

Critical Mass With Law.com's Amanda Bronstad: 80% of Claims in Altria's Juul Settlement Are Fraudulent or Invalid, Motley Rice Turns to ABA Rule in Opioid DQ Defense

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By Amanda Bronstad

Juul brand vaping supplies on display in the window of a vaping store in New York. Credit: rblfmr/Shutterstock.com

March 13, 2024 at 09:22 AM

Critical Mass

Amanda Bronstad 
staff reporter

Welcome to **Law.com Class Actions: Critical Mass**, a weekly briefing for class action and mass tort attorneys.

This week: Lawyers in **Altria's Juul** settlement told the judge that “click farms” and other AI are making the majority of the claims. **Motley Rice** turned to last month's formal opinion of an **ABA** rule to stave off disqualification in opioid cases. Find out who represents a fertility clinic facing 10 lawsuits over dead embryos.

I'm **Amanda Bronstad**. Feel free to reach out to me with your input. My email is abronstad@alm.com. Follow me on LinkedIn or X: [@abronstadlaw](#).

Dena Sharp, with Girard Sharp.

'More Sophisticated Than the CAPTCHA'

Lawyers asking to approve a \$45.5 million settlement with **Altria** over **Juul** cigarettes got five times the number of claims they expected—but as many as 80% of them were likely invalid or fraudulent.

Why is this a big deal? The Altria deal is the latest class action settlement to get hit by large numbers of fraudulent claims. At a March 6 final approval hearing, Dena Sharp (**Girard Sharp**) told **U.S. District Judge William Orrick III** that “bad actors” using AI and other technology had filed the fraudulent claims, some of which were filed by “click farms,” or large groups of people who break through reCAPTCHA, the anti-bot program that asks if a user is a robot by displaying images of ordinary items, like stairs or street lights. Orrick suggested Sharp reach out to federal prosecutors to consider criminal action against the click farms.

The judge planned to approve the settlement, which Sharp predicted could still end up with a 15% claims rate after weeding out the fraud.

I spoke to **Don Beshada**, a former **Faegre Drinker** partner who is now president of **ClaimScore**, which provides software to combat fraudulent claims in class action settlements. He called fraudulent claims the “single largest topic” in consumer class action cases. His solution? He told me:

“The fraud is more sophisticated than the CAPTCHA. The real way to do this is to do it in real time, and use a tool that monitors the claims as they come in, and you get determinations of these claims within seconds of the claims being made. So at the end of the claims period, you don’t have to review 10 million claims.”



Motley Rice ‘Functioning as a Government Lawyer’?

Motley Rice has turned to a Feb. 28 formal opinion on the **American Bar Association's** Model Rule of Professional Conduct 1.11 to defend against a disqualification motion brought in dozens of opioid cases.

A quick backgrounder: Pharmacy benefit manager **OptumRx** has moved to disqualify Motley Rice, which it says obtained confidential information about the company while representing the state of Hawaii, the District of Columbia and the city of Chicago. Motley Rice is now one of three firms representing cities and counties suing OptumRx and others over opioids.

What the rule says: ABA Model Rule 1.11 prohibits a lawyer with confidential government information about a person from representing a private client “whose interests are adverse to that person.” However, there is little agreement about the ABA Standing Committee on Ethics and Professional Responsibility’s formal opinion (see here). Motley Rice says it backs up its claim that the cities and counties suing over opioids aren’t private clients, but OptumRx said the firm was effectively trying to “dismantle the rule.”

U.S. District Judge Dan Polster, who heard arguments last month, said he planned to rule “as expeditiously as I can” on the disqualification motion but had more questions about Motley Rice’s prior government representations.

I reached out to Dru Stevenson (**South Texas College of Law**), who teaches professional responsibility law. He told me:

“I can also see why the judge wants to look at the retention agreements and see whether they were really functioning as a government lawyer. That’s a big part of the defendant’s argument. Both sides are arguing whether they really count as a government lawyer.”

Jenny A. Covington of Nelson Mullins. Courtesy photo

Who Got the Work?

Clark Hill’s Roger Perkins, Carolyn Taylor, Elizabeth Evans, David Perl and **Nelson Mullins’** Jenny Covington and Jennifer Persky stepped in to represent **The Cooper Companies’ CooperSurgical**, a fertility clinic that faces at least 10 lawsuits brought on behalf of individuals whose embryos died during in-vitro fertilization due to allegedly defective lots of embryo culture media, which were recalled in 2023. The lawsuits, flagged by Law.com Radar, all were filed in California’s Northern District.

Here’s what else is happening:

Elmiron Ending: Litigation over bladder medication **Elmiron** is winding down, with most of the 150 cases resolved in Philadelphia, which originally had its first trial scheduled to begin Monday. A significant portion of the cases in the multidistrict litigation, which involved nearly 2,000 cases in the **U.S. District Court for the District of New Jersey**, also have been resolved. The lawsuits alleged that Elmiron, made by **Johnson & Johnson’s Janssen Pharmaceuticals**, caused vision loss.

Blackbaud Breach: **U.S. District Judge Joseph Anderson in the District of South Carolina** heard arguments on March 8 about whether to certify a class of software provider **Blackbaud’s** customers impacted by its 2020 data breach. Plaintiffs’ lawyers have moved

to certify a nationwide class of millions of customers, plus subclasses in Florida, California and New York. Class certification orders in data breach cases are rare given that most defendants settle the lawsuits.

Derailment Dismissal: A federal judge tossed a third-party complaint brought by **Norfolk Southern** hoping to find the shippers and owners of railcars liable for the 2023 derailment in East Palestine, Ohio. **U.S. District Judge John Adams, of the Northern District of Ohio**, dismissed Norfolk's claims against the other companies, which include **Dow Chemical Inc.** and **Occidental Petroleum Corp.'s Oxy Vinyls**. The case, brought by the state of Ohio and the U.S. government, is separate from the dozens of cases against Norfolk coordinated in multidistrict litigation. The first trial is set for March 31, 2025.

Thanks for reading Critical Mass! I'll be back next week.

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- Latest
- Trending
- **Litigation Surge**

Bridgestone, Goodyear and other major tiremakers were pummeled with antitrust cases in February. At least 14 federal antitrust class actions were filed, primarily in New York Southern District Court; the suits accuse the companies of conspiring to drive up prices for replacement tires. What triggered the surge? The suits were filed soon after the European Commission announced that it was carrying out inspections at the defendants' facilities. Other defendants include Continental, Michelin, Nokian Tyres and Pirelli. The suits are backed by several firms including Ahdoot & Wolfson, Glancy Prongay & Murray and Robins Kaplan.

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Judge certifies class alleging maker of Parkinson's drug misled investors

DJ [dailyjournal.com/articles/377594-judge-certifies-class-alleging-maker-of-parkinson-s-drug-misled-investors](https://www.dailyjournal.com/articles/377594-judge-certifies-class-alleging-maker-of-parkinson-s-drug-misled-investors)

Health Care & Hospital Law

Mar. 13, 2024

The lawsuit alleges that the company failed to disclose adverse information relating to its flagship Parkinson's treatment drug, artificially inflating stock prices and causing substantial losses when it was revealed that the FDA would not approve the company's application for expanded use.

A federal judge certified a class of investors who say a San Diego biopharmaceutical company failed to disclose adverse results in studies of its flagship Parkinson's disease treatment drug, and misled the public into believing it would receive Food and Drug Administration approval for expanded use.

Acadia Pharmaceuticals Inc. develops and sells small-molecule drugs for the treatment of central nervous system disorders. The company developed pimavanserin, which was approved by the FDA in 2016 to treating Parkinson's disease psychosis. The company filed an application with the FDA in 2019 to expand use of the drug for other dementia-related diagnoses but was denied two years later.

The class action was filed in federal court in San Diego by John T. Jasnoch of Scott+Scott Attorneys at Law LLP. Jasnoch represents the City of Birmingham Relief and Retirement System and Ohio Carpenters' Pension Fund. The complaint claims Acadia omitted adverse information of studies in press releases, calls and SEC filings, which artificially inflated the price of its stock. City of Birmingham Relief and Retirement System et al. v. Acadia Pharmaceuticals Inc., et al., 3:21-cv-00762 (S.D. Cal., filed Dec. 10, 2021).

On Monday, U.S. District Judge William Q. Hayes certified the class of stock purchased between 2019 and 2021. The judge wrote that the company's SEC filings indicated they did not fully disclose subgroup analytics in the terms of an agreement with the FDA prior to the class period. "Defendants have not provided evidence that investors were aware of this information before or during the class period. Although Acadia generally informed the public

it had reached an agreement with the FDA regarding the Harmony Study design, this omitted term provides key information with respect to the significance of subgroup data,” Hayes wrote.

Jasnoch declined to comment on the judge’s order. Peter M. Adams, a partner at Cooley LLP and lead counsel for Acadia, could not be reached for comment.

In court filings opposing class certification, Adams wrote that any omission of information did not impact the price of the stock. “The market already knew of the allegedly corrective information,” and therefore Acadia’s stock price “could not have been inflated through the omission of that information,” Adams wrote.

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Tesla Investors Sound Off to Judge Who Voided Musk Pay Plan (1)

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- Some shareholders are upset attorneys want \$6 billion in stock
- Delaware judge says she won't read letters; cites ethics rules

The judge who threw out Tesla Inc. co-founder Elon Musk's record-setting

pay package said she's received "many communications" from investors about the request from the winning lawyers for almost \$6 billion in company stock.

Delaware Chancery Court Chief Judge Kathaleen St. J. McCormick said she's not reading the letters. The state judiciary's ethics code "prohibits me from considering" the letters from non-parties in the litigation "who claim to hold stock in Tesla," she

to lawyers on both sides. She asked the attorneys to recommend a process for handling the letters.

In January, McCormick

that the compensation plan — the largest ever given to a corporate executive in the US — was excessive and that Tesla's directors were handcuffed by when they approved it in 2018. The judge also faulted Tesla's public disclosure about the pay package.

This month, lawyers representing the investor who challenged the pay package, Richard Tornetta, submitted an

to be paid their fees in stock — which they said would ease the burden on company shareholders.

That didn't go over well with some investors, who launched a letter-writing campaign.

Shareholder Alexandra Merz urged fellow investors in a post on social media platform X to "send tens of thousands of letters" to McCormick and "describe in your own passionate words in a VERY RESPECTFUL MANNER" how there is no financial benefit from the judge's ruling striking down the pay package that "could serve as the basis of calculation for plaintiff attorney fees."

"Elon Musk deserves the original compensation package in full," reads another X post. "On top of that, I was surprised to learn that the lawyers who filed and 'won' this Class Action lawsuit demanded a roughly \$5.9 billion compensation in Tesla shares, claiming it was to protect Tesla shareholders. Nothing could be further from the truth."

Arthur Blake, a Tesla investor, told McCormick in a letter posted to the internet that her ruling and the requested legal fees were “extremely contrary to shareholders’ interests.”

“Respectfully, I believe that this judgement is dangerous and misguided, extremely shareholder-hostile and sets a new precedent that will now mark Delaware going forward as being the state with the most business unfriendly environment,” Blake wrote.

Musk has encouraged other businesses to follow his lead and move to reincorporate outside Delaware, the corporate home to almost 70% of Fortune 500 companies.

Greg Varallo, a lawyer for Tornetta, declined to comment. Evan Chesler, one of Musk’s attorneys, didn’t immediately respond after regular business hours to an email seeking comment.

The case is Tornetta v. Musk, 2018-0408, Delaware Chancery Court (Wilmington).

(Adds Blake’s letter at end.)

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- Founder-CEO is target of suit after drugmaker's bankruptcy
- Covid-19 partial excuse for killed FDA meeting alleged false

Block & Leviton LLP is lead counsel for the investors. Sidley Austin LLP represents Klaerner.

The case is Pardi v. Tricida, Inc. , 2024 BL 80038, N.D. Cal., No. 21-cv-00076, 3/11/24 .

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Chancellor McCormick out swinging:
courts.delaware.gov/Opinions/Downl...

The respondent's argument concerning the deal price raises an interesting question about deal primacy under Delaware law—namely, whether the appraisal statute requires deference to the deal price in controller squeeze-outs conditioned on *MFW* protections. The short answer is no. The slightly longer answer is that even as the court independently measures going concern value, companies remain incentivized to deploy strong procedural protections for minority stockholders, as those protections can help reduce exposure to liability in appraisal actions, and they did to a degree in this action.

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CM is all of us

Respondent advances deal price as a valuation metric. Respondent does not use deal price to set a precise fair value but argues that it supplies a cap on fair value because the transaction was conditioned on *MFW* protections.³¹⁰ Petitioners argue that deal price cannot be given presumptive weight in an appraisal of a controller squeeze-out, even where the transaction is subject to *MFW*.

There is no presumption in favor of deal price.³¹¹ Nonetheless, when the "transaction price represents an unhindered, informed, and competitive market valuation, the trial judge must give particular and serious consideration to transaction price as evidence of fair value."³¹² Thus, although not dispositive, deal price gets "considerable weight" "absent deficiencies in the deal process."³¹³



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2-person spec comm. Opinion discusses the conduct of one, Klevorn, at some length. Reader, Klevorn's conduct had virtually no bearing on the substantive analysis.

