person.

I [think sometimes](#) about Ted Chiang's essay arguing that popular fears about runaway artificial intelligence are *really* about modern corporate capitalism, that modern corporations actually do what we worry superintelligent AIs might one day do. "Consider," writes Chiang: "Who pursues their goals with monomaniacal focus, oblivious to the possibility of negative consequences? Who adopts a scorched-earth approach to increasing market share?" Here, the AI chatbot was benevolent and human; the corporation was not.

Things happen

Capital One to [Buy Discover](#) for \$35 Billion in Year's Biggest Deal. Two [Rothschild Bank Clans](#) Fight Over Clients, Power and the Family Name. The Secret Oil-Trading Ring That Funds Russia's War. Markets Start to Speculate If the Next Fed Move Is Up , Not Down. Can the SEC's landmark reforms survive a Wall Street fightback? Bitcoin Liquidity Shifts to the US as Spot ETFs Reshape Crypto Markets. Wall Street's Moelis Bet Big on the Middle East; Now He's Cashing In. 'The one thing I've always had is deal flow': RedBird's Gerry Cardinale. Arkhouse Seeks Majority on Macy's Board After Rejected Takeover Bid. China's Bold Mortgage Rate Cut Met With Lukewarm Reaction. Bad property debt exceeds reserves at largest US banks. Investors shun riskiest US corporate bonds on default fears. Megaprojects in the Desert Sap Saudi Arabia's Cash. Billions Start Flowing to Chip Makers for New U.S. Factories. OpenAI Quietly Deletes Ban on Using ChatGPT for "Military and Warfare." Nvidia as meme stock. Trump Hawks Gold, Self-Branded \$399 Sneaker as Legal Fees Mount. RIP chocolate chip. Keynesian lawn care.

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To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Daniel Niemi at dniemi1@bloomberg.net

- 1. Sorry. From the New York Magazine profile of Ackman last week: "Ackman believes that our lives are often fated from birth. 'I have a view that people become their names,' he told me. 'Like, I've met people named Hamburger that own McDonald's franchises.' We'd been talking for nearly an hour and a half when Ackman asked me what my name was, hoping to offer a diagnosis. After he seemed momentarily stumped by my surname, I offered him my first name, which he misheard as Reed. 'Read ... write,' he said, before turning back to himself. 'So, my name is Ackman – it's like Activist Man.'"
- 2. That last part isn't really true for Ackman, though. He has a huge permanent capital vehicle , which means that if performance is bad he doesn't have to call anyone to reassure them.
- 3. Also, while the Feb. 14 letter is publicly filed, the Feb. 10 nomination is not, so I don't know how much it disclosed about Mithaq's ownership. But the company's bylaws say that the nomination has to specify how many shares the shareholder owns.
- 4. Form 4 has to be filed within two business days. Mithaq first became a Form 4 filer on Friday, Feb. 9, and filed its first Form 4 after the close on Tuesday, Feb. 13, two business days later. Schedule 13D has to be

filed within five business days of crossing over 5%, which Mithaq also did on Feb. 9; it filed its 13D after the close on Friday, Feb. 16, five business days later.

- 5. Incidentally, a reader asked me if Mithaq was obligated to file a Hart-Scott-Rodino notification, and I think the answer is no? In general, if you're buying a big stake in a US company, you need to file an HSR notification with US antitrust regulators and wait about 30 days before completing the acquisition, which is one reason that M&A is normally done with merger agreements or tender offers rather than with the Buy button on Robinhood. But The Children's Place is small enough that Mithaq could acquire a majority of the stock without hitting the \$119.5 million HSR threshold.

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Temenos Should Oust CEO at Once, Activist Petrus Advisers Says

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- Activist Petrus owns slightly more than 2% in Temenos
- Fund has long been pushing for replacement of CEO Andreades

Activist investor Petrus Advisers called on Temenos AG to replace its interim chief executive officer immediately and address allegations made by short seller Hindenburg Research by Monday.

“We very much agree with Hindenburg that **Andreas Andreades** has to finally leave Temenos,” **Klaus Umek** and **Till Hufnagel** of Petrus said in a letter Friday to Temenos Chairman **Thibault de Tersant**.

London-based Petrus owns slightly more than 2% of shares in Swiss banking technology provider Temenos and has been calling for Andreades’s ouster since 2022.

Read more: Hindenburg Report Throws Swiss Fintech Temenos Into Turmoil

The Swiss company’s shares have plunged more than 30% since Hindenburg’s report Thursday alleged “major accounting irregularities.” Temenos also “manipulated earnings,” the short seller said, adding that the practices were an “open secret” at the company.

Temenos said the report “contains factual inaccuracies and analytical errors, together with false and misleading allegations.” A representative for Geneva-based Temenos didn’t have an immediate comment on the letter from Petrus, when contacted by Bloomberg News.

Short-Term Focus

Petrus said most of Hindenburg’s allegations were “based on hear-say talk from former disgruntled Temenos executives.” Still, the investment firm said Andreades had created a culture that “favored short-term gains over long-term value creation,” with poorly executed acquisitions that added to the problems.

Temenos should address Hindenburg’s allegations about customer contracts, research spending and other issues by Monday, Petrus said.

Temenos, which has been of interest to buyout firms, is in the midst of a long search for a CEO. Andreades became the interim boss after Max Chuard stepped down in January 2023 following activist pressure.

Umek, a former Goldman Sachs Group Inc. banker, founded Petrus. The firm, with offices in London and Bratislava, Slovakia, invests in European companies and seeks “active engagement both publicly and behind the scenes,” according to its website.

(Updates with background on Petrus and Temenos from paragraph eight.)

--With assistance from **Allegra Catelli** and **Tara Patel**.

To contact the reporter on this story:

Eyk Henning in Frankfurt at ehenning1@bloomberg.net

To contact the editors responsible for this story:

Ben Scent at bscent@bloomberg.net

Phil Serafino, Wojciech Moskwa

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Musk's SEC Subpoena Fight Carries on After Court's Oops Moment

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Environmental, Social & Governance (ESG)

Feb. 16, 2024, 4:16 PM PST

Rachel Graf

Bloomberg News

Elon Musk will get another chance to resist testifying in the US Securities and Exchange Commission's probe of his 2022 Twitter Inc. acquisition after a federal magistrate said she erred in ordering him to comply with a subpoena.

It turns out Musk is entitled to make his case to a higher-ranking US district judge about why he shouldn't have to testify — which was recognized Friday by a San Francisco magistrate judge who said her Feb. 10 order enforcing the subpoena will now be just a recommendation.

US Magistrate Judge Laurel Beeler said she "lost sight of the fact" that back in October, Musk had exercised his right to decline to let her have final say in the dispute. She has now re-assigned the case to a district judge.