If the two Pivotal Special Committee members, Klevorn, was missing from this process. She missed the March 22, 2019 Board meeting. She could not recall the details of this process. She left only from the April 9, 2019 Board meeting due to a engagement. At this meeting, Lankton provided an update to the Board on the merger. She missed the October 8, 2018 Board meeting. She later testified absence was likely due to separate duties at Ford. Through April 2019, Klevorn missed, was late for, or left early from each of Special Committee meetings. Klevorn testified that because the Pivotal was "a lot of work and I don't know, so he [Lankton] how I felt about it. She arrived late to the March 15, 2019 Board meeting. She could not recall why. lay, the Pivotal Special Committee held a meeting to decide accompanied by Morgan Stanley, Mee, and other members. Klevorn attended, reluctantly. A few days prior, Klevorn's assistant ended that meeting from 5:30 p.m. to 7:00 p.m. Klevorn responded that she did a bunch of errands at 5:30 p.m. I thought it was at 2:00 p.m. asked about the timing. Klevorn replied, "I [Lankton] ruin it. OK."

ee met on July 31, 2019
meeting at Ford.¹⁹³

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also:

On August 14, 2019, the VMware Special Committee made what it termed a "best final offer" of \$15.00 per share.²²⁰ The Pivotal Special Committee held a meeting to consider it; Klevorn was absent.²²¹ Morgan Stanley advised Lankton that Pivotal's Q2

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I'll just say this is a nice example of Ed Rock's thesis - Delaware operates via public shaming

papers.ssrn.com/sol3/papers.cfm?abstract_id=3411111

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March 13, 2024, 10:53 AM PDT

To Buy a Bank, You Have to Be a Bank

By Matt Levine

(Bloomberg Opinion) --

Shelf charter

The cheapest way to get into the banking business might be to buy a failed bank. When the US Federal Deposit Insurance Corp. takes over a failed bank, it tries to find a buyer, and buying a bank from the FDIC has some attractive features. For one thing, you get a bank, with a brand name and customer relationships and branches and stuff; building all of that from scratch would take you a lot of time and money. You get it cheap, probably, because it failed. And, critically, you don't buy the *whole* bank; you get to pick and choose what you want. You take over the failed bank's customer deposits, but you can avoid many of its other liabilities (long-term debt, lawsuits, etc.), making it a fairly clean thing to buy. And you can buy most of the bank's assets, but if it has any particularly hairy assets that you don't want, you probably leave those with the FDIC.

There is one problem with this approach, though, which is that the FDIC won't sell you a failed bank *unless you are already a bank*. This is the flip side of the good things in the previous paragraph: If you buy a failed bank from the FDIC, you are not actually *buying the bank*, taking over the entire corporate entity with its bank charter. ¹ Instead, you are buying some of its assets and assuming some of its liabilities, including particularly deposits: The trade with the FDIC is that you agree to be liable for \$X of the bank's deposits, you agree to pay the FDIC \$Y for the assets you want, and the FDIC credits the \$X of assumed liabilities against the \$Y purchase price. ²

But only a bank can issue bank deposits; that's the point of a banking charter. So if I wanted to take over a failed bank, and I showed up at the FDIC and said "look, give me all of that bank's assets, and I'll be good for its deposits – if any depositors want their money back, they can come to me and I'll get out my wallet," the FDIC would say no. Only a bank, with a banking charter, that meets capital and regulatory requirements, is going to be allowed to take over the deposits.

And so I guess one good way to get into the banking business is:

1. Get yourself a bank charter.
2. Wait.
3. When a bank fails, buy it.

The Financial Times reports:

Porticoes Capital will seek to take over banks closed by the Federal Deposit Insurance Corporation, the US regulator, according to an official filing. The firm's sponsors aim to attract hundreds of millions of dollars from investors. ...

The FDIC takes over US lenders when they fail and brokers deals to sell what remains. The agency typically likes to sell to other regulated banks so the loans and customers of collapsed lenders remain under the eye of regulators. The result has been that private equity firms and other outside investment groups are largely locked out of the bidding.

Porticoes won approval late last year from the Office of the Comptroller of the Currency to buy banks closed by the FDIC. Its so-called shelf charter is a workaround to traditional curbs on private investors. [Founder Leslie] Lieberman's group was approved to run a bank holding company once Porticoes actually buys a bank. ...

More banks would need to fail for Porticoes to be able to use money it has raised – and the list of potential targets is slim.

Despite the turmoil of early 2023, only five banks failed last year and all were resold within weeks.

Yeah, but it doesn't hurt right? It is a little unclear to me whether Porticoes has raised, or is planning to raise, much committed capital. I don't see why you'd need to lock up hundreds of millions of dollars to just wait for a bank to fail. The value here is not the *money*, it's the charter. Next time a bank fails, you go to private equity firms and say "hey, do you want to buy that failed bank? Well you can't. But if you give us the money, we can buy it for you." It's a good regulatory service.

Charter airline regulatory arbitrage

No, wrong, this might be my favorite business origin story of all time:

Wilcox got the idea for the service in what's possibly the least glamorous business origin story of all time. Combing through US Federal Aviation Administration regulations, he learned that while scheduled flights with more than nine seats have to meet onerous safety and security requirements, on-demand public charters have separate, less stringent rules. Though, they can't specify flight times or cities or sell single seats.

To get around that, Wilcox decided to create two companies that would work together: One would make a flight schedule and sell tickets, and a second would fly the aircraft on specified routes at set times and dates. In reality, though, it's one entity working behind the scenes.

"I spent months without sleep, just looking at all the rules, looking for ways why it couldn't be done," he said on a clear February day in a hangar at Dallas Love Field. "Every single person we talked to said, 'No, you can't do it.'" Then US regulators signed off on his idea. "So we did it."

That is from a Bloomberg story about JSX, a charter airline that Alex Wilcox started after sleepless nights of reading FAA regulations. He read and read and read the rules until he found an arbitrage. 3 If you have an airline that sells and operates scheduled flights, you are subject to high and expensive safety standards. But if you *divide* that airline into two bits, one that operates flights and another that serves as a front end to set schedules and sell tickets, each bit is subject to lower standards. If the two bits are owned by the same corporate entity and coordinate together, then the result is something that looks like a single normal airline *to customers*, but looks like two separate less-regulated entities *to regulators*.

I guess this is not technically a *finance* story, but half of what I write about has the form "if you do Thing X it gets Regulatory Treatment Y, but if you divide it into Things X1 and X2, the combination is the same as Thing X but gets better Regulatory Treatment Z." We have talked about treating loans as purchases, about derivatives to get around stock ownership limits, about special purpose acquisition companies to get around initial public offering rules, about brokered deposits as a way to get around FDIC insurance limits, about slicing up fund investments to get better ratings. I am sure that *some* of these businesses originated exactly as JSX's did: Somebody thought, "well, this rulebook is long and boring, so probably nobody has read it all the way through, and if I do, money might come flying out." Just a great way to find a business model.

Incidentally, we talked last week about a related but slightly different business model. Avid Bioservices Inc. had a convertible bond, and it made a small mistake in its administration of the bonds, and if you read the bond documents very carefully and paid close attention and had a good understanding of convertible market practice, you could have made a fair amount of money for yourself, and caused a lot of trouble for Avid, by calling attention to the mistake. Somebody did. I wrote:

That's the thing about efficient markets, man. *You* might quite reasonably find section 4.06(e) of this 2021 convertible bond indenture, the section covering restricted transfer legends, boring, and not want to think about it. *Avid* quite reasonably found it boring, and did not think about it. But for someone who *did* find it interesting enough to pay attention, there was \$7 million of prize money just lying around for the taking.

That is the small-scale version of all of these regulatory arbitrage businesses: If you read boring rules and think really hard about them, you can win monetary prizes.

Byrne Hobart also wrote about Avid last week, and he made another point:

Right now, it's suddenly gotten much easier to do this at scale: you can unleash LLMs on indenture agreements, and try to find edge cases that the company didn't think of or notice. These will all be technicalities in practice; in the Avid case, if the restriction had been a big deal to the note owner, they probably would have noticed right away. But, perhaps coincidentally, they only noticed after the newly-widespread availability of tools that can trawl through vast amounts of text to extract useful information.

I don't know if the explanation for the Avid situation is really "some hedge fund used an artificial intelligence large language model to look through convertible bond indentures to find profitable mistakes"; as a former converts structurer myself, I would like to think that some former converts structurer found this trade using general market knowledge and connoisseurship. But the larger point is right: An LLM probably can read the boring documents for you and spot the issues. And if "find profitable mistakes in bond indentures" is a useful thing to ask your LLM to do, then maybe so is "find profitable loopholes in aviation regulations and tell me what businesses to start to exploit them."

Anyway the Bloomberg JSX story goes on:

All that growth might now be the company's undoing.

The FAA says its review of rules for public charter carriers like JSX came "in light of recent high-volume operations" that "appear to be offered to the public as essentially indistinguishable from" commercial carriers. The "size, scope, frequency and complexity" of public charter operations like JSX has "grown significantly over the past 10 years," the agency wrote in an August filing.

Ah well. Nothing lasts forever; on to the next business model.

Quants

Another classic way to set up a business is to go work for a big sophisticated financial firm that has built a good business by being the smartest and fastest at applying high-tech methods to squeeze out the last penny in hypercompetitive liquid financial markets, spend some time there learning the techniques, and then leave for a sleepier market where the competition is weaker and spreads are wider. This describes, like, 90% of crypto markets, for better and worse. But here's a Wall Street Journal article about quant traders in China's stock market:

The launch of China's quant industry goes back to around 2010, when a generation of Chinese-born traders returned home after working for some of the biggest U.S. hedge funds. In the wake of the global financial crisis, when China's economy was booming while the Western world suffered, setting up a fund in mainland China was a natural choice for these traders.

Millennium, a New York-based fund, was a particularly strong breeding ground for talent. Wang Chen and Yao Qicong, who had both worked there, moved to China to help set up Ubiquant Investment in 2012. Ma Zhiyu left to set up Ningbo Lingjun Investment Management Partnership in 2014. The two funds are now among the biggest quants in China, with Ubiquant managing more than \$7 billion.

At some level, "we will take the techniques we learned in the most competitive markets in finance and apply them to a sleepy backwater" is an obviously appealing pitch, and it made a lot of fortunes in crypto and also in Chinese stock markets. But "we will apply the statistical techniques we learned in a market with a ton of historical data through various market regimes, and apply them to a less liquid market that started 20 minutes ago" has some obvious flaws, too:

China's quants had a few problems not shared by their U.S. counterparts.

For one thing, the country's rapid emergence as an economic powerhouse meant these funds didn't have decades of data to fall back on, a major failing for firms that rely on data mining to identify trades. The even bigger problem was China's great intangible: the whims of the government.

The algorithms used by quant funds digest large amounts of historical data and take advantage of repeatable patterns. While China's stock-market interventions have become more frequent in recent months, they are still not regular occurrences.

"Quants are just really bad at coping when something suddenly changes," said Phillip Wool, head of research at money manager Rayliant Global Advisors. "If you have a policy intervention that changes the rules of the game, these models just aren't that adaptable."

And:

The country's two biggest stock exchanges and its securities regulator launched a widespread clampdown on quants in late February, tightening the rules governing the sector and temporarily banning two funds from trading altogether.

If you learned your trade at Millennium, you probably did not learn to put *that* much weight on the risk of regulators banning you from trading when the market goes down, because that was not a regular occurrence at Millennium.

Cat bonds

One more good business model. Learn a real thing about the world; learn to predict weather or something. Then hope that that thing gets ingested into the financial system, so that instead of predicting weather as one of many inputs into some difficult complicated physical business like farming or homebuilding or airline operations, you can just trade concentrated weather derivatives on a computer and get rich directly off your weather-predicting abilities. Here's a Bloomberg profile of John Seo:

Seo, a 57-year-old hedge fund manager in southern Connecticut, is the reason why millions of people from New Zealand to Chile have financial protection against natural disasters. His fund, Fermat Capital Management, owns the world's biggest collection of catastrophe bonds – complex financial instruments that insurers issue to cover risks they can't handle.

Fermat is an oddity in the hedge fund world. Its modest office, in the affluent town of Westport, sits in a former post office across from an auto-repair shop. There are meteorology journals in the reception area and equations scrawled on a whiteboard. Investment decisions are guided by complicated weather-risk computer models powered by large servers that whirr ceaselessly behind a glass window. ...

Investing in cat bonds was the most profitable hedge fund strategy of 2023. Fermat delivered a 20% return, beating the average 8% achieved by hedge funds as a whole. While other cat bond funds did well too, Fermat's \$10 billion portfolio – capturing a quarter of the market – made it by far the most prolific investor to take advantage of a bumper year. ...

Seo, who has a PhD in biophysics from Harvard University, founded Fermat in 2001 with his brother Nelson, an economics graduate from the Massachusetts Institute of Technology. In a room above Seo's garage, the two built a science-based model to weigh the probability of a natural disaster against the returns of a cat bond. They named the fund after Pierre de Fermat, a French mathematician who helped lay the foundation for probability theory.

Quantitative financial firms regularly use physical models as *metaphors* for financial markets – stocks move sort of like particles in Brownian motion, and this profile has a discussion of "one of Fermat's strategies" that is "inspired by the laws of physics that govern how airplanes fly" – but of course if you can just use physical models to *actually predict the weather* that probably helps you trade catastrophic weather risk.

Goldman North

How could it possibly be otherwise:

One executive described an Evercore practice at the end of each year where managing directors submitted how much revenue they believed to have personally originated. Every year, the sum of those numbers has exceeded the group's total revenue.

That is from a Financial Times profile of Evercore Inc. At a big full-service investment bank, I would assume that the ratio of (1) how much revenue the managing directors believe that they personally had originated to (2) revenue has to be at least 2 to 1. If a big bank advises a private equity sponsor on a leveraged buyout of a ball bearings company, there are absolutely going to be a sponsors banker, a leveraged finance banker and an industrials banker who say "oh yeah that was my deal" and claim 100% of the revenue during bonus season. As they should! They all probably worked on the deal, they all probably had relationships that were helpful in winning the business and getting the deal done, it is just a team sport where all the team members think they are the stars.

Evercore is a bit different, though, as it is more of a pure mergers-and-acquisitions boutique. (Though: "Forty per cent of Evercore's revenues in 2023 came from outside traditional M&A deals.") If everyone is an M&A banker, it's probably pretty clear who brought in each deal, though there will be some debates; if a senior banker hands off a smaller longtime client to another MD who then gets a deal mandate, both of them will probably take some credit.

Also, more important, at a big full-service bank everyone understands that there are multiple claims on each piece of revenue, and the bonus pool is allocated in a fuzzy way that reflects that. At Evercore, it is more eat-what-you-kill, so that number that you personally originated matters more:

Insiders say the bedrock of Evercore's success has been an explicit "eat what you kill" bonus structure, where top bankers expect to keep about a quarter of the deal fees they bring in. Typically, large Wall Street investment banks will pool revenues and then leave it to the boss's discretion on how to reward employees. ...

In an industry where working on one transaction can net tens of millions of dollars in fees, the Evercore approach has appealed to ambitious bankers who see a strong pipeline of deals in the offing.

"The fact that your personal comp is going to be logically derived is a reason why you grow the pie, and different than the 'black box' at competitors," said one Evercore banker.

The trade-off may be a fiercely competitive culture where bankers can become territorial about the projects they are working on, a dynamic that risks becoming problematic as Evercore gets larger. "The model works. But it's hard to scale," another banker at the company said.

At a big bank, a lot of scale comes from cross-selling; the industry banker drags the interest-rate-derivatives banker to a client meeting, the client does a derivative trade, and both bankers claim fuzzy credit for the revenue. "You get a quarter of all the fees you originate" makes that a bit harder. What if there are five people at the meeting?

Anyway the story calls Evercore "Goldman North" and draws a contrast with Goldman Sachs Group Inc. (disclosure, where I used to work):

"Evercore is like Goldman was 20 years ago," said one person familiar with both firms. "It's very entrepreneurial, they celebrate wins. Goldman [today] is more about lamenting losses."

Another Evercore banker put it more bluntly: It's "Goldman without the bull****."

You could tell a crude, like, 25-year history of US investment banking that would go something like this:

1. Once, there were “commercial banks,” which made loans, and “investment banks,” which provided advice on mergers and acquisitions, underwrote stock and bond offerings and traded securities.
2. Over time, the regulatory barriers between them softened, and they tended to blend together. The commercial banks wanted to get into the lucrative investment banking business, while the investment banks needed to get access to bank balance sheets to offer more financing services to their customers.
3. This culminated in 2008, when the five big independent investment banks (Goldman, Morgan Stanley, Merrill Lynch, Bear Stearns and Lehman Brothers) all either disappeared, were acquired by big commercial banks, or became chartered bank holding companies themselves.
4. That was the high-water mark though: Everyone looked around and said “huh, this has gone far enough,” and since then the trends have been toward disaggregation, going back to a separation between classic banking and the trading and advisory businesses.

So we talked last week about the increasing importance of prime brokerage divisions at big banks, which lend money to hedge funds and proprietary trading firms. I suggested that one possible interpretation might be that banks – for regulatory reasons, for risk reasons, for reasons of changing culture – do less *trading using their own balance sheets* than they did in, like, 2008; hedge funds and prop trading firms have picked up the slack, and banks remain in the business of lending money to them.

Similarly, when I was an investment banker, it was taken for granted that having the balance sheet of a big bank was helpful in winning advisory business. Now, though, maybe it is cleaner and simpler to be a boutique, to advise on mergers without having a bank attached, to be Goldman without the bank.

Things happen

Corporate Bond Rush Is Breaking Down a Maturity Wall That Everyone Feared. Basis Trade Is Seen Dwindling as Asset Managers Pivot to Credit. TikTok Plans Legal Fight If US Divestment Bill Becomes Law. How TikTok Was Blindsided by U.S. Bill That Could Ban It. Stripe Says Payment Volume Surged to \$1 Trillion Last Year. Argentina's record bond swap aims to pave way to ending currency controls. Social Capital sacks two partners over 'situation' involving AI investment. Surge in Fake Ozempic Reveals Dark Side of Weight-Loss Frenzy. Ex-Wall Street Banker Takes On AOC in New York Democratic Primary. German military still faxes documents and cannot radio allies, official warns. OpenAI Calls Elon Musk 'Incoherent' in Legal Filing. "If you meet [Ye] on an airport, I don't know what you do. Do you hide? Or what do you do?"

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1. The framing in these two paragraphs is based in part on this December memo from Skadden, Arps, Slate, Meagher & Flom LLP: “Media and other reports often describe these failed bank transactions as if the healthy bank ‘acquired’ the failed bank. However, this shorthand characterization misses an important nuance. In such failed bank transactions, the winning bidder does not acquire the failed bank entity itself (as would generally be the case in an M&A transaction among banks outside of receivership). Rather, the winning bidder acquires from the FDIC only specified assets and assumes specified liabilities of the failed bank. This purchase and assumption structure allows bidders to leave the other assets and liabilities of the failed bank with the FDIC. For example, bidders often will assume all of the failed bank’s deposits but leave behind most of the failed bank’s other liabilities (e.g., other borrowings, litigation exposure, various contractual obligations). This purchase and assumption structure has the practical effect of preventing nonbank investors from participating in these failed bank transactions. From the FDIC’s perspective, a key objective is to provide for assumption of the failed bank’s deposit liabilities – thereby ensuring that customers do not lose their deposits. But, importantly, the only type of legal entity with the authority to assume deposit liabilities is a bank. Thus, while private equity funds and other nonbank investors can bid on the assets of a failed bank, they are not legally able to assume the deposits of a failed bank. For this reason, only bidders that have a bank charter are eligible to participate in the FDIC’s typical purchase and assumption auction.”
2. Last May, I wrote about JPMorgan Chase & Co.’s takeover of First Republic Bank from the FDIC, a high-profile recent deal that more or less followed this classic approach.
3. You can read some slightly more technical discussions in airline blogs [here](#) and [here](#).

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Daseke Sued Over TFI International Buyout Proxy Post-Stock Spike

By Ben Miller

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [1:24-cv-01833](#)

Bloomberg Law News 2024-03-13T10:41:10447516481-04:00

Daseke Sued Over TFI International Buyout Proxy Post-Stock Spike

By Ben Miller 2024-03-12T11:18:45000-04:00

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [1:24-cv-01833](#)

Daseke Inc. and its directors omitted key details from a proxy statement filed ahead of TFI International Inc.'s proposed acquisition of the trucking company, a shareholder complaint says.

The proxy was filed last month without key background details about the proposed \$1.1 billion deal, potential conflicts of interest, or certain projections and analyses used by financial adviser J.P. Morgan Securities LLC, according to the complaint filed Monday in US District Court for the Southern District of New York.

Daseke shareholders are scheduled to vote March 26 on the proposed acquisition, which would pay out \$8.30 per share, but they can't make an informed decision to vote for or against the deal without the missing information in the proxy, the complaint says.

Immediately after the companies announced the proposed transaction on Dec. 22, Daseke's share price increased 65% to close at \$8.10 per share, the stock's biggest single-day jump in almost three years, according to data compiled by Bloomberg. Before that, Daseke's stock had fallen 48% over the previous two years amid a recession in the freight industry.



Company insiders could face conflicts, as the proxy fails to disclose whether any of TFI's proposals mentioned management retention or participation in the equity of the combined company, the complaint says.

The commercial banking affiliate of J.P. Morgan also provides lending and other services to Daseke, according to the proxy, which allegedly fails to disclose how much compensation was given for those services.

Daseke's proxy also allegedly failed to mention key information about the negotiation of employee benefits in connection with the proposed deal, and how that factored into TFI reducing its merger consideration from an initial offer of \$8.45 to \$8.30 per share.

Shareholder Katherine Finger seeks to prevent the acquisition from being completed until the missing information is filed in an updated proxy statement, or otherwise to rescind the deal and collect rescissory damages if it is finalized, alleging that the company and its board violated the Securities Exchange Act. She also seeks legal fees, the complaint says.

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

Acocelli Law PLLC represents the plaintiff.

The case is *Finger v. Daseke Inc.*, S.D.N.Y., No. 1:24-cv-01833, complaint filed 3/11/24.

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Discovery paused in class action against X Corp.

DJ [dailyjournal.com/articles/377591-discovery-paused-in-class-action-against-x-corp](https://www.dailyjournal.com/articles/377591-discovery-paused-in-class-action-against-x-corp)

Class Action

Mar. 13, 2024

X Corp.'s legal team argues that users explicitly agreed to the use of their data for advertising in the company's privacy policy and that the case should be dismissed.

Judge Ethan P. Schulman

A San Francisco judge on Tuesday paused discovery in a putative class action that accuses the X platform, formerly Twitter, of improperly using users' personal information to sell targeted advertisements.

Superior Court Judge Ethan P. Schulman's order following Tuesday's case management conference also designated the parties to appear again on May 31 for a hearing on X Corp.'s demurrer and motion to strike as the company continues its push to dispose of the lawsuit. *Yeh et al. v. Twitter, Inc.*, CGC23605100 (S.F. Sup. Ct. filed March 10, 2023).

X Corp.'s legal team – Jessica Stebbins Bina, Whitney B. Weber, Susan E. Engel, and Margaret A. Upshaw of Latham & Watkins LLP – filed the demurrer and motion to strike in January, arguing that users explicitly agreed to the use of their data for advertising in the company's privacy policy and thus, the case must be tossed.

During the hearing Schulman questioned one of the plaintiffs' attorneys – John A. Yanchunis of Morgan & Morgan Complex Litigation Group – about the possibility that X Corp.'s argument would be dispositive to his client's claims.

"Twitter's demurrer and motion to strike may rest on the terms of the privacy policy, which they tell me expressly warn consumers that their personal information may be used for advertising purposes," Schulman said. "I'm just kind of looking down the road here, you tell me the privacy policy is attached to the complaint. If the court agrees with that, is that the end of this case? Or are there still claims that could conceivably survive? I recognize, Mr. Yanchunis, that none of these issues are before me now but I'm just trying to get some sense as to where this case may be going."

Yanchunis responded, telling the judge, “We are optimistic we can get through the consent argument. If you don’t mind, I’d rather not go out on a limb, so to speak, and take a position that might be wrong. If I can just hold my powder until we file a response to the demurrer? But we do not believe, or I wouldn’t have filed these cases, that the consent would be an end all to the claims of the class.”

Yanchunis added that the users agreeing to their private information being used for advertisement purposes through the terms of a privacy policy is, “a developing issue both among academics as well as courts depending upon the circumstances.”

One of X Corp’s attorneys responded to the claim saying, “It’s our perspective that the demurrer and motion to strike is indeed dispositive. We think there’s also significant problems with the plaintiffs’ damages theory that will impact plaintiffs’ standing.”

Yanchunis and a number of other attorneys had previously filed a similar lawsuit against X Corp. in the Northern District court, but that case was voluntarily dismissed in May 2023. *Price v. Twitter, Inc.*, 4:22-cv-03173 (N.D. Cal. Filed May 31, 2022).

The following attorneys are Yanchunis’ co-counsel in the case: Sophia M. Rios and Mark B. DeSanto of Berger Montague PC; Jean Sutton Martin, Patrick Barthle, and Michael F. Ram of Morgan & Morgan Complex Litigation Group; Kate M. Baxter-Kauf and Karen Hanson Riebel of Lockridge Grindal Nauen PLLP; John J. Nelson and Gary M. Klinger of Milberg Coleman Bryson Phillips Grossman PLLC.

X Corp.’s use of user data has been in the crosshairs of regulators in recent years even before Elon Musk purchased the company in the fall of 2022 for \$44 billion.

According to a May 25, 2022 press release, the social media giant agreed to pay a \$150 million fine to the Federal Trade Commission for violating the terms of a 2011 resolution to the commission’s complaint against the company for its alleged misrepresentation of the strength of its security apparatus.

The FTC’s news release stated, “The just-announced \$150 million civil penalty stems from a new complaint filed by the Department of Justice on behalf of the FTC, alleging that Twitter violated the order in the earlier case by collecting customers’ personal information for the stated purpose of security and then exploiting it commercially.”

#377591

L3Harris Workers Get First OK for \$650,000 Retirement Plan Deal

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- Amount reflects company's 'strenuous' denial of damages
- Settlement is expected to cover more than 40,000 people

L3Harris Technologies Inc.'s \$650,000 settlement with a class of employees challenging how the defense and aerospace contractor manages their retirement plan received initial court approval from a federal judge in Florida.

The deal represents about 22% of the employees' highest estimated damages in connection with the plan's allegedly excessive recordkeeping fees, according to the settlement motion. The amount reflects the company's "strenuous arguments" that the workers suffered no damages with respect to the plan investments challenged by the case, according to the motion.