The SEC is seeking information about Musk's 2022 purchases of Twitter stock and statements he made about his investments ahead of his \$44 billion purchase of the social media platform. The SEC sent Musk a letter asking about the delayed disclosure of his Twitter stake, which he reported a week late. Musk previously testified twice in July 2022, the SEC said, but failed to show up last year for follow-up questioning.

Read More: Musk Must Testify in SEC Twitter Probe, Court Rules

The case is Securities and Exchange Commission v. Musk, 23-mc-80253, US District Court, Northern District of California (San Francisco).

To contact the reporter on this story:

Rachel Graf in San Francisco at rgraf27@bloomberg.net

To contact the editors responsible for this story:

Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net

US judge says Musk can seek review of order in SEC subpoena matter

 [reuters.com/legal/musk-can-seek-district-judge-review-sec-subpoena-case-court-order-2024-02-16](https://www.reuters.com/legal/musk-can-seek-district-judge-review-sec-subpoena-case-court-order-2024-02-16)

Reuters

Elon Musk, CEO of SpaceX and Tesla and owner of X, formerly known as Twitter, attends the Viva Technology conference dedicated to innovation and startups at the Porte de Versailles exhibition centre in Paris, France, June 16, 2023. REUTERS/Gonzalo Fuentes [Purchase Licensing Rights ↗](#), opens new tab

NEW YORK, Feb 16 (Reuters) - Elon Musk can ask a U.S. District Court to review a magistrate judge's order that he must testify in the Securities and Exchange Commission's investigation of his \$44 billion takeover of Twitter, according to a court notice filed on Friday.

Lawyers for Musk on Thursday had said in a court filing they planned to seek review of U.S. Magistrate Judge Laurel Beeler's order to compel Musk's testimony. The order formalized her tentative ruling from December in which she sided with the SEC.

The SEC is examining whether Musk followed the law when filing the required paperwork about his purchases of Twitter stock, and whether his statements in relation to the deal were misleading.

Musk has fought the SEC's bid to interview him, saying he has done so twice and accusing the regulator of harassment.

Reporting by Chris Prentice; additonal reporting by Kanishka Singh; Editing by Leslie Adler and Rosalba O'Brien

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Crypto hedge fund accused of 'criminal' mismanagement in dispute over FTX

Swiss prosecutor raided Geneva-based Tyr last August following complaint by investor TGT



Geneva-based Tyr Capital Partners is alleged to have ignored an internal risk limit and investor warnings over its exposure to FTX © Dado Ruvic/Reuters

Laurence Fletcher and **Scott Chipolina** in London YESTERDAY



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One of the cryptocurrency industry's highest-profile hedge fund firms has been accused of "criminal" mismanagement and raided by a Swiss prosecutor, in a dispute with an investor over losses suffered following the collapse of crypto exchange FTX.

Geneva-based Tyr Capital Partners is alleged to have ignored an internal risk limit and investor warnings over its exposure to FTX, according to legal documents filed in the Cayman Islands by an investor and seen by the Financial Times.

The action has been brought by TGT, a fund that invested with Tyr and that is now trying to wind up the portfolio and take control of the remaining assets, including a \$22mn claim against FTX. TGT invests money from a group of companies that includes crypto wealth platform Yield App.

Tyr — which denies the allegations brought against it by TGT — is led by Edouard Hindi, the former head of Deutsche Bank's energy proprietary trading, and Olivier Trombert, ex-head of Société Générale's energy options desk.

The hedge fund has been viewed as a relative success story in the crypto hedge fund sector, even as other names such as [Three Arrows Capital](#) and [Galois Capital](#) have folded. The firm, which manages around \$140mn in assets, has profited in recent years from trading discrepancies in prices of tokens such as bitcoin and ether.

TGT claims in the filing that it raised concerns with Tyr chief investment officer Hindi about the financial health of FTX between November 7 and 10 2022, the days leading up to the collapse of Sam Bankman-Fried's exchange. However, Tyr only tried to withdraw its assets from FTX around November 11, the day the exchange filed for bankruptcy, according to the filing.

FTX's administrators have since abandoned plans to revive the defunct exchange. Customers are expected to be paid back based on the value of their investments at the time of FTX's collapse, when cryptocurrencies such as bitcoin and ether were less than half their current prices.

TGT also filed a criminal complaint about Tyr to the Geneva prosecutor in April last year, alleging "the criminal offence of criminal management" and requesting a "dawn raid" on the fund manager's offices.

The search, in which the prosecutor seized documents, took place on August 17 last year, according to a person familiar with the details. Hindi was summoned to appear before the prosecutor as a so-called person providing information — a status between a witness and being accused — according to the filing in the Cayman Islands.

"The procedure is still ongoing," said a spokesperson for the Geneva prosecutor.

A person close to Tyr said that Hindi was not summoned, but that Tyr asked for a meeting with the prosecutor "a couple of days" after the search took place.

“Given there are ongoing investigations as a result of these false claims, we cannot comment in detail as we refuse to prejudice those investigations,” Tyr said in a statement.

“There is no valid legal claim that can be asserted” by TGT against Tyr, it said, and added that it “respects all relevant laws” and has “complied with its regulatory and contractual obligations.”

The person close to Tyr disputed TGT’s account of the warnings ahead of FTX’s collapse.

“We are currently working through the legal process in Cayman Islands to wind up [the fund],” said TGT director Justin Wright. TGT added it “could not comment further as legal proceedings are ongoing.”

TGT also claims that Tyr ignored an internal risk requirement limiting exposure to any single counterparty to 15 per cent of assets. Tyr told the prosecutor that an independent committee, set up by the fund, had found that it did not breach internal rules, according to the filing, which the FT obtained via OffshoreAlert website.

The filing also shows that the claim against FTX was transferred to a new fund. A small portfolio containing TGT’s remaining assets suffered an 84 per cent loss in dollar terms between January and October last year, according to FT calculations based on performance data in the filing.

That fall in assets, according to the person close to Tyr, was driven by the legal cost of defending against TGT’s legal claims and the fund’s running costs, rather than trading decisions, and equated to around \$800,000.

The 84 per cent loss “is false and wholly disputed”, Tyr said.

“There has been a serious and demonstrable lack of probity in the conduct of the fund’s affairs,” TGT said in the filing. It added it had “irretrievably and justifiably lost trust and confidence in the fund due to mismanagement” and called for an independent investigation into how the fund was run.

TGT, whose directors are Yield App co-founders Wright and Jason Corbett, also took aim in its filing at the fund’s independent committee, which it said has refused to take part in the criminal proceedings in Switzerland.

The committee has also “done nothing to stop the unjustified depletion” of the fund even though no trades had been made since around the time of FTX’s collapse, the petition alleges.

“The fund’s board of directors and independent committee rejects entirely the allegations of mismanagement made against them by TGT/Yield App,” said Carlos Mariano Grandval, who is a director and part of the independent committee. “The fund intends to apply to strike out the petition.”

Casey McDonald, a director and the other member of the independent committee listed in the petition, did not respond to a request for comment.

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Byju's Judge Says Missing \$533 Million Raises 'Serious Concerns'

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- US court is overseeing bankrupt unit of Indian education firm
- Judge allows quicker-than-normal investigation of missing cash

A small, Florida hedge fund that allegedly helped Indian tech firm Think & Learn Pvt. hide \$533 million must face questions from a bankrupt company that is trying to recover the cash on behalf of lenders, a judge ruled Friday.

US Bankruptcy Judge **John Dorsey** approved a quicker-than-normal process for lawyers to try to track down money that belongs to bankrupt Byju's Alpha Inc., a shell company taken over by lenders owed \$1.2 billion. The \$533 million was transferred to the hedge fund, Camshaft Capital Fund, by managers of Think & Learn, the education-tech startup founded by entrepreneur **Byju Raveendran**.

"I do have serious concerns about the location of the funds and why it hasn't been disclosed," Dorsey said during a hearing in Wilmington, Delaware. "It leads me to have serious concerns that there is something happening here that shouldn't be happening."

Byju's Hid \$533 Million in Fund Run From IHOP, Lenders Say (1)

Last year lenders declared a default and seized Byju's Alpha, whose parent is Think & Learn. Since then lenders have tried to force Think & Learn to repay the \$1.2 billion and to find \$533 million they say should be used to repay the debt.

Lawyers for Think & Learn and one of its managers, Riju Ravindran, argued that the lenders wrongly seized Byju's Alpha and that the bankruptcy case should be thrown out. The lenders have acted so unfairly that Ravindran no longer trusts them, his attorney Joseph Cicero told the judge during the hearing.

"The lenders have shown they will stop at nothing," Cicero said. "They have cut off the oxygen to the company and the value has plummeted."

Ravindran is appealing a Delaware Chancery Court ruling that gave lenders control of Byju's Alpha.

Lawyers for Camshaft sided with Ravindran and urged Dorsey to first decide whether the bankruptcy case is legitimate before allowing Byju's Alpha to begin collecting information from the hedge fund. The judge rejected that argument.

Dorsey's ruling on Friday means that lenders, acting through Byju's Alpha attorneys, should be able to force the hedge fund to answer questions about the money. Dorsey also ruled that bankruptcy attorneys can also try to get information from Ravindran.

Last month, the lenders also filed an insolvency petition in India.

The US bankruptcy case is BYJU's Alpha, Inc., 24-10140, US Bankruptcy Court District of Delaware (Wilmington).

To contact the reporter on this story:

Steven Church in Wilmington, Delaware at schurch3@bloomberg.net

To contact the editors responsible for this story:

Claire Boston at cboston6@bloomberg.net

Michael B. Marois, Steven Church

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Paul Hastings Represents Trump-Tied SPAC in Truth Social Deal

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- Law firm now advising entity merging with Trump's media outfit
- Brad Bondi, a partner working on deal, related to key Trump ally

A blank-check company looking to combine with former President Donald Trump's media enterprise turned to Paul Hastings for outside counsel as it sought approval from regulators.

Paul Hastings is representing the Miami-based special purpose acquisition company Digital World Acquisition Corp. along with Ellenoff Grossman & Schole, according to recent securities filings.

Paul Hastings is advising Digital World on the transaction and related matters but isn't doing any work for any other parties related to the deal or other Trump-related entities, a person familiar with the matter said. Digital World retained Paul Hastings prior to when the company filed an amended S-4 registration statement in mid-November last year, the person said.

Digital World has spent more than two years trying to merge with Trump Media & Technology Group Corp., the Sarasota, Fla.-based company that operates Trump's Truth Social media platform. The agreement drew the scrutiny of the US Securities and Exchange Commission, although a settlement last year of securities fraud claims cleared a key hurdle that had delayed the merger.

Digital World shares rose 16% Thursday after the SEC declared the registration statement for its proposed combination with Trump's company effective.

Ellenoff Grossman, a boutique firm known for its SPAC expertise, has been advising Digital World since 2021. Paul Hastings is one of several Big Law firms that benefited from a boom in SPAC transactional work in recent years.

Brad Bondi, global co-chair of the litigation and white-collar investigations practice at Paul Hastings, is listed in securities filings as advising Digital World along with corporate partner Brandon Bortner and two other corporate and capital markets lawyers—of counsel Gil Savir and Maria Larsen.

Bondi joined Paul Hastings last year from Cahill Gordon & Reindel, where he had led that firm's white-collar and government investigations group after it hired him in 2015 from Cadwalader, Wickersham & Taft.

Bondi is the brother of Pam Bondi, a former Florida attorney general who over the years has been a frequent supporter of Trump. In November, she was tapped to lead the Florida chapter of the America First Policy Institute, a pro-Trump think tank. The organization paid roughly \$251,300 to Pam Bondi for advisory services in 2022, according to its most recent federal tax filing.

Nelson Mullins Riley & Scarborough, a firm that has enjoyed close ties to Trump, has been advising Trump Media & Technology for more than two years. Nelson Mullins is also handling trademark work for the company, per public records.

Scott Glabe, a former partner at Husch Blackwell who previously worked in the Trump administration, is general counsel for Trump Media & Technology.

To contact the reporter on this story: Brian Baxter in New York at bbaxter@bloomberglaw.com

To contact the editors responsible for this story: John Hughes at jhughes@bloombergindustry.com



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Samsung Ordered To Arbitrate Hundreds Of BIPA Claims

By **Joyce Hanson**

Law360 (February 16, 2024, 10:38 PM EST) -- An Illinois federal judge has ordered Samsung Electronics to arbitrate 806 customers' biometric-privacy claims and to pay the American Arbitration Association for fees it owes in the slew of disputes, ruling that the company can't refuse to arbitrate under its own binding agreements.

U.S. District Judge Harry D. Leinenweber's Thursday order said Samsung Electronics America Inc. requires its customers to sign valid and binding arbitration agreements, which state that all disputes between customers and the company "shall be resolved exclusively through final and binding arbitration, and not by a court or jury."

But when the 806 customers filed their individual arbitration actions for the electronic giant's alleged violations of the Illinois Biometric Information Privacy Act — and after they paid their portion of the fees for the arbitrations — Samsung wrongly refused to arbitrate, Judge Leinenweber ruled.

"Defendant Samsung Electronics America Inc. rebuffed, failing to pay its portion of fees by the deadline set by the presiding American Arbitration Association arbitrator," the judge wrote. "The AAA then closed the petitioners' cases on an administrative basis."

Judge Leinenweber went on to say that the plaintiffs are allowed under Section 4 of the Federal Arbitration Act to seek an order compelling arbitration after "a duly initiated arbitral proceeding" is administratively closed because of the opposition's failure to pay its fees.