Judge Paul Byron of the US District Court for the Middle District of Florida signed the preliminary approval order Monday. He also instructed the parties to prepare for a July 9 final approval hearing.

The lawsuit says the company violated the Employee Retirement Income Security Act by failing to obtain the cheapest available share classes for multiple 401(k) plan investments and by causing workers to pay higher fees than necessary on their retirement savings. The company failed to use the plan's asset base as leverage to negotiate a better deal on administrative fees, and it favored actively managed funds over better performing passive funds, the lawsuit says.

Byron allowed the case to advance last March, saying the workers plausibly alleged that L3Harris breached its fiduciary duties under the statute. He certified the case as a class action last June—a move the company didn't oppose.

The class covered by the deal is "slightly modified" from the one Byron certified in order to simplify the distribution process, according to the settlement motion. It covers more than 40,000 people, an attorney for the class said in a declaration.

Hundreds of lawsuits challenging retirement plan fees have been filed in federal courts over the past few years, and dozens of employers have agreed to class-wide settlements. Recently announced deals include those signed by Spectrum Health System for \$6 million,

Wake Forest University Baptist Medical Center for \$3.8 million, Omnicom Group Inc. for \$2.45 million, VCA Inc. for \$1.5 million, Pactiv Evergreen Services Inc. for \$725,000, and Munson Healthcare for \$600,000.

Sidley Austin LLP and King, Blackwell, Zehnder & Wermuth PA represent L3Harris. Capozzi Adler PC and Matthew Fornaro of Coral Springs, Fla., represent the employees.

The case is Stengl v. L3Harris Techs., Inc. , M.D. Fla., No. 6:22-cv-00572, 3/11/24 .

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UnitedHealth 401(k) Investors Get Trial Over Wells Fargo Funds

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A class action challenging the Wells Fargo target date funds in UnitedHealth Group Inc.'s retirement plan is heading toward trial after a federal judge said the insurer may have prioritized its business relationship with the bank over workers' retirement savings.

Retirement investor Kim Snyder presented sufficient evidence that UnitedHealth had "its hand in the cookie jar" with respect to the \$15 billion 401(k) plan covering its workforce, Judge John R. Tunheim said in a Tuesday opinion declining to resolve the case at the summary judgment stage. A trial is needed to determine whether UnitedHealth paid reasonable fees to Wells Fargo and whether it acted imprudently and disloyally in offering allegedly underperforming funds from the bank, Tunheim said.

Snyder's evidence shows a "large, two-way business relationship" between the companies, with United previously generating at least \$50 million each year as Wells Fargo's health insurance provider while serving as the bank's "largest client" in the target date fund industry, the judge said. According to Snyder, United opted to maintain its relationship with Wells Fargo despite the bank initially being omitted from the list of providers recommended by an outside consultant.

This "easily" satisfies the standard necessary to move forward with fiduciary disloyalty claims under the Employee Retirement Income Security Act, said Tunheim, who sits in the US District Court for the District of Minnesota.

United said it followed independent advice when it decided to keep the Wells Fargo funds as the retirement plan's default investment. While this may ultimately be "powerful evidence in United's favor," it's not enough for the insurer to win the case without a trial, the judge said.

Tunheim allowed the bulk of the case to move forward, including claims against former United chief executive officer David Wichmann, but he rejected claims that United's actions violated the investment policy statement governing its retirement plan. Tunheim also dismissed individual members of United's board of directors as defendants in the case, explaining that they didn't act as fiduciaries under ERISA.

The lawsuit, which covers a class of "thousands" of United 401(k) plan participants, takes aim at the suite of Wells Fargo target date funds chosen as the plan's default investment option. This suite of funds, which allegedly held more than \$7 billion in plan assets, "significantly underperformed both its benchmark indices and comparable target date funds" and should have been swapped for one of the "hundreds of better performing" alternatives available in the marketplace, the lawsuit claims.

Wells Fargo isn't a party to the case.

Sanford Heisler Sharp LLP and Halunen Law represent the class. Kirkland & Ellis LLP and Faegre Drinker Biddle & Reath LLP represent UnitedHealth.

The case is Snyder v. UnitedHealth Grp., Inc. , 2024 BL 81822, D. Minn., No. 0:21-cv-01049, 3/12/24 .

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Mass torts against 3M, J&J fueled spike in new federal lawsuits in 2023

 [reuters.com/legal/government/mass-torts-against-3m-jj-fueled-spike-new-federal-lawsuits-2023-2024-03-12](https://www.reuters.com/legal/government/mass-torts-against-3m-jj-fueled-spike-new-federal-lawsuits-2023-2024-03-12)

Nate Raymond

The company logo and trading information for 3M is displayed on a screen on the floor of the New York Stock Exchange (NYSE) in New York City, U.S., November 29, 2022.

REUTERS/Brendan McDermid Purchase Licensing Rights , opens new tab

- Judiciary says overall filings in federal court rose 18% in 2023
- Criminal cases fell 3%

March 12 (Reuters) - The number of new federal lawsuits jumped 24% in the 2023 fiscal year as cases by people alleging they were injured by products like 3M's combat earplugs and Johnson & Johnson's talcum powder soared, the federal judiciary reported , opens new tab on Tuesday.

The increase in civil case filings in the fiscal year that ended Sept. 30, marked a shift after two years of straight declines in new lawsuits filed in federal court, drops the judiciary had attributed in part to disruptions brought on by the COVID-19 pandemic.

The jump in new lawsuits in fiscal 2023 came even as other activity in the federal courts continued to decline, with new criminal cases falling 3% and filings in regional appeals courts dropping 4%.

Reuters Graphics

Criminal cases charging defendants with drug crimes fell 8% to 18,103 and constituted 27% of all criminal cases, the judiciary said.

The increase in civil lawsuits led the judiciary to report 405,878 in overall new case filings in 2023, up 18%.

The judiciary in an annual report attributed much of the increase in civil cases to a 47% jump in diversity of citizenship cases, or disputes between citizens of different states, with personal injury cases jumping 66% to 117,705.

Much of that increase was in mass tort cases consolidated in multidistrict litigation. Even excluding the mass tort cases, civil lawsuits increased 10% last year.

Florida's Northern District reported 47,650 personal injury cases filed last year, a 38% jump attributed to more lawsuits being consolidated before a judge there by U.S. military veterans and service members who say they suffered hearing loss from using 3M's combat earplugs.

3M in late August agreed to pay \$6.01 billion to settle those lawsuits, which had become part of the largest federal multidistrict litigation proceeding in U.S. history with more than 276,000 lawsuits, according to court statistics.

In New Jersey, personal injury filings in the health care and pharmaceutical sector soared 310% primarily due to lawsuits alleging that Johnson & Johnson's talc-based products like its baby powder caused people to develop cancer.

Nearly 53,800 lawsuits against J&J are pending there. The cases were on hold for about two years after J&J attempted to resolve its talc liabilities in bankruptcy court, but courts dismissed two separate bankruptcy filings, allowing litigation to resume last year.

Illinois' Northern District also saw a 1,421% increase in product liability cases to 8,487 as a result of lawsuits claiming chemical hair relaxer products made by L'Oreal USA, Revlon and others cause cancer and other injuries.

The companies in all of these cases have denied wrongdoing.

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New federal lawsuits continued to fall in 2022 amid pandemic, judiciary says

New federal lawsuits, appeals fell in 2021 amid pandemic - judiciary

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CPAP Makers Say Claims Related to Recall Should Be Dismissed

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Philips RS North America LLC, the maker of recalled sleep apnea CPAP machines, is urging a federal court to dismiss multi-district litigation alleging the recall was negligently executed, as well as a variety of other fraud and consumer protection claims.

Philips said that claims related to its recall and post-recall conduct are preempted by the Federal Food, Drug, and Cosmetics Act which stops individuals from enforcing Food and Drug Administration regulations or seek recovery based on FDCA and FDA non-compliance, according to the company's motion to dismiss filed Monday in the US District Court for the Western District of Pennsylvania.

The plaintiffs "improperly attempt to step into the FDA's shoes in regulating recalls and are subject to implied preemption," Philips said. They don't identify a state law duty requiring the initiation of a recall without FDA involvement, so the failure to recall claim "reflects a quintessential effort to privately enforce the FDCA that is 'foreclosed' by preemption," company argued.

The plaintiffs said they inhaled foam toxins from recalled CPAP, Bilevel PAP, and mechanical ventilator products that caused widespread damage to critical systems of the human body. The FDA designated the device recall as a Class I recall, the most serious type. The company has settled some claims related to the recall of 16 lines of machines for \$479 million.

The company said the negligent execution of the recall claim is barred because the FDA has primary jurisdiction for recall oversight.

State product liability statutes subsume breach of warranty, fraud, and some consumer protection claims, the company said. Additional plaintiffs in Kansas, Louisiana, New Jersey, and Ohio improperly pleaded unavailable theories of liability under each state's product liability statute, Philips said.

Philips argued the consumer protection claims should be dismissed because 16 states limit their statutes to consumer goods, not medical devices prescribed by a doctor. Though the plaintiffs say they purchased the CPAP machines for personal use, caselaw from six of the 16 jurisdictions shows courts don't consider prescription medical devices to be consumer goods for personal use, the company said.

The company also said plaintiffs who only alleged use of the device—and not that they rented or purchased it—lack standing because 10 consumer protection statutes only afford a private right of action for people who rented or purchased a product.

The company is represented by Morgan Lewis & Bockius LLP.

The case is In re Philips Recalled CPAP, Bi-Level Pap, & Mechanical Ventilator Prod. Liab. Litig , W.D. Pa., No. 2:21-mc-01230, 3/11/24 .

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Private challengers to Kroger/Albertsons tieup 'not second-class'

DJ [dailyjournal.com/articles/377596-private-challengers-to-kroger-abertsons-tieup-not-second-class](https://www.dailyjournal.com/articles/377596-private-challengers-to-kroger-abertsons-tieup-not-second-class)

Mar. 13, 2024

Joseph M. Alioto vowed to appeal decision that his case must wait behind the FTC's challenge to the merger.

The attorney leading a consumer antitrust lawsuit against Kroger's \$24.6 billion acquisition of grocery retailer Albertsons promised to appeal a federal judge's stay order pending the U.S. Federal Trade Commission's challenge to the merger, saying legal precedent requires private actions and government actions to be prosecuted separately.

"We are not second-class citizens. We started this case and had no reason to believe that the government would even get involved in it. When we start these cases, we take the risk," Joseph M. Alioto with the Alioto Law Firm in San Francisco said in a phone call Tuesday. The attorney added that he welcomed the FTC's interest in the matter but would ask the 9th U.S. Circuit Court of Appeals to clear the way for the consumer lawsuit.

Kroger and Albertsons are represented by Arnold & Porter Kaye Scholer LLP and Debevoise & Plimpton LLP. The firms did not respond to a request for comment on U.S. District Judge Vince G. Chhabria's stay order on Monday. The judge wrote in his ruling that the private action should be paused until the district court in Oregon decides on the FTC's request for a preliminary injunction or the agency abandons the request. *Whalen et al. v. Albertsons Companies Inc. et al.*, 3:23-cv-00459-VC (N.D. Cal., filed Jan. 31, 2023).

The FTC's challenge to the Kroger-Albertsons merger, the largest proposed supermarket acquisition in U.S. history, is scheduled for trial in August before U.S. District Judge Adrienne C. Nelson in Portland. Eight other states, including California, are named as co-plaintiffs. *Federal Trade Commission et al. v. Kroger Company et al.*, 3:24-cv-00347-AN (Oregon Dist. Ct., filed Feb. 26, 2024).

In a brief submitted earlier this month, Arnold & Porter partner Daniel B. Asimow said a stay would benefit the public interest as the FTC's "standing to bring suit is not in question and its lawsuit asks for relief on behalf of the entire country, including the private plaintiffs here. In contrast, the private plaintiffs in this case represent only themselves, they have not sought to certify a class action, and they cannot advance any legal interest on behalf of non-parties."

On Tuesday's phone call, Alioto pointed to several rulings that he said refuted the supermarket chains' argument. For example, a 1963 decision by the 9th Circuit said private antitrust actions in district court cannot be stayed pending the resolution of overlapping claims in state court except in rare circumstances, said Alioto. The attorney also noted a 1966 decision by the U.S. Supreme Court blocking supermarket chain Von's acquisition of a competitor in the Los Angeles area. The high court said the deal represented "two already powerful companies merging in a way which makes them even more powerful than they were before." Vons is now owned by Albertsons.

Food prices are one of the most pressing issues for Americans today and the proposed merger between Kroger and Albertsons is an "outrageous and blatant violation" of antitrust regulations, said Alioto. "There is no question that this acquisition lessens competition," the attorney added.

#377596

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Tire companies attempt to dismiss claims over toxic chemicals

DJ [dailyjournal.com/articles/377590-tire-companies-attempt-to-dismiss-claims-over-toxic-chemicals](https://www.dailyjournal.com/articles/377590-tire-companies-attempt-to-dismiss-claims-over-toxic-chemicals)

Mar. 13, 2024

According to the complaint, tire companies began using 6PPD-q in the 1950s to prevent cracking, and the rubber preservative is now found in unsafe concentrations in Los Angeles, San Francisco, and Seattle watersheds.

Several major tire companies asked a federal judge in San Francisco to dismiss a lawsuit accusing them of violating environmental protections by using a toxic chemical in their manufacturing process, saying the plaintiffs were trying to circumvent the U.S. Environmental Protection Agency.

“6PPD-q from tires is devastating to aquatic life, including salmon and trout protected under the Endangered Species Act. This is exactly what the act was designed to prevent. There is no legal reason that the act would not apply in this case, and we look forward to making our arguments before the court,” Elizabeth B. Forsyth with Earthjustice said in an email Tuesday. A nonprofit public interest firm based in San Francisco, Earthjustice represents the Institute for Fisheries Resources and the Pacific Coast Federation of Fishermen’s Associations.

According to the complaint, tire companies began using 6PPD-q in the 1950s to prevent cracking, and the rubber preservative is now found in unsafe concentrations in Los Angeles, San Francisco, and Seattle watersheds. The case is scheduled for a bench trial before U.S. District Judge James Donato in January 2026. Institute for Fisheries Resources et al. v. Bridgestone Americas Inc. et al., 3:23-cv-05748-JD (N.D. Cal., filed Nov. 8, 2023).

The named defendants, which include Continental Tire and Goodyear, are represented by DLA Piper LLP and Beveridge & Diamond PC. The issues raised by the plaintiffs belong “within the special competence” of the EPA, DLA Piper partners George Gigounas and Gwendolyn Keyes Fleming wrote in their motion Friday. “Indeed, the plaintiffs’ own counsel submitted a detailed [Toxic Substances Control Act] citizen’s petition to the EPA, asserting that the risks 6PPD-q presents to protected salmon and trout ‘are precisely what [the Act] was designed to address,’” the attorneys wrote. On Nov. 2, the EPA granted a petition by the Yurok Tribe, the Port Gamble S’Klallam Tribe, and the Puyallup Tribe to investigate the impact of 6ppd-q on salmon and trout populations and consider establishing regulations.

Gigounas and Keyes Fleming added that manufacturing a lawful consumer product does not violate the Endangered Species Act only because the product contains a chemical that allegedly harms wildlife. “The plaintiffs’ expansive interpretation of the ESA would fundamentally alter authority to regulate the use, processing, and distribution of chemicals in the U.S. and could, for the first time, expose an untold number of manufacturers, distributors, resellers, shippers, and transporters of countless products to the ESA’s civil and criminal penalties,” they wrote. A hearing on the motion to dismiss is scheduled for May 16.

#377590

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Proactiv Products Accused of Containing Unsafe Levels of Benzene

 [law.com/therecorder/2024/03/12/consumer-class-action-accuses-proactiv-products-of-containing-benzene](https://www.law.com/therecorder/2024/03/12/consumer-class-action-accuses-proactiv-products-of-containing-benzene)

By Riley Brennan

Alchemee, a skin care company formerly known as Proactiv, has been hit with a consumer class action in a California court that claims the company's products are contaminated with unsafe levels of benzene.

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

Attorneys with Wisner Baum in Los Angeles brought the class action in Alameda County Superior Court on behalf of Efren Ramos, Joshua Cross, Marisol Scharon and others, alleging that the defendant's Proactiv acne-treatment products contain the carcinogenic compound.

The consumer fraud lawsuit contends that Alchemee has caused economic harms via its sale of benzoyl peroxide acne treatment products without warning consumers that the products allegedly have unsafe levels of benzene, an alleged potent human carcinogen, and that the products "were at risk of degrading further into benzene under normal use, handling, and storage conditions," the complaint said.

According to the March 7 complaint, the products "should not have benzene, nor degrade into benzene, except under extraordinary circumstances."

The complaint alleges that Valisure, an independent laboratory, conducted studies on the BPO products, and found high levels of benzene. However, Alchemee has failed to list it among the ingredients on its products or anywhere on the packaging, advertising or the company website, according to the complaint.

CVS was similarly accused of selling benzene-contaminated acne products, specifically the CVS Health brand benzoyl peroxide acne treatment drug products. The consumer class action, also filed by Wisner Baum on March 7, contends that CVS's products contain dangerous levels of benzene and that the products were at risk of degrading further into benzene under normal use, handling and storage conditions.

The plaintiffs in the Alchemee suit claim they purchased Proactiv products without knowing that the product was allegedly contaminated with benzene or an ingredient that degraded to benzene. The plaintiffs claim they wouldn't have purchased the products had they known

they would allegedly be exposed to benzene and the potential increased risk of cancer, and allege that they have suffered economic loss as a result of Alchemee's statements and misrepresentations.

The complaint argues that the company knew or should have known that its products contain benzene or degrade into benzene when it is exposed in expected customer use, and have thus mislead the plaintiffs, the purposed class, and the public. It further alleges that Alchemee's statements and omissions regarding the safety of its products are prohibited deceptive trade practices and false and deceptive advertising, contending the company's statements are false, misleading, unsubstantiated, untruthful and deceptive.

The plaintiffs bring claims for violation of California's Unfair Competition Law Business and Professional Code Section 17200, violation of California's Consumer Legal Remedies Act, California Civil Code Section 1750, violation of California's False Advertising Law, breach of express warranty, breach of implied warranty and unjust enrichment. The complaint requests class certification, that Alchemee be ordered to disgorge profits and revenues earned during the course of their misconduct, and injunctive and declaratory relief prohibiting Alchemee from engaging in the alleged misconduct, which it requests be considered to have violated its express and implied warranties.

The plaintiffs further request compensatory, punitive and statutory damages, as well as pre- and postjudgment interest and attorney fees and the costs of the lawsuit.

The plaintiffs' attorney, Stephanie Sherman of Wisner Baum in Los Angeles, did not immediately respond to a request for comment.

Counsel have not yet appeared for the defendant.

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GEICO Blocks Class Certification in Suit Over Covid-Era Premiums

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Class Action

Attendees take pictures with a Geico Gecko mascot during a shareholders shopping day ahead of the Berkshire Hathaway annual Attendees meeting in Omaha, Nebraska, on May 5, 2023.

Photographer: David Williams/Bloomberg

March 12, 2024, 4:13 PM PDT

Mike Vilensky

- Federal judge said plaintiffs don't have way to divide damages
- Plaintiffs have 30 days to remedy deficiencies

GEICO Casualty Co. persuaded a federal judge to deny class certification to policyholders claiming they were charged unlawfully high auto insurance premiums during the Covid-19 pandemic.

"The proponents need to further show that a class action is superior to other available methods of resolving the controversy," said Judge Sharon J. Coleman, of the US District Court for the Northern District of Illinois.

The drivers are suing for deception and unfair conduct under the Illinois Consumer Fraud and Deceptive Business Practices Act. The lead plaintiffs have said more than 300,000 people could be part of the proposed class action. They allege GEICO charged excessive premiums during the pandemic, failing to account for the reduction in driving and related decreased insurance risk.

The court granted GEICO's motion to strike the class of proposed plaintiffs alleging deception, reasoning the plaintiffs did not present a common injury.

While the proposed class alleging unfair business practices had an alleged common injury, the court found they did not present a way to fairly calculate how damages would be divided among the class, striking their certification, too.

"[W]ithout presenting a reliable methodology, '[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class,'" Coleman said. "The Court gives Plaintiffs 30 days to cure these deficiencies."

Stephan Zouras LLP and others represent the plaintiffs. Duane Morris LLP represents GEICO.

The case is Thomas v. GEICO Casualty Co. , N.D. Ill., 1:20-cv-04306, 3/12/24

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Geico won't face class-action claims it overcharged drivers during pandemic

 [reuters.com/legal/geico-wont-face-class-action-claims-it-overcharged-drivers-during-pandemic-2024-03-12](https://www.reuters.com/legal/geico-wont-face-class-action-claims-it-overcharged-drivers-during-pandemic-2024-03-12)

Jonathan Stempel

People pose with 'gecko' from GEICO during the Berkshire Hathaway event in Omaha, Nebraska, U.S. May 5, 2023. REUTERS/Rachel Mummey/File Photo Purchase Licensing Rights , opens new tab

March 12 (Reuters) - Geico, the car insurer owned by Warren Buffett's Berkshire Hathaway (BRKa.N) , opens new tab, will not face class-action claims as it defends against a lawsuit alleging it overcharged policyholders early in the COVID-19 pandemic, a federal judge ruled on Tuesday.

U.S. District Judge Sharon Johnson Coleman in Chicago said policyholders in Illinois could not sue as a group because questions about calculating damages for individual drivers would "inevitably overwhelm" questions common to the proposed class.

She also found no "common injury" from Geico's statements that it created its "Geico Giveback" program because "shelter in place laws have reduced driving" and it wanted to start "passing these savings" to customers.

Class actions can let plaintiffs pursue greater recoveries at less cost than if they sued individually.

The case was brought by Illinois purchasers of Geico car, motorcycle or RV insurance since March 21, 2020, including those who visited the "What if I'm driving less?" or "Why are we doing this?" pages on Geico's website.

Geico in April 2020 offered policyholders \$2.5 billion of credits, including 15% on renewals.

The plaintiffs said Geico should have joined rival insurers such as State Farm and Allstate (ALL.N) , opens new tab by offering refunds as driving accidents declined.

They said Geico ended up charging "unconscionably excessive" premiums that violated Illinois consumer protection laws.

The plaintiffs' lawyers did not immediately respond to requests for comment. Lawyers for Geico did not immediately respond to similar requests.

Less driving during the pandemic contributed to Geico's "loss ratio," or percentage of premiums paid to cover claims, falling in 2020 to a 13-year low.

The insurer later suffered six consecutive quarters of underwriting losses, but has since rebounded by tightening standards and reducing policies in force. Geico earned \$3.64 billion before taxes from underwriting in 2023.

Berkshire, based in Omaha, Nebraska, has owned all of Geico since 1996. Geico is based in Chevy Chase, Maryland.

The case is Thomas et al v Geico Casualty Co et al, U.S. District Court, Northern District of Illinois, No. 20-04306.

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Reporting by Jonathan Stempel in New York; Editing by Bill Berkrot

Smashbox Cosmetics Accused of Using TikTok to Collect Private Information

 [law.com/therecorder/2024/03/12/smashbox-cosmetics-accused-of-using-tiktok-to-collect-private-identifying-information](https://www.law.com/therecorder/2024/03/12/smashbox-cosmetics-accused-of-using-tiktok-to-collect-private-identifying-information)

By Maria Dinzeo

Smashbox Beauty Cosmetics is accused of using TikTok's "tap and trace" software to collect and store website visitors' private identifying information, allegedly using "fingerprinting" software to collect and store user data without their consent.

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

According to the suit, the cosmetic retailer uses "fingerprinting" software that matches anonymous visitors' data with existing data stored by TikTok to use for marketing purposes without users' consent, allowing the app to gather device and browser information, geographic information, referral tracking, and URL tracking.

Los Angeles-based law firm Tauler Smith filed the March 8 digital privacy class action in Los Angeles County Superior Court on behalf of Karla Huff and others similarly situated, accusing Smashbox of running "advanced matching," which TikTok allegedly describes as scanning a website "for recognizable form fields containing customer information," such as a phone number or email address.

The complaint contends that this software captures data and sends it to TikTok's servers, allowing the app to reconstruct the user's identity and giving Smashbox the ability to use some of the data to run advertising campaigns on TikTok to market its business.

"The TikTok Software installed and activated by Defendant captures data and sends it to TikTok's servers so that TikTok can reconstruct the user's identity. As part of this arrangement, Defendant has the ability to use some of the data to run an advertising campaign on TikTok to market its business on social media. The objective for TikTok is to gather as much information about Americans as they can, by any means necessary," the complaint alleges. "In this regard, TikTok has recently been identified as 'a platform for surveillance' by the director of the National Security Agency."

The plaintiff brings a class action complaint for violation of the California Trap and Trace Law, California Penal Code Section 638.51, which is part of the California Invasion of Privacy Act and seeks class certification, an order enjoining Smashbox from the alleged conduct and an order of disgorgement of data gathered through the TikTok software.

The complaint also requests statutory damages pursuant to CIPA, punitive damages and attorney fees and costs.

“I personally think it is a shame that Smashbox would share intimate details of a young person’s life, including their skin color, with TikTok. TikTok keeps this data for reasons that our leaders believe pose a threat to ordinary citizens,” the plaintiff’s lawyer, Robert Tauler of Tauler Smith, said. “Smashbox should consider the negative impact their secret and immoral data collection practices are having on society instead of just trying to acquire young customers at any cost.”

Counsel have not yet appeared for the defendants.

Illinois Task Force Explores How AI Could Speed Up Litigation

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- Illinois courts launch task force to make recommendations
- Judges, self representers could benefit from AI tools

Generative artificial intelligence could boost the Illinois judiciary by helping judges produce opinions faster and assist individuals in better preparing their own cases, members of a new Illinois AI task force said.

The Illinois Judicial Conference task force, created in January, is meeting monthly to discuss how generative AI could help the court system improve access to the courts, promote procedural fairness, and increase public confidence in the judiciary.

In interviews and emails with Bloomberg Law, members of the task force acknowledged AI could impair the administration of justice if not used responsibly by, for instance, relying on it for researching legal cases without verifying its findings.

But if used right, they said artificial intelligence could help judges and individuals expedite case resolution, speed up legal research, and make the court system easier for everyday citizens to navigate.

“Are there bad actors who could misuse AI? Of course. Yet, I am extremely optimistic about AI and the courts,” task force co-chair and Williamson County Associate Judge Jeffrey Goffinet said in an email. “The worst in my mind would be that we do nothing with it. That would be a wasted opportunity,” he said.