"Samsung's scheme is a quintessential refusal to arbitrate under Section 4," the judge said. "Petitioners are entitled to their requested relief."

The plaintiffs led by Melanie Hoeg allege in their March 28 petition to compel arbitration under the Federal Arbitration Act that Samsung violated the Illinois Biometric Information Privacy Act by collecting their biometric information when the consumers used Samsung Galaxy devices. When they opposed the company's collection and storage of their biometric data, the consumers said, Samsung tried to back out of its own arbitration agreement.

"This petition raises the important question of whether, after Corporate America's calculated, decades-long drive — in courtrooms, legislative chambers and boardrooms — designed to force aggrieved consumers, insureds, and employees into individual arbitrations to vindicate their rights, corporations are now free to ignore their own draconian, adhesive arbitration contracts when consumers fight back in the very arbitrations corporations forced upon them in the first place," according to the petition.

Hoeg's case is **related to another BIPA suit** in Judge Leinenweber's court, in which he ordered Samsung in September to pay \$4 million in individual arbitration fees on behalf of 35,651 customers alleging it illegally collected biometric data. The judge wrote "Samsung was surely thinking about money" when it wrote its arbitration agreement and then alluded to William Shakespeare, saying Samsung was "hoist with its own petard." Samsung's appeal in that case is now **pending in the Seventh Circuit**.

A lawyer for the Hoeg plaintiffs, Stuart A. Davidson, told Law360 in an email Friday that his clients are pleased with the court's "well-reasoned" decision.

"It was hardly unexpected, as every court to have faced rank hypocrisy like Samsung's here has ruled in the consumers' favor," Davidson said. "Unfortunately, we expect Samsung to use every delay tactic in the book, as they have thus far, to prevent our clients from presenting their claims to the arbitrators. My co-counsel and I will continue fighting for our clients until the very end and are confident Samsung will eventually be held accountable."

Representatives for Samsung did not immediately respond Friday to requests for comment.

Hoeg is represented by Stuart A. Davidson, Mark Dearman, Lindsey H. Taylor and Alexander C. Cohen of Robbins Geller Rudman & Dowd LLP, and Gary M. Klinger and Jonathan B. Cohen of Milberg Coleman Bryson Phillips Grossman PLLC.

Samsung is represented by Randall W. Edwards and Matthew D. Powers of O'Melveny & Myers LLP, Michael W. McTigue Jr., Meredith C. Slawe, Kurt Wm. Hemr and Colm P. McInerney of Skadden Arps Slate Meagher & Flom LLP, Mark H. Boyle of Donohue Brown Mathewson & Smyth LLC, and James L. Kopecky of Kopecky Schumacher Rosenberg LLC.

The case is Hoeg et al. v. Samsung Electronics America Inc. et al., case number 1:23-cv-01951, in the U.S. District Court for the Northern District of Illinois.

--Editing by Rich Mills.

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Oat Milk Co. Settles Greenwashing Investor Suit For \$9.25M

By **Sydney Price**

Law360 (February 16, 2024, 8:39 PM EST) -- Investors suing Swedish alternative milk manufacturer Oatly asked a New York federal judge Friday to preliminarily approve a \$9.25 million deal to settle claims that the company pitched its business as more environmentally friendly than it is.

The proposed \$9.25 million settlement, which is subject to court approval, is consistent with the median \$9 million settlement value for securities class actions settled in the Second Circuit in the last decade, the motion says.

Lead counsel for the investors intends to request up to approximately \$2.78 million in fees and up to \$135,000 in litigation expenses.

According to the settlement notice, the parties reached an agreement to settle following a full-day mediation session in October.

The suit, which was launched in July 2021, alleged that Oatly's shares were artificially pumped because the company overhyped demand for its products and engaged in "greenwashing," or promoting the company as being more environmentally sound than it was. In August 2023, the plaintiffs filed their third amended complaint in the suit after their previous complaint **was dismissed** and some of the alleged greenwashing was deemed corporate puffery.

"Even if plaintiffs had been able to revive those claims in their re-pled [third amended complaint], there could be no assurance that the [third amended complaint] would survive defendants' renewed motions to dismiss (let alone summary judgment, trial and inevitable appeals)," Friday's motion says.

Kai Jochims first filed the suit, claiming that trading prices for Oatly's American depository shares sank by nearly 9% after a short-seller accused Oatly of greenwashing months after its \$1.4 billion initial public offering.

Several other investor cases lined up in fall 2021 after Jochims sued Oatly, and the matters were consolidated later that year, prompting a consolidated amended complaint by the plaintiffs in March 2022.

When moving to dismiss the suit, Oatly said its efforts to bolster its production capacity were "hampered by global supply chain constraints" because of the COVID-19 pandemic. The oat milk maker contended it had been seeing a "downward trend in the price" of its stock before July 2021, when the short-seller published the critical report about Oatly.

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

The investors are represented by William C. Fredericks, David R. Scott and Jacob B. Lieberman of Scott + Scott Attorneys at Law LLP and Samuel H. Rudman, Michael G. Capeci and Ellen G. Stewart of Robbins Geller Rudman & Dowd LLP.

Oatly is represented by William O. Reckler, Benjamin A. Naftalis, Elizabeth R. Marks, Kalana Kariyawasam and Jamie M. Marr of Latham & Watkins LLP.

The case is In Re: Oatly Group AB Securities Litigation, case number 1:21-cv-06360, in the U.S.

District Court for the Southern District of New York.

--Additional reporting by Gina Kim. Editing by Stephen Berg.

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6th Circ. Rejects FirstEnergy Objector's Appeal In \$180M Case

By **Katryna Perera**

Law360 (February 16, 2024, 10:33 PM EST) -- The Sixth Circuit on Friday rejected an appeal from a FirstEnergy investor who was holding up a \$180 million settlement in a derivative suit seeking to hold the utility company responsible for its involvement in a \$1 billion bribery scandal.

A three-judge panel for the Sixth Circuit issued an **unpublished opinion** affirming the district court's approval of the settlement and rejecting all the arguments raised on appeal by investor Todd Augenbaum.

In 2021, FirstEnergy **admitted it conspired** to pay millions of dollars to former Ohio House Speaker Larry Householder's political nonprofit in exchange for support of a bill bailing out nuclear power plants affiliated with the company, and FirstEnergy paid the federal government \$230 million to settle federal wire fraud claims.

Multiple investors in FirstEnergy then filed actions over the hit their stock took in response to the scandal, and most were consolidated in the Southern District of Ohio. The Southern District shareholders **announced a deal** in June 2022, and U.S. District Judge Algenon L. Marbley gave it his **final approval** the following August.