In 2017, the Illinois Supreme Court broadened the conference’s membership to include non-judges and appoint task forces focused on discrete objectives. The appointment of the AI Task Force is one of the conference’s latest steps.

The task force consists of 21 members, six of whom are judges.

‘Huge Opportunity’

Because technology changes so quickly, the task force will focus on how courts could benefit from using AI and spend less time teaching people how it works. The group anticipates issuing recommendations no later than Dec. 31.

Task force members said AI could help judges do their jobs by speeding up their analysis of litigants' briefs, researching case histories, and marshaling facts relevant to cases under review.

"[T]here's a huge opportunity for creating tools to help judges with the work they do," Northwestern Pritzker School of Law professor and task force member Daniel Linna said in an interview.

AI tools are already good enough to accelerate the legal research process and will allow judges and their law clerks to "do routine tasks more efficiently and effectively so that more time can be devoted to challenges that AI will not solve, including the human aspects of disputes and court proceedings," Linna said.

An example would be using AI to analyze the case citations used in briefs filed by both sides in a case. The AI tool could quickly list what cases plaintiffs and defendants both cite in their briefs, even if voluminous, as well as which cases only one side references. By analyzing the topic, the AI tool could also surface relevant cases neither side mentioned.

Such tools could speed up the drafting of opinions. "One of the greatest difficulties about legal research is finding the right words to frame the inquiry. I believe AI would be able to help judges and clerks accomplish that more quickly," Goffinet said.

Fears that AI will eliminate some traditional jobs at the courthouse are overblown, Linna said. "In some situations, it might almost eliminate the need for traditional research assignments a judge might ask an intern or a clerk to do," he said. But "law clerks have unending opportunities to do more in the courts to deliver value for litigants and society."

Judges and their teams need no special training to use the AI tools. Indeed, some tools already available can be used by simply dropping electronic copies of briefs into a desktop folder. "Judges will not need to learn a lot about AI to use the tool, but it is important that they learn about the benefits and risks so that they can use these tools effectively and responsibly," Linna said.

Self Representation

Task force members agreed AI will also help individuals, including those representing themselves, better navigate the court system.

For instance, AI terminals could help individuals identify the correct forms needed in a court proceeding and provide instructions, in numerous languages and in a conversational way, on completing them, Greenberg Traurig LLP shareholder Reena Bajowala said.

“Anyone who has worked a help desk in a courthouse knows these forms can be very difficult to fill out,” she said.

AI could also help individuals without a lawyer draft statements to a court, said Bajowala, who specializes in data security, privacy, and artificial intelligence matters.

“Putting myself in the shoes of a self-represented party, I might use an available large language model to help me write an opening statement or prepare interrogatories in order to be better prepared for a hearing date,” Illinois Trial Court Administrator and task force co-chair Thomas Jakeway said in an email.

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Reforming Corporate Governance Is a Path to Better ESG Strategy

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March 12, 2024, 1:30 AM PDT



Aisha Saad

Georgetown Law

Georgetown Law's Aisha Saad says corporate technocracy could steer companies toward more effective ESG policies to avoid distraction by polarizing political causes.

Environmental, social, and governance activity has become a major target in the right-wing campaign against “woke capitalism.” Corporate ESG technocracy that prioritizes topical expertise and relevant, routine procedures rather than politics could be a solution for more purposeful and effective ESG programs.

A turn away from corporate ESG is playing out against the backdrop of a forceful legislative attack by Republican lawmakers: At last count, 181 anti-ESG bills were proposed or enacted between 2018 and 2023.

Financial institutions are reacting to these attacks. Last month, JPMorgan Chase & Co. and State Street Corp. exited the world's biggest investor coalition on climate change, Climate Action 100+.

Other companies are also shifting gears on ESG. Executives at ExxonMobil Corp. initiated a high-profile legal battle against two of the company's activist investors, casting their climate-focused shareholder proposal, which called on the company to reduce its emissions, as a bad-faith effort to undermine the company's business.

Saving ESG from its critics will require a new corporate governance model that overcomes its key weaknesses. Some anti-ESG advocacy is undoubtedly opportunistic, seeking to score political points by making a bogeyman of any decisions not rationalized in terms of short-term profit. But to dismiss all critique of ESG is misguided.

Accountability challenges riddle ESG governance and remain largely unaddressed by ESG's supporters, who generally champion one of two ways to administer ESG.

One model relies on the benevolence of corporate executives, and empowers them to manage the corporation on behalf of shareholders and stakeholders who are affected by its business. A second model looks to shareholders and activists to champion social welfare goals using the tools of shareholder democracy.

Both models fail to address fundamental problems of accountability and coordination that arise when corporations adopt goals broader than short-term pursuit of profit.

The struggle for defining and administering a corporation's purpose has animated a century of corporate law debate. At its heart is concern with the challenges that arise when ownership and control become separated—the defining feature of the modern corporation.

Since the 1980s, the idea has stuck that shareholders can hold managers accountable for their decisions by limiting them to a singular objective of profit maximization: In Milton Friedman's famous words, "There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits."

After all, profit is measurable, reviewable, and comparable. Simplifying shareholders' preferences to profit generation limits managers' mandate to delivering on this singular goal. This way, modern corporate governance limits the potential for abuse that might arise from allowing managers to pursue a more complex set of goals that need broader discretion.

But today, the traditional assumptions that undergirded more than 40 years of corporate governance have given way.

Millennials expect more of the companies they invested in than just turning a profit, and the public is attentive to social and political impacts of corporate behemoths. For the past few years, corporate ESG appreciated a favorable spotlight, focusing on its promise to wed profit with purpose.

One of the most high-profile examples was a corporate purpose statement signed by CEOs of the US' largest companies in 2019, which embraced stakeholder interests and signaled a shift away from the status quo. But the task of implementing ESG, even for those who take its goals seriously, remains a thorny problem.

If managers are left to decide corporate ESG, the criticism goes, then they're vulnerable to self-dealing or coopting corporate resources to advance their own preferences. And if shareholders lead on corporate ESG, a company can become hampered by micromanagement and infighting among groups championing different environmental and social causes.

The solution to this is to embrace ESG technocracy—abandon politicized accounts of ESG and instead focus on developing specific, topical expertise and relevant, routine procedures. Such an approach would overcome fundamental problems that arise from simply trusting managers or shareholders to steer corporations to champion the common good.

In practice, technocracy could take the form of a company-level skills matrix that identifies managers' climate or labor expertise, specific board or management-level committees tasked with identifying and overseeing emergent ESG risks, and routine ESG disclosures that allow for standardization, reviewability, and comparability across issues and between companies.

Policymakers and investors who seek to redeem the possibilities of an ESG agenda while avoiding the pitfalls of unfettered power for shareholders or managers should embrace technocratic approach to ESG. This framework emphasizes institutional capacity, systemic oversight and decision-making, and procedural accountability.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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FTC can reopen Meta privacy case despite \$5 billion fine, court rules

 [reuters.com/legal/transactional/ftc-can-reopen-meta-privacy-case-despite-5-blb-fine-court-rules-2024-03-13](https://www.reuters.com/legal/transactional/ftc-can-reopen-meta-privacy-case-despite-5-blb-fine-court-rules-2024-03-13)

Mike Scarcella

People walk behind Meta Platforms logo during a conference in Mumbai, India, September 20, 2023. REUTERS/Francis Mascarenhas/File Photo Purchase Licensing Rights , opens new tab

March 13 (Reuters) - Meta (META.O) , opens new tab cannot stop the U.S. Federal Trade Commission from reopening a probe into its Facebook unit's privacy practices for now, a U.S. appeals court ruled, despite Meta's objections that it already paid a \$5 billion fine and agreed to a range of safeguards.

The FTC wants to tighten an existing 2020 Facebook privacy settlement to ban profiting from minors' data and expand curbs on facial recognition technology. The agency has accused Meta of misleading parents about protections for children.

The decision , opens new tab late on Tuesday from the U.S. Court of Appeals for the D.C. Circuit was a setback for Meta, which had asked the court to freeze the FTC case while it pursues a separate lawsuit challenging the FTC's inquiry on constitutional grounds. The appeals court said the FTC's stated privacy concerns "implicate important public interests" and that Meta would have an opportunity to contest any final action by the agency.

Meta in a statement said the court's order "does not address the substance of the FTC's allegations, which are without merit."

The FTC on Wednesday declined to comment.

Meta, which owns WhatsApp, Instagram and Facebook, has countered that the FTC cannot "unilaterally rewrite" the prior settlement terms, which a U.S. judge approved in 2020.

Meta said the FTC's proposed changes would "curtail Meta's development of new products, superintend Meta's corporate governance, and impair Meta's ability to serve its users and advertisers."

The FTC countered that the settlement, which set new compliance and oversight requirements, was not intended to resolve "all claims in perpetuity."

Meta and other social media companies are separately fighting hundreds of U.S. lawsuits accusing them of addicting children to their platforms.

The FTC is also suing Meta for allegedly monopolizing the personal social network market. Meta has denied the allegations.

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Reporting by Mike Scarcella Editing by David Bario, Alexandra Hudson

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Lawmakers across the U.S. seek to curb utility spending on politics, ads and more extras

michiganadvance.com/2024/03/12/lawmakers-across-the-u-s-seek-to-curb-utility-spending-on-politics-ads-and-more-extras

By Robert Zullo

March 12, 2024

A coalition of climate justice groups organized a rally Monday outside the Washington, D.C., hotel where the National Association of Regulatory Utility Commissioners is holding its winter policy meeting. The speakers, including Christine Pendzich, center, of Montgomery County, Md., took aim in part at energy company and utility sponsorship of the event. (Robert Zullo/States Newsroom)

After a string of scandals and amid rising bills, lawmakers in statehouses across the country have been pushing legislation to curb utilities spending ratepayer money on lobbying, expert testimony in rate cases, goodwill advertising, charitable giving, trade association membership and other costs.

At least a dozen states have considered bills to limit how gas, water and electric utilities can spend customers' money, according to a tracker maintained by the Energy and Policy Institute, a watchdog group funded by environmental and climate-focused foundations that concentrates on utilities and fossil fuel interests.

Another, Louisiana, has opened a proceeding at its public service commission to investigate use of ratepayer cash on trade association dues, "activities meant to influence the outcome of any local, state, or federal legislation," advertising expenses and other costs.

Michigan joined the party last week with the introduction of legislation to ban utility political spending. In states like Illinois, the push has been joined by groups like the AARP and the Citizens Utility Board, a state watchdog group, which said the legislation would "stop electric, gas and water utilities from charging us for a long list of expenses they rack up trying to raise our rates and further increase their political power."

Three states – Maine, Colorado and Connecticut – have already signed similar bills into law. The legislation comes as natural gas bills have fallen but average residential electric prices in the U.S. climbed from 13.66 cents per kilowatt hour in 2021 to 15.93 cents per kilowatt hour in 2023, per the U.S. Energy Information Administration. That would mean a monthly bill going from \$136.60 in 2021 to \$159.30 in 2023 for a house that uses 1,000 kilowatt hours per month.

“It absolutely is a growing trend,” said Matt Kasper, the Energy and Policy Institute’s deputy director. “There’s a lot of eyes on the industry, how it’s operating.”

The institute published a report last year that scrutinized how electric and gas utilities use ratepayer money to “fund political machines that push legislation, curry favor with regulators and alter the outcomes of elections, sometimes even breaking laws in the process.”

Some of the lowlights include:

- A massive bribery scandal in Ohio involving FirstEnergy, a utility holding company that paid nearly \$61 million in bribes to the Ohio house speaker’s political organization in exchange for a nuclear plant bailout worth \$1 billion to the company. A U.S. attorney called it “one of the largest public corruption conspiracies in Ohio history.”
- In Illinois, the state’s largest electric utility, Commonwealth Edison, or ComEd, showered the state House speaker’s allies with jobs, contracts and payments to grease the wheels for the company’s legislation. Three ex-lobbyists and a former CEO of the company were convicted by a federal jury last year for their roles in the scheme. The speaker’s trial is scheduled for later this year.
- Florida Power & Light, one of the largest utilities in the nation, is facing calls for a federal investigation over accusations of using political consultants to back “ghost candidates” in legislative races to draw votes away from candidates it opposed. It also took over a news website as “part of an elaborate, off-the-books political strategy to advocate for rate hikes, agitate for legislative favors, slam political opponents and eliminate anything ... (that) might undermine its near monopoly on selling power in the Sunshine State,” the Miami Herald reported. That’s not to mention accusations of hiring private investigators to follow a newspaper columnist who was critical of the company.

Other examples of questionable spending abound. In 2018, South Carolina lawmakers were flooded with bogus emails encouraging them to support Virginia utility giant Dominion Energy’s takeover of SCANA Corp., a company struggling under the weight of a failed nuclear project. Dominion denied having anything to do with the fake emails, which were sent by the Consumer Energy Alliance, a group that was then supported by Dominion. (The company is no longer listed as a CEA member).

Consumer Energy Alliance was also involved in a 2016 campaign to support a natural gas pipeline running through Ohio that involved sending 347 letters to the Federal Energy Regulatory Commission using the names of locals — more than a dozen of whom signed affidavits denying they signed the letters — including “an Ohio man who has been dead since 1998,” The Plain Dealer reported.

In Louisiana, Entergy was fined \$5 million by the New Orleans City Council after actors hired by a public relations firm working for the utility showed up at public hearings to support a proposed power plant.

Arizona Public Service, which has 1.4 million electric customers in the state, spent \$10 million in 2014 that was funneled to dark money groups to help elect its preferred members of the State Corporation Commission, which regulates utilities. That spending wasn't revealed until 2019, when the company complied with a subpoena to release documents.

"Utilities are often using their ratepayer-funded political machines to slow the nation's urgently-needed transition away from fossil fuels and toward clean energy," the Energy & Policy Institute wrote. "Working hand-in-hand with their trade associations, the Edison Electric Institute and American Gas Association, utilities continue to fight tooth-and-nail against policies that enable the adoption of essential technologies like rooftop solar power, energy efficiency and building electrification."

'The appetite is there'

However, bills to curb utility influence spending can face an uphill fight, demonstrating the stronghold that the companies can have on state governments.

In Virginia, for example, another round of legislative attempts to prevent candidates from accepting donations from public service companies like Dominion Energy, the state's largest electric utility and long the biggest corporate donor in Virginia politics, died in House and Senate committees. Both houses are controlled by Democrats.

"Time will tell what will happen," Del. Josh Cole, a Democrat who was carrying the House version of the legislation, told the Virginia Mercury. "The appetite is definitely there for it."

A separate proceeding at the Federal Energy Regulatory Commission has been looking into the "rate recovery, reporting and accounting treatment of industry association dues and certain civic, political and related expenses."

The Edison Electric Institute, which represents investor-owned electric utilities and is one of the trade groups affected by some of the state-level legislation, said electric customers benefit when its member companies "have a seat at the table," adding that they are among the most regulated businesses in the nation.

"We engage on their behalf through lobbying, advocacy and regulatory proceedings as part of our work to ensure that electricity customers have the affordable, reliable and resilient clean energy they want and need. Engaging in discussions with policymakers and regulators is essential to achieving these outcomes," EEI spokeswoman Sarah Durdaller said in a statement. "We bring unique expertise and insights on how policy proposals will

affect business operations, the cost for capital, and, ultimately, our customers. ... There are strict laws in place already to ensure that lobbying activities are always funded by shareholders not customers.”

The American Gas Association, which represents natural gas utilities, did not respond to a request for comment.

On Monday, across the street from the Washington, D.C., hotel where the National Association of Regulatory Utility Commissioners was holding its winter policy meeting, a group of climate justice organizations held a rally to call attention to energy company influence, taking aim at corporate sponsorship of the event and a lack of progress on renewable power.

“When we see events like this where utility execs fund gatherings and hobnob with regulators ... we need to speak out,” said Sukrit Mishra, D.C. program director at Solar United Neighbors, a nonprofit that helps communities form solar co-ops. He voiced support for state legislative efforts as well as federal legislation introduced by U.S. Rep. Kathy Castor, a Florida Democrat, to prevent utility companies from using ratepayer dollars to fund political activities.

“The public is ready to hold utilities accountable. We need regulators to do the same.”

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Some firms spend more on executive pay than taxes

 [usatoday.com/story/money/2024/03/13/companies-spend-more-executive-salaries-than-taxes/72941207007](https://www.usatoday.com/story/money/2024/03/13/companies-spend-more-executive-salaries-than-taxes/72941207007)

MONEY

Income Taxes

What costs more, paying top dogs or taxes? At some firms, executive pay outstrips taxes



Daniel de Visé

USA TODAY

Dozens of large corporations paid more money to their top executives than they shelled out in federal taxes between 2018 and 2022, according to a new watchdog report.

The analysis names 35 corporations, including Tesla, Netflix and Ford, that each reportedly spent more on compensation to their five highest-paid executives than they paid in federal income taxes over five years.

Collectively, the 35 corporations spent \$9.5 billion on their top executives over that span, the report said, while their combined federal tax bill came to -\$1.8 billion: a collective refund.

The report, released Wednesday, is titled “More for Them, Less for US: Corporations That Pay Their Executives More Than Uncle Sam.” It comes from the Institute for Policy Studies, a nonprofit, left-leaning think tank, and Americans for Tax Fairness, a nonprofit that advocates for progressive tax reform.

“Lavish corporate compensation packages and inadequate corporate tax payments are not unrelated phenomena,” the report states.

Corporate boards “have more money to spend on their highest-paid employees when they don’t have much or anything to pay in taxes. Until this self-reinforcing cycle is broken, we’ll have a corporate tax and governance system that works for top executives—and no one else.”

Netflix, for example, paid its five top executives \$652 million between 2018 and 2022, the report says, while paying only \$236 million in cumulative federal income tax in the same years.

In response, the streaming company said, "Netflix complies with tax laws and regulations in the US and around the world. From 2018-2022 we paid global income taxes in excess of \$2B and in 2023 we paid nearly \$1.2B in global income taxes, the majority of which was US federal income tax."

Another firm targeted in the report is FirstEnergy, the electric utility. According to the watchdog groups, FirstEnergy paid \$121 million in executive compensation over five years, compared with -\$44 million in federal income tax, a net refund.

FirstEnergy responded with a prepared statement.

"FirstEnergy pays taxes in compliance with federal, state and local tax laws. In addition to federal taxes, the company pays hundreds of millions in state, local and payroll taxes every year," it said.

The company said its executive pay programs are "carefully designed to attract, retain, focus and reward our talented and diverse executive team," and that shareholders overwhelmingly support the firm's compensation structure.

The report also names Duke Energy, saying the firm paid \$181 million to top executives over five years, compared to -\$1.2 billion in federal income taxes, a net refund.

In response, the company said, "Duke Energy fully complies with federal and state tax laws as part of our efforts to make investments that will benefit our customers and communities. Duke Energy has a deferred tax balance – this does not mean Duke Energy is not paying these taxes, it means that our taxes are due in future years, and we will pay them. We have approximately \$10.6 billion in deferred tax liabilities related to investments in the energy system on behalf of our customers."

The utility said it is investing private capital in "our nation's critical energy infrastructure," a corporate practice incentivized by the current federal tax code.

"It's also important to note that at the state and local levels, we are often the largest taxpayer in many of those communities and much of the taxes paid are directed toward local services," the company said.

Several other firms did not comment on the report.

The watchdog report draws on recent research by the Institute on Taxation and Economic Policy, another nonprofit, left-leaning think tank. That group found 342 large corporations that paid a cumulative effective tax rate of 14.1% over five years, well short of the statutory corporate tax rate of 21%.

The data in the report come from financial documents filed with the Securities and Exchange Commission. Compensation figures include base salary, cash bonuses, perks, stock options, stock awards and changes in the value of retirement benefits.

Report: 18 corporations paid no federal income tax in 5-year stretch

The new report cites 18 profitable corporations that paid no federal income tax in the five-year period. Instead, all but one received refunds. The same corporations paid their top executives a cumulative \$5.3 billion in those years.

The watchdog report comes as the Internal Revenue Service is ramping up audits of large businesses and high-income Americans, leveraging billions in new funding from Congress.

President Biden added nearly \$80 billion in IRS funding to the Inflation Reduction Act of 2022 with the hope that the investment would recoup as much as \$400 billion over the next decade in unpaid taxes from wealthy people and companies.

The watchdog report charts a decades-long decline in the tax rates paid by corporations. The top statutory tax rate has declined from 51% in 1986 to 21% today, according to the Tax Policy Center, a joint venture of the Urban Institute and Brookings Institution.

Corporations also avoid taxes by shifting profits offshore, among other loopholes, the report says.

While corporate tax revenue has stagnated, the report says, executive pay has skyrocketed. The typical CEO compensation package reached \$14.8 million in 2022, according to the Associated Press, compared with \$77,178 for the average worker in those companies.

Which firms spend more on executive pay than income tax?

Here are snapshots of 10 large corporations, spotlighted in the watchdog report, whose executive pay reportedly exceeds their federal income tax payments.

Tesla

5-year executive pay: \$2.5 billion

5-year federal income tax (and tax rate): -\$1 million (0%)

T-Mobile

5-year executive pay: \$675 million

5-year federal income tax (and tax rate): -\$80 million (-0.4%)

Netflix

5-year executive pay: \$652 million

5-year federal income tax (and tax rate): \$236 million (1.6%)

American International Group

5-year executive pay: \$406 million

5-year federal income tax (and tax rate): \$385 million (2.2%)

Ford Motor

5-year executive pay: \$355 million

5-year federal income tax (and tax rate): \$121 million (1.5%)

NextEra Energy

5-year executive pay: \$325 million

5-year federal income tax (and tax rate): \$287 million (1.2%)

Darden Restaurants

5-year executive pay: \$120 million

5-year federal income tax (and tax rate): \$28 million (0.8%)

MetLife

5-year executive pay: \$240 million

5-year federal income tax (and tax rate): \$96 million (0.8%)

Duke Energy

5-year executive pay: \$181 million

5-year federal income tax (and tax rate): -\$1.2 billion (-7.9%)

FirstEnergy

5-year executive pay: \$121 million

5-year federal income tax (and tax rate): -\$44 million (-0.7%)

Ephemeral Messaging Isn't a Fleeting Interest for Regulators

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Cooley attorneys explain the risks of ephemeral messaging platforms for companies and how they can be managed, considering regulatory attention to such applications.

It has been one year since the Department of Justice announced updated guidance on use of ephemeral messaging platforms for corporate communications. Since then, the DOJ and other regulators continue to sound alarms about these tools, which automatically erase conversations between parties. Their stance is clear: Companies with strong policies will be rewarded, and companies that fail to act face potentially tougher penalties if those communications ever become relevant.

To mitigate risks, companies should implement clear policies on ephemeral messaging, offer alternative means to send company-related texts, and develop training programs for employees.

Regulatory Focus

Government regulators see text messages, including those sent over ephemeral messaging platforms, as vital evidence. While the DOJ's guidance is easy to understand, it could be difficult to follow in practice. Prosecutors would no longer accept "at face value" a company's failure to turn over ephemeral communications and noted that "[a] company's answers—or lack of answers [concerning ephemeral messages]—may very well affect the offer it receives to resolve criminal liability."

The widely understood implication was that the DOJ expected companies to play an active role in guiding and monitoring employees' use of messaging applications for company business. Yet it was unclear how the policy would work in practice or if the DOJ's focus would wane.

Regulators' focus on ephemeral messaging didn't turn out to be a passing fad, and the DOJ has continued to broadcast how important it believes this type of evidence can be. In January, the DOJ antitrust division and Federal Trade Commission announced that they are changing language in their standard preservation letters, grand jury subpoenas, and compulsory legal processes to specifically address increased use of ephemeral messaging platforms.

These changes ensure that companies can no longer "feign ignorance" when it comes to their need to monitor and preserve ephemeral messaging. The DOJ even warned that, under this new guidance, the failure to produce such documents can result in criminal charges for

the company, including obstruction of justice charges.

Companies with clear policies concerning ephemeral messaging have been rewarded. For example, DOJ officials have consistently praised Corsa Coal Corp. for making voluntary disclosures to the DOJ that resulted in two former executives of the company being charged with offenses related to the Foreign Corrupt Practices Act.

In declining to prosecute the company, the DOJ cited Corsa Coal's significant cooperation as one of the factors leading to the decision not to prosecute. It also identified the case as an example of "the need for companies to develop policies concerning these messaging applications and, where appropriate, retrieve and then produce such communications."

On the other hand, failure to adequately preserve messages can create additional risks for a company and its employees. Issues concerning ephemeral messaging were front and center in the criminal trial of FTX Trading Ltd. co-founder Sam Bankman-Fried in the Southern District of New York. There, the jury heard evidence concerning the involvement of FTX lawyers in creation and implementation of document retention policies.

This included testimony that company policies allowed for certain communication applications to be set to auto-delete, as well as testimony that Bankman-Fried had discussed with counsel the fact that certain messaging applications were so configured. Bankman-Fried was convicted of all charges and is awaiting sentencing.

Mitigating Risks

The past year has shown ephemeral messaging remains a source of significant peril for companies, particularly because regulators are unlikely to excuse companies' inaction when their employees use these platforms.

In certain regulated industries, an employee's use of ephemeral messaging can trigger an enforcement action for failure to abide with recordkeeping requirements. For example, the Securities and Exchange Commission in September 2023 charged several broker-dealers and investment advisers with recordkeeping violations in connection with failure to preserve off-channel communications.

There are actionable steps companies can take to mitigate these risks.

Have a policy. Implement a clear policy that bans the use of ephemeral messaging applications for company communications. This policy should be harmonized with the company's acceptable use policies for technology. Company policies should also clarify that, should an employee use ephemeral (or any non-sanctioned) messaging communications, the company has a right to collect relevant data from the employee's phone and make any disclosures to law enforcement as necessary.

Offer an alternative. In place of ephemeral messaging applications, companies should offer employees alternate messaging applications that are company-controlled and accessible for review, with practical retention policies that comply with applicable rules and regulations. Companies should also design and use functional mobile device policies and software to manage applications on devices used for business purposes, including personal devices.

Use training to understand the risks. Companies should develop training programs aimed at educating and empowering employees to understand their role in helping the company manage risks, including by using company-approved messaging applications.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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Amazon Denies Concealing Texts In Alexa Users' Privacy Suit

By **Rachel Riley**

Law360 (March 12, 2024, 10:05 PM EDT) -- Amazon has rebuffed claims that it withheld text messages in a proposed class action brought by unregistered Alexa users who alleged they were illegally recorded, arguing the plaintiffs accused the technology giant of yet another failure as discovery closes to "cast aspersions on Amazon's diligence and motives."