But Augenbaum objected, and when the judge **overruled his objections**, he filed a motion for reconsideration. FirstEnergy, acting through a special litigation committee of its board of directors, **objected to Augenbaum's efforts** in October 2022.

Augenbaum appealed to the Sixth Circuit last year, arguing that notice of the \$180 million settlement was inadequate, that the deal was undermined by later developments, that the district court awarded excessive attorney fees and that the settlement needed approval from the U.S. District Court for the Northern District of Ohio. Augenbaum also alleged that the parties colluded to get approval of the deal and conducted inadequate discovery.

The panel rejected all of Augenbaum's arguments on Friday. According to the opinion, Augenbaum claimed the settlement notice was inadequate because it failed to disclose that FirstEnergy's insurance policies would partially fill the settlement fund.

But the panel said the notice did explain this fact and that Augenbaum could have easily discovered the insurance allocation through the "slightest amount of reasonable diligence."

"Shareholders like Augenbaum thus had ample notice and opportunity to assess FirstEnergy's funding mechanism and raise any corresponding objections," the opinion states.

Regarding the settlement's approval, Augenbaum argued that the value of the settlement is overstated because "although it purports to secure a \$180 million return for investors, 'only \$72.28 million of the \$180 million settlement fund' would 'not otherwise have been available to FirstEnergy' as insurance against other claims."

In Augenbaum's view, the deal is capped at the \$72.28 million FirstEnergy could otherwise not have recovered, and Augenbaum feels that characterizing the settlement value as \$180 million is misleading enough to be considered "collusion" between the parties, according to the opinion.

The panel disagreed, however, saying the district court did not abuse its discretion in assessing the benefit of the settlement at \$180 million.

Augenbaum further argued that additional discovery would have served "the public interest" by "exposing the culpability of individual executives and would have benefitted the company by determining the extent to which its executives engaged in 'wrongful conduct.'"

But the appeals court said Friday that derivative actions serve fiduciary interests, not public interests and that Augenbaum does not identify any new evidence that could have been revealed to shareholders through additional discovery.

"The plaintiffs had no duty to exhaust every possible source of discovery without regard to litigation expense on the theory that continued discovery could theoretically yield new, material evidence," the opinion states.

The panel also rejected Augenbaum's argument that two later developments invalidated the settlement and that the district court awarded excessive attorney fees.

Finally, the panel said Augenbaum's argument that the deal needed approval from the Northern District of Ohio because of the "first-to-file" doctrine is unpersuasive.

According to the opinion, under the "first-to-file" doctrine, when actions involving nearly identical parties and issues have been filed in different district courts, the court where the first suit was filed "should generally proceed to judgment."

Augenbaum says that because the first suit over the current issues was filed and actively litigated in Ohio's Northern District, that court should have a say over the approval of the settlement.

However, the panel said Augenbaum "provides no basis for concluding that the district court abused its discretion in declining to stay the Southern District litigation under the ordinary first-to-file doctrine, and identifies no authority suggesting that a shareholder derivative settlement reached in one district requires approval in every other district hosting concurrent litigation, particularly when no other plaintiff has objected, nor does he offer any reason to believe the first-to-file rule is mandatory in shareholder derivative actions."

The Sixth Circuit's ruling comes after U.S. District Judge John R. Adams **paused** the parallel derivative suit in the Northern District of Ohio, citing Augenbaum's pending appeal.

Judge Adams appointed counsel for the shareholders in 2022 after determining that "the parties have made clear that they do not intend to prosecute the matter" in his district and refused to toss the suit even after the parties filed a joint dismissal motion following the settlement in the Southern District of Ohio.

In his July 2022 order denying the dismissal motion, Judge Adams said he would not "abandon the first-to-file rule" unless the parties gave him a good legal reason to do so, particularly not after the parties purportedly tried to "evade" his review of the later-filed case's settlement.

The \$180 million settlement is meant to resolve both actions.

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

U.S. Circuit Judges Alice M. Batchelder, Jane Branstetter Stranch and Stephanie Dawkins Davis sat on the panel for the Sixth Circuit.

Augenbaum is represented by W.B. Markovits of Markovits Stock & DeMarco LLC and Jeffrey S. Abraham and Michael J. Klein of Abraham Fruchter & Twersky LLP.

The other FirstEnergy investors are represented by John Camillus of the Law Offices of John C. Camillus LLC, Saxena White, Bernstein Litowitz Berger & Grossmann LLP and Cohen Milstein Sellers & Toll PLLC.

The individual FirstEnergy defendants are represented by Jones Day, BakerHostetler, Tucker Ellis LLP, McDermott Will & Emery LLP, Brouse McDowell LPA, Skadden Arps Slate Meagher & Flom LLP and Ballard Spahr LLP.

The case is Empl Ret Sys of St. Louis et al. v. Charles Jones et al., case number 23-3512, in the U.S. Court of Appeals for the Sixth Circuit.

–Additional reporting by Ryan Harroff. Editing by Michael Watanabe.

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NYCB Brass Face Investor Suit Over Signature Bank Takeover

By **Sydney Price**

Law360 (February 16, 2024, 9:17 PM EST) -- Executives and directors of New York Community Bank were named in a new shareholder derivative suit, adding to the growing list of litigation the bank and its leaders are facing over the fallout from its acquisition of Signature Bank's assets last year.

According to the suit, filed by shareholder Joseph Hauser in New York federal court on Thursday, NYCB was damaged when it disclosed last month that losses related to its acquisition of assets from Signature Bank would require it to reduce dividends. NYCB acquired \$38.4 billion in assets from Signature Bank in March 2023, which had been placed into Federal Deposit Insurance Corp. receivership after **failing**.

In addition to nominal defendant NYCB, the suit lists 14 individual defendants, including NYCB's president and CEO Thomas R. Cangemi, Chief Financial Officer John J. Pinto and several directors.

NYCB began to expand into commercial banking in 2022 after operating primarily as a maker of multifamily and commercial loans. NYCB acquired Flagstar Bancorp on Dec. 1, 2022, which added \$25.8 billion in assets for the fourth quarter 2022, the complaint states.

A few months later, NYCB announced its subsidiary Flagstar agreed to acquire some of Signature Bank's assets and liabilities. According to the suit, Signature Bank said in a press release on March 20, 2023, that the acquisition was "expected to be significantly accretive to both earnings per share and tangible book value," which Hauser says is false and misleading.

The transaction put NYCB over \$100 billion in total assets, placing it into the Category IV large bank class, and subjecting it to new capital requirements and liquidity standards, according to the suit.

On Jan. 31, NYCB disclosed it crossed this threshold "sooner than anticipated" and would reinforce its balance sheet by recording a \$552 million provision for loan losses and cutting its quarterly dividend to 5 cents per common share.

Following the news, NYCB's share price fell \$3.90, or about 38%, to \$6.47 on Jan. 31, according to the suit.

The suit accuses the individual defendants of violating the Exchange Act, breaching fiduciary duties, gross mismanagement, wasting corporate assets, unjust enrichment, and aiding and abetting.

NYCB, Cangemi and Pinto face two additional securities class actions for claims that it misled investors about NYCB's acquisitions of Signature Bank and Flagstar Bank.

"If and when the company is found liable in the **securities class action** for these violations of the federal securities laws, the company's liability will be in whole or in part due to the officer defendants' willful and/or reckless violations of their obligations as officers and/or directors of the company," the suit states.

Counsel for Hauser and a representative for NYCB did not immediately respond to requests for comment Friday.

Hauser is represented by Gregory M. Egleston, Thomas J. McKenna and Christopher M. Brain of

Gainey McKenna & Egleston.

Counsel for NYCB and the individual defendants was not immediately available Friday.

The case is Hauser v. Cangemi et al., case number 1:24-cv-01207, in the U.S. District Court for the Eastern District of New York.

--Editing by Drashti Mehta.

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Athira Pharma Investors Win OK Of \$10M Deal On Second Try

By **Gina Kim**

Law360 (February 16, 2024, 9:42 PM EST) -- Over 30,000 Athira Pharma investors have scored preliminary approval of a \$10 million settlement over claims its former CEO manipulated studies relating to an Alzheimer's drug, five months after a Washington federal judge rejected their first bid but let them try again to address concerns over conflicts and equitable treatment.

In his Thursday order, U.S. District Judge Thomas Zilly of the Western District of Washington granted the plaintiffs' second stab at seeking his preliminary blessing of a \$10 million class action settlement reached last year with Athira Pharma Inc., which was accused of securities violations stemming from false and misleading statements made about the qualifications of its onetime CEO, Dr. Leen Kawas, during the company's September 2020 initial public offering and its January 2021 secondary public offering.

In September, the judge rejected the investors' first preliminary approval motion, airing concerns that there was "intraclass conflict" of interest between the lead plaintiffs and the settlement class, as the lead plaintiffs' chose not to replead their Exchange Act claims that the court had previously dismissed. That placed the lead plaintiffs in a different position than other putative members whose Exchange Act claims remained, the judge said.

Judge Zilly also found that the proposed deal wouldn't treat the class equitably, since investors with Exchange Act claims could recover more than those with Securities Act claims, or both sets of claims.

The investors revised their settlement in December, as well as their allocation plan. The investors split the settlement class into two groups, with two different class periods: a Securities Act class consisting of investors who acquired Athira common stock between Sept. 17, 2020, through March 16, 2021, and an Exchange Act class of those who acquired Athira common stock from March 17, 2021, through June 17, 2021.

The investors also provided an estimated minimum and maximum possible recovery per class member and streamlined the method for distinguishing the two groups.

"In response to the court's inquiries ... the parties have clarified that all Athira shares issued before the IPO (and SPO) were subject to lock-up or market-stand-off restrictions that prevented their trading until the market opened on March 17, 2021," Thursday's order said. "Based on this information, the parties have substantially simplified their traceability analysis for purposes of the claims in this litigation."

A lock-up restriction is a window of time when insiders are prohibited from selling shares after an IPO.

Now that the investors split the classes, Judge Zilly found on Thursday that the Securities Act claims would relate to Athira shares traceable to both the IPO and SPO, while the Exchange Act claims cover shares bought after the expiration of the lock-up period, and before the corrective information was announced.

The investors also rectified the judge's concern regarding conflict, the order said. While the investors' counsel deny a conflict exists, they added as name plaintiff Hang Gao, who has both Securities Act and Exchange Act claims against Athira but isn't bound by the two other lead plaintiffs' decision not

to replead the Exchange Act claims, Judge Zilly noted.

The judge also found fair and reasonable the mediator's proposed allocation plan of giving at least 91.5% of the net settlement to the Securities Act class and a maximum of 8.5% of the net sum to the Exchange Act class is also fair and reasonable, which was based on the opinion of the plaintiffs' expert who estimated that nearly 60% of Athira stock is traceable to either the IPO or the SPO.

"The court is persuaded that the proposed apportionment between Securities Act claims and Exchange Act claims 'treats class members equitably relative to each other,'" Thursday's order said. "The 91.5-to-8.5% split reflects that the Securities Act claims are associated with more than a majority of affected shares (59.6%) and estimated damages (57.8%)."

Thursday's order brings the nearly three-year litigation, which commenced in June 2021, closer to its end.

According to the amended complaint, Athira is a biopharmaceutical company that develops drugs to stop neurodegeneration. Athira created dihexa, the active ingredient in Athira's lead product, ATH-1017, which was marketed to potentially improve cognition in patients suffering from Alzheimer's or other conditions.

Kawas published research studies related to dihexa, some of which she co-wrote with her former professors at Washington State University years ago when she was a graduate student.

However, Kawa had altered images of her research results directly related to dihexa's efficacy, which investors alleged created the false impression of its precognitive and anti-dementia effects. Kawa's conduct spiked the value of Athira's research and development pipeline, its stock prices and its intellectual property, which the investors alleged were backed by the manipulated research results.

Independent researchers, however, broke the news of the falsification of results, which Athira and Kawa did not dispute, the investors alleged. After Kawa's resignation, stock prices sank nearly 40% overnight on June 18, 2021, the complaint said. The suit also named as defendants Goldman Sachs & Co. LLC, Jefferies LLC, Stifel Nicolaus & Co. Inc. and JMP Securities LLC, who were the underwriters for the two registered public offerings by Athira.

In July 2022, the judge gutted the investors' claims against the underwriters, and the investors chose not to replead them.

On April 28, the investors filed their preliminary approval motion of the \$10 million settlement, which Judge Zilly denied five months later, but invited the plaintiffs to renew their request. On Dec. 15, the plaintiffs submitted their renewed approval bid, addressing the judge's prior concerns.

Class counsel indicated they plan to seek no more than a third of the gross settlement fund and costs that won't exceed \$205,000.

On Thursday, Judge Zilly agreed to certify the class but partially deferred his ruling on the class' proposed notices and claim forms, and asked them to submit an opt-out form. A hearing is set for March 15.

Gregory L. Watts of Wilson Sonsini Goodrich & Rosati PC, who represents Athira, said the company and its representatives did not wish to issue a statement.

Representatives for the investors did not immediately respond to inquiries for comment Friday.

The investors are represented by Thomas G. Hoffman and Michael P. Canty of Labaton Keller Sucharow LLP, and Kara M. Wolke, Casey E. Sadler and Natalie S. Pang of Glancy Prongay & Murray LLP, and Benjamin T.G. Nivison of Rossi Vucinovich PC.

Athira Pharma is represented by Gregory L. Watts, John C. Roberts Jr. and Tyre L. Tindall of Wilson Sonsini Goodrich & Rosati PC.

Kawas is represented by Sean C. Knowles, Zachary E. Davison and Joseph E. Bringman of Perkins

Coie LLP.

The underwriter defendants are represented by Anthony Todaro and John J. Clarke Jr. of DLA Piper.

The case is Antonio Bachaalani Nacif et al. v. Athira Pharma Inc. et al., case number 2:21-cv-00861, in the U.S. District Court for the Western District of Washington.

--Editing by Rich Mills.

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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

State Farm 'Bad Deal' Can't Save Policyholders' Suit

By **Greg Lamm**

Law360 (February 16, 2024, 10:54 PM EST) -- The Tenth Circuit on Friday refused to revive a proposed class action accusing State Farm of illegally denying full uninsured motorist coverage for policyholders, relatives and passengers, saying that the insurer may have sold them a "bad deal" but that they agreed to it.

Oklahoma residents Shannon Sharp and Eric M. Thurston said they paid for policies that offered uninsured motorist coverage that could add together – or "stack" – providing more protection by combining coverage limits on policies on multiple vehicles.

Sharp and Thurston urged the Tenth Circuit to reverse a trial court that dismissed their lawsuit after State Farm argued that the plaintiffs failed to point to a policy provision State Farm purportedly breached. The 2022 lawsuit in federal court in Oklahoma was filed about a year after the Oklahoma Supreme Court ruled against Thurston in a previous lawsuit involving similar claims against State Farm's related uninsured motorist coverage.

On Friday, a three-judge panel of the Tenth Circuit said that Sharp and Thurston agreed to pay the separate premiums despite State Farm's disclosure that uninsured motorist coverage policies would not stack.

In siding with State Farm, the panel said that the insurance company delivered uninsured motorist coverage "exactly as promised" and the policyholders did not have a viable breach-of-contract claim.

"State Farm may have offered claimants a bad deal, but they agreed to it. And a bad deal, alone, does not amount to a breach of contract," the panel said **in its opinion**.

Under Oklahoma law, State Farm is required to offer uninsured motorist coverage for named insured, resident relatives and guest passengers.

But the panel said the insurer is not required to automatically "stack" benefits in a way that would combine separate coverage limits from multiple policies, resulting in one higher limit that would offer greater protection in the event a policyholder was involved in a traffic accident with an uninsured motorist.

Sharp and Thurston **had argued** their brief before the Tenth Circuit that State Farm sold policies that promised aggregated coverage, but delivered something less valuable.

In **State Farm's brief**, the insurer said the Oklahoma Supreme Court has already settled the issue in another case brought by Thurston alleging virtually the same claims. In the earlier case, the Oklahoma high court concluded the language in Thurston's policies unambiguously prohibited stacking.

The Tenth Circuit panel noted that the trial court said Thurston's and Sharp's lawsuit against State Farm presented the same issues in Thurston's previous lawsuit, "packaged in a slightly different form."

Representatives for the policyholders and State Farm did not immediately respond Friday to requests for comment.

U.S. Circuit Judges Harris L. Hartz, Gregory A. Phillips and Joel M. Carson sat on the panel for the

Tenth Circuit.

Shannon Sharp and Eric M. Thurston are represented by Edward L. White and Travis D. Mendoza of Edward L. White PC.

State Farm is represented by Sondra A. Hemeryck of Riley Safer Holmes & Cancila LLP and Joseph T. Acquaviva Jr. and Elizabeth A. Snowden of Wilson Cain & Acquaviva.

The case is Shannon Sharp et al. v. State Farm Mutual Automobile Insurance Company, case number 23-6067, in the U.S. Court of Appeals for the Tenth Circuit. The underlying case number is 5:22-cv-00854, in the U.S. District Court for the Western District of Oklahoma.

--Editing by Peter Rozovsky.

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Old Rules Face New Risks As Justices Hear Truck Stop's Case

By **Jon Hill**

Law360 (February 16, 2024, 11:50 PM EST) -- A North Dakota truck stop's long-haul quest to save on bank card fees reaches the U.S. Supreme Court on Tuesday in a case that could hand businesses a double-edged sword with which to hack away at even decades-old regulations.

The case, *Corner Post Inc. v. Board of Governors of the Federal Reserve System*, is scheduled for oral argument on Tuesday morning and has drawn relatively little attention in a term stacked with blockbuster challenges to administrative agencies' funding, enforcement and interpretive authority.

But the issue at the heart of the case — whether a new business can preemptively challenge an old regulation — could have significant ramifications for rulemaking and compliance, potentially opening up fresh opportunities for industry to litigate the validity of long-standing rules.

"If the decision goes against the government, then that will greatly expand the capacity of plaintiffs to challenge administrative procedure footfalls basically forever," said Susan C. Morse, professor of law and associate dean for academic affairs at the University of Texas at Austin School of Law.

How We Got Here

Corner Post, a gas station and truck stop in western North Dakota, was one of several merchant-side plaintiffs behind a 2021 lawsuit challenging the Federal Reserve's debit card interchange rules, known collectively as Regulation II.

Finalized in 2011, the rules limit the fees that larger card-issuing banks can charge merchants for processing a customer's debit card payment. This cap implemented parts of the Dodd-Frank Act that sought to rein in these interchange fees, also called swipe fees, by requiring that they be "reasonable and proportional" to banks' actual processing costs.

Under the cap, banks can charge up to 21 cents per swipe, plus a small percentage-based allowance to cover fraud losses. But merchants have long chafed at how the Fed calculated what the cap should be, viewing it as overly generous to banks.

Those complaints underpinned a 2011 merchant-backed lawsuit that challenged the rules under the Administrative Procedure Act, which allows courts to review and set aside rules found to be arbitrary, capricious or otherwise defective. But the suit fizzled at the D.C. Circuit, which upheld the rules in 2014.

Many years later, the Fed was sued again over the rules, this time by Corner Post and its co-plaintiffs. Their suit, similarly brought under the APA, also claimed the rules were improperly written in violation of Dodd-Frank's requirements, resulting in an allegedly excessive cap that has generated windfall fee profits for banks at the expense of consumers and merchants.

But a North Dakota federal court, and later the Eighth Circuit, rejected this case as untimely. There is a six-year statute of limitations that applies to APA claims, and this limitations period "begins to run upon publication of the regulation," the Eighth Circuit said in a 2022 decision.

The deadline to sue, in other words, had passed years earlier, in 2017.

The problem with that, from Corner Post's perspective, is it couldn't have sued then even if it wanted to. The store only opened for business in 2018, meaning it wouldn't have been paying the allegedly problematic swipe fees — and wouldn't have had standing — until after this supposed 2017 deadline.

According to Corner Post, that not only isn't fair, it also isn't the law. The store has argued that because it sued within three years of opening and first paying the Fed-regulated swipe fees, it met the APA claims deadline.

Put more technically, Corner Post's position is that APA claims accrue and start the limitations period running only once a plaintiff becomes subject to, and is accordingly harmed by, the disputed rule. The Fed and, by extension, the U.S. government insist that accrual occurs at the rule's promulgation.

Each side will have the chance to present their position to the justices in person on Tuesday, with Consvooy McCarthy PLLC partner Bryan Weir arguing for Corner Post and Benjamin W. Snyder of the U.S. Solicitor General's Office arguing for the government.

Neither counsel for Corner Post nor the U.S. Department of Justice returned requests for comment.

Why the Case Matters

Corner Post has received considerable high court support from an amicus coalition that includes 18 Republican state attorneys general, conservative advocacy groups like Americans for Prosperity, and business groups like the U.S. Chamber of Commerce, which have painted the case in terms of accountability for regulators and fairness for the regulated.

The government's position, which the Eighth Circuit endorsed, "severely curtails, for all practical purposes, the ability of newly created or harmed businesses and individuals to challenge regulations, no matter how ultra vires and unconstitutional those regulations might be," Americans for Prosperity said in a brief late last year.

"It is fundamentally unfair to close the courthouse doors on businesses and individuals newly harmed by long-extant regulations imposing burdensome and expensive compliance requirements or other costs," AFP added.

The Chamber similarly argued that "businesses need a way to challenge unlawful regulations" and that there are "myriad reasons" why they might not be able to do so until years after those regulations are issued. For one, they might be new businesses, like Corner Post, or they might be new to a particular regulated sector, like a firm expanding into new business lines.

"The goal of the Administrative Procedure Act is to provide a structured process for challenging unlawful agency action, not to freeze agency regulations in amber after a six-year window," the Chamber told the justices.

The government has pushed back on such criticisms as overblown, saying it isn't arguing for "complete repose" when it comes to older rulemakings. No matter how many years a regulation has been on the books, it is still subject to challenge and invalidation when an agency attempts to enforce it, and businesses always have the option of formally petitioning agencies for rewrites of rules they don't like.

Corner Post's position would also "create serious problems for agency and judicial administration," according to the government.

If the APA claim clock doesn't automatically start ticking when rules are issued, the deadline to sue would become a rolling one that permits many more potential lawsuits, from many more potential plaintiffs, the government has said.

That could include, for example, new entities set up essentially as litigation vehicles for businesses looking for another chance to challenge older regulations, as well as more tangential plaintiffs who are merely downstream of a rule rather than directly subject to it.

The government has argued that this not only would risk vastly increasing the potential litigation and

recordkeeping burden on agencies but would also risk straining the courts with complicated standing analyses to sort through, concerns that consumer advocacy group Public Citizen echoed in an amicus brief late last year.

If the justices side with Corner Post, "the APA's six-year limitations period would be essentially meaningless," Public Citizen said. "As a result, agencies and courts could be forced to return repeatedly to an ever-older administrative record to defend against and adjudicate repetitive attacks."

That might not be good for business, either. Although companies may feel more *schadenfreude* than sympathy when their regulator gets dragged into court, they could find it difficult to navigate a proliferating set of legal challenges that result in differing rulings about which regulations they do and don't have to follow.

Particularly in heavily regulated industries, such a scenario could turn out to be "kind of a nightmare" for compliance officers, according to Kristen Larson, a financial services attorney who spent nearly two decades in-house at multiple banks and is now of counsel at Ballard Spahr LLP.

Banks, for example, have previously contested new regulations that they believe are overreaching, but banks also "like to have a stable regulatory environment," Larson said. If the APA claim deadline is tied to promulgation, it neatly "gives you that finality."

By contrast, if new challenges can be filed many years or even decades after the fact, "it could be hard for financial institutions to deal with the uncertainty," Larson said.

What To Watch For

Tuesday's oral argument is taking place just weeks after the justices signaled their appetite for diminishing or even dispensing with so-called Chevron deference, a decades-old doctrine that directs judges to grant agencies some leeway when reviewing how they interpret federal statutes.

If the Supreme Court does roll back Chevron deference, it could create a more favorable climate in the courts for challenging agency rules. And if Corner Post has its way, more of those challenges could make it into court in the first place.

Those kinds of practical considerations shouldn't be lost on the justices when they convene Tuesday morning, according to the University of Texas at Austin's Morse.

"I hope that the justices will recognize that a decision in favor of Corner Post has the potential to expose our administrative agencies to substantially more challenges to the work they've done," said Morse, who recently published a law review article on the Corner Post case.

Ballard Spahr's Larson said that concerns about impact could indeed loom large during the arguments, particularly the potential for uncertainty and gamesmanship if the deadline for APA challenges is plaintiff-dependent.

The justices may question whether there could be "costly chaos for regulated industries if these claims can be brought at any point in time," Larson said. They may also press the government on its assertion that agencies would struggle with the recordkeeping needed to defend older regulations.

"That is one place where the government's argument is weak," Larson added. "I mean, I think we can all agree that the rulemaking process under the APA really requires the retention of rulemaking records. They're still going to have the records a decade later to be able to defend against the claim."

Expect plenty of questions focused on statutory text, too. The APA, for example, contains provisions limiting judicial review to those "suffering legal wrong because of" or "aggrieved by agency action," but Corner Post and the government disagree about what those provisions mean for accrual — that is, when the six-year deadline to sue kicks in.

Corner Post maintains that its position is consistent with the APA's "plain text" and that the government's is not, although the government also has the weight of the Eighth Circuit and five other

circuits on its side. Corner Post only has the Sixth Circuit in its corner, a minority view that Morse said may be emphasized on Tuesday.

"I hope that there is an acknowledgment of the strength of the [majority] court of appeals precedent on this point, and a curiosity on the part of the justices about why there is such a strong consensus among the court of appeals judges who have considered this," Morse said.

Corner Post may also be pushed to reckon with a different precedent — namely, the 2014 D.C. Circuit decision upholding the Fed interchange rules. Larson said the truck stop could be questioned about why its claims against the rules need to proceed now, given that an indisputably timely challenge was already brought before and fell short.

"The justices may ask [Corner Post] to articulate how its claim is somehow different from those that have already been adjudicated and why this is a good use of judicial resources to continue to adjudicate very similar matters," Larson said.

Corner Post is represented by Tyler R. Green, Bryan Weir and Frank H. Chang of Consovoy McCarthy PLLC.

The Fed is represented by Elizabeth Prelogar of the U.S. Office of the Solicitor General and Brian M. Boynton, Malcolm L. Stewart, Benjamin Snyder, Daniel Tenny and Sarah Clark of the U.S. Department of Justice.

The case is Corner Post Inc. v. Board of Governors of the Federal Reserve System, case number 22-1008, in the Supreme Court of the United States.

--Editing by Jay Jackson Jr.

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