In a **response** filed Monday in Washington federal court, Amazon.com Inc. objected to the users' bid for an order compelling the company to hand over the texts, contending that most of its employees don't use their personal phones to text about work, and even if they did, collecting those texts for this case would raise privacy concerns.

On the final day of discovery, the Seattle-based company asserted, Kaeli Garner and other plaintiffs "jumped on" a former executive's deposition testimony that he occasionally texted other team members, fomenting a new dispute after nearly two years in the fact-finding phase.

"As they have throughout this case, plaintiffs accuse Amazon and its lawyers of 'failing to comply' with Amazon's discovery obligations, and they cast aspersions on Amazon's diligence and motives," the company wrote.

The **proposed class action**, first filed in 2021, accuses Amazon of recording, storing and sharing communications that Alexa devices captured from unregistered users who hadn't activated it using a "wake" word.

In their Feb. 27, 2024, motion to compel, the consumers cited the Feb. 13 deposition of David Limp, a former Amazon senior vice president of devices. While Limp's exact remarks are redacted from the publicly available version of the motion, the Alexa users said his testimony revealed the existence of potentially relevant text messages — either sent or received by any of the employees identified in discovery as custodians in the case.

During discovery, the users alleged, Amazon had identified and produced only three types of potentially relevant electronic communications: emails, as well as messages sent on platforms Slack and Amazon Chime.

According to Amazon, most of its employees don't have company-issued mobile phones or use their personal devices to text about work; Limp, however, was issued a corporate phone as one of its top executives.

"Although Mr. Limp primarily used email and chat platforms for work communications, he testified that he occasionally sent text messages to his team," the company noted in its response.

Amazon contends the proposed class has raised the text message issue far too late, and even if the motion had come earlier, the company would not have collected or searched employees' personal phones because of privacy concerns. The consumers also failed to show that the texts would be accessible and contain information relevant to the litigation, Amazon said.

U.S. District Judge Robert S. Lasnik ruled in October 2022 that Amazon **must use specific search terms** in its electronically stored information to produce relevant documents in the case, rejecting the e-commerce giant's insistence that the search would be unduly burdensome.

Judge Lasnik has also **ordered** Amazon to provide the putative class with state-by-state information on the number of voice profiles and automatically recognized voices it has identified as belonging to Alexa devices, aside from the person who registered the device.

More recently, the federal judge determined last September that the company failed to provide the plaintiffs with certain documents related to a Federal Trade Commission investigation into the users' allegation that Amazon recorded and stored voices of children.

"In light of the court's prior discovery orders, Amazon has now gone to remarkable lengths and expense to identify and produce potentially relevant information (the vast majority of which ultimately will have no bearing at all on this case)," the company said in the Tuesday response. "Requiring Amazon to search for, review, and produce text messages at this late stage would be disproportionate and unfair."

Amazon filed another response Monday that opposed the consumers' request for an on-camera review of a sampling of hundreds of documents they alleged the company produced then clawed back. Two other motions from the proposed class were sealed. The company also filed two additional briefs in support of sealing the plaintiffs' pending discovery motions.

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

The Alexa users are represented by liaison counsel Byrnes Keller Cromwell LLP, co-lead counsel Labaton Keller Sucharow LLP and Robbins Geller Rudman & Dowd LLP, and interim counsel Bursor & Fisher PA, Zimmerman Reed LLP and Lockridge Grindal Nauen PLLP.

Amazon is represented by Brian D. Buckley, Monica Chan, Jedediah Wakefield, Tyler G. Newby, Armen N. Nercessian, Garner Kropp, Melissa Lawton, Esther D. Galan and Janie Yoo Miller of Fenwick & West LLP.

The case is Garner et al. v. Amazon.com Inc. et al., case number 2:21-cv-00750, in the U.S. District Court for the Western District of Washington.

--Editing by Covey Son.



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Binance Investors Must Wait To Depose Ex-CEO, Judge Says

By **Katryna Perera**

Law360 (March 12, 2024, 10:25 PM EDT) -- A Florida federal judge has said that the investors suing crypto exchange Binance over alleged money laundering and securities law violations don't need to rush to depose its former CEO, Changpeng Zhao, now that his criminal sentencing has been delayed.

In an **order** on Monday, U.S. District Judge Lisette M. Reid denied the investors' request to take Zhao's testimony even though discovery in the case is stayed pending resolution of a related criminal matter against Zhao.

Zhao **pled guilty** in November to one count of failure to maintain an effective anti-money laundering program and agreed to resign from the company as part of a deal with the U.S. Department of Justice to resolve a yearslong investigation into the company over allegations of money laundering, bank fraud and sanctions violations. Binance also agreed to pay a \$4.3 billion fine.

Zhao was also ordered **to stay in the United States** until his sentencing, with a Seattle federal judge saying he poses a flight risk given his wealth and close ties to the United Arab Emirates. Zhao's sentencing was initially scheduled for February but has since been pushed to April.

The investors **argued** Zhao's testimony is "crucial to the claims and defenses of all parties," regardless of whether the suit moves to arbitration, **as Binance requested** in December. They also argued that new facts in the case have created an exigency that requires the court to temporarily lift the discovery stay and allow for a deposition, according to Monday's order.

"Plaintiff[] allege[s] that [defendant] controlled all of Binance's business activities at all relevant times.... [t]he complaint focuses specifically on Mr. Zhao's knowledge concerning Binance's lack of any money laundering and anti-corruption safeguards.' Therefore, defendant's deposition will aid the case immensely. 'Yet, without this court's intervention, plaintiff[] ... may never have an opportunity to depose [defendant],'" the order states.

However, Judge Reid said Monday that there have not been any changes in circumstances that warrant the immediacy of Zhao's deposition. According to the order, Zhao was overseas when the discovery stay was implemented. Therefore, the investors' ability to depose him will be "exactly the same" if he returns to the UAE following his sentencing.

"Additionally, if defendant is incarcerated, case law allows for a prisoner to be deposed in a civil case," the order states. "These seem like reasonable assurances that weaken any exigency concerns for an immediate deposition. The court, therefore, remains unpersuaded by plaintiff's argument."

The judge further stated that no special circumstances weigh in favor of lifting the stay order. The investors continue to suffer little prejudice from a stay, and Zhao is not the only person who can provide information relevant to their case.

In the absence of a stay, however, Zhao would face "substantial prejudice" since he would either have to invoke his Fifth Amendment rights or decline to do so and risk self-incrimination.

In a statement, Adam Moskowitz of The Moskowitz Law Firm PLLC, counsel for the investors, acknowledged the court's reasoning and said: "Knowing that we will be able to eventually uncover this discovery from Binance is extremely helpful to all of our victims."

Counsel for Zhao did not immediately respond to requests for comment on Tuesday.

Investors filed suit against Binance and Zhao **in April** alleging they knowingly and willfully ignored U.S. regulatory requirements by failing to implement an effective anti-money laundering program, which is required of financial institutions, and by offering and selling unregistered securities.

According to the complaint, on the compliance side, Binance has purposely grown and maintained its U.S. customer base without implementing necessary restrictions and procedures that would allow it to properly oversee and determine the true identities of its customers. It has also not filed a single suspicious activity report in the U.S., the complaint states.

Because of this lack of compliance, the investors claim, illegal and illicit activity has been allowed to proceed unchecked on the platform, and they have suffered damages as a result.

The investors are represented by Adam M. Moskowitz and Joseph M. Kaye of The Moskowitz Law Firm PLLC, Brooke Alexander, Stephen Neal Zack and Tyler Ulrich of Boies Schiller Flexner LLP and Jose M. Ferrer and Desiree Fernandez of Mark Migdal Hayden LLP.

Zhao is represented by Melanie M. Blunschi and Abid R. Qureshi of Latham & Watkins LLP and Martin B. Goldberg of Lash & Goldberg.

Binance is represented by Aaron S. Weiss and Benjamin M. Stoll of Carlton Fields and Christopher N. LaVigne and Joseph Gallo of Withers.

The case is Sizemore et al. v. Zhao et al., case number 1:23-cv-21261, in the U.S. District Court for the Southern District of Florida.

--Editing by Michael Watanabe.

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Murdochs Seek Toss of Epic Election Defamation Suit

By **Jeff Montgomery**

Law360 (March 12, 2024, 7:21 PM EDT) -- Fox Corp. media mogul Rupert Murdoch and other Fox empire figures have urged Delaware's Court of Chancery to toss as unwinnable a stockholder suit seeking to make them liable for billions in potential damages for defamatory statements alleging 2020 election conspiracies on network and affiliate broadcasts.

The motion to dismiss made public Monday argued that the derivative suit, filed by seven benefit or pension funds and a Fox Corp. stockholder, fails to show — among other shortcomings — an utter failure of oversight and knowing breach of duty required to overcome Delaware charter protections for company directors.

Among the damages sought in the suit, filed in May 2023 and last amended in September, is an award to cover a \$787.5 million company settlement with Dominion Voting Systems in April 2023 on Dominion claims for \$1.6 billion in damages. That suit claimed that Fox personalities relentlessly trumpeted baseless allegations about the exploitation of Dominion voting machine flaws in a bid to tip the 2020 election, jeopardizing the Dominion business and brand.

"Plaintiffs, with the benefit of hindsight, seek to equate a significant corporate liability with bad faith — a mistake the Delaware courts have repeatedly cautioned against," the defendants said. They argued that the allegations are insufficient to show with required detail "that a functioning system of board-level reporting and controls regarding compliance and legal risk did not exist or was not monitored."

Also potentially among the liability claims is a suit seeking as much as \$2.7 billion on behalf of Florida-based Smartmatic USA Corp.'s suit accusing Fox and hosts Maria Bartiromo and Jeanine Pirro and former host Lou Dobbs of defaming it by airing unfounded vote-rigging accusations from former President Donald Trump and his supporters.

Other stakes include the value of lost broadcast licenses and claims in other cases.

The suit names Fox CEO Rupert Murdoch, executive chairman and Rupert's son Lachlan Murdoch, five directors and two officers of breaching the duties of care and loyalty first articulated by the Court of Chancery in the 1996 Caremark case.

The Caremark standard, now widely adopted, obliges those who invoke it for damage recoveries to show action in bad faith and "sustained or systematic failure of the board to exercise oversight — such as an utter failure to attempt to assure a reasonable information and reporting system exists."

Other stakes include so-called Massey claims that board actions put profits over legal compliance, which the defendants' motion rejected.

"The complaint does not remotely allege the extreme facts necessary to state such a claim" and "does not point to any board-approved strategic plan — or any other board document — that suggests the board adopted a plan to seek profits by committing actionable defamation," it said.

The defendants said the "extraordinary claim that the directors intentionally pursued a tortious business model in which Fox News deliberately made false accusations, including regarding election fraud, to appeal to some viewers and so increase market share" is supported only by conjecture.

They said emails cited to support claims that profits drove defamation "hardly show a plan of

pursuing illegal profits, let alone one approved by the Fox board."

For instance, emails showing Rupert Murdoch suggested "pivoting coverage to topics other than the presidential election" to avoid antagonizing now-former President Donald Trump indicates the opposite, the motion said.

The defendants argued that corporate charter provisions shield directors from regular duty of care claims and require stockholders to convince the court that directors knowingly ignored their oversight duties and failed to maintain oversight systems.

The stockholders argue that the defendants ignored "red flag" warnings of potential liability, including a suit filed in 2018 by the parents of murdered Democratic National Committee staffer Seth Rich.

Fox News Network LLC and a Fox reporter and contributor were sued for reports that Rich was killed for leaking thousands of Democratic National Committee emails to WikiLeaks. The parties reached an undisclosed settlement.

Fox and the investors did not immediately respond to a request for comment.

Vice Chancellor J. Travis Laster in December named the New York City Employees Retirement System and four other New York pension funds, the state of Oregon and the Oregon Public Employees Retirement Fund as lead plaintiffs.

The plaintiffs are represented by Joel Friedlander, Jeffrey M. Gorris and Christopher M. Foulds of Friedlander & Gorris PA, Ellen Rosenblum, Brian A. de Haan, Julie Goldsmith Reiser and Molly J. Bowen of the Oregon Attorney General's Office, Brendan Schneiderman of Cohen Milstein Sellers & Toll PLLC and Katherine Lubin Benson of Lieff Cabraser Heimann & Bernstein LLP.

The defendants are represented by Blake Rohrbacher, Kevin M. Gallagher, Kyle H. Lachmund and Morgan R. Harrison of Richards Layton & Finger PA and William Savitt, Anitha Reddy, Cynthia Fernandez Lumermann, Won S. Shin and Jane Park of Wachtell Lipton Rosen & Katz.

The case is: In re: Fox Corp. Derivative Litigation, case number 2023-0418, in the Court of Chancery of the State of Delaware.

--Editing by Brian Baresch.



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Pilates Giant Xponential Hid Studio Closures, Investor Says

By **Sydney Price**

Law360 (March 12, 2024, 10:05 PM EDT) -- Executives and directors of fitness brand franchiser Xponential were hit with a shareholder derivative suit alleging the company was damaged when media reports uncovered that Xponential had concealed from investors that dozens of its fitness studios had permanently closed and most of its brands were operating at a monthly net loss.

According to the suit filed on Sunday by shareholder Gideon Akande, Xponential Fitness Inc. operates a series of 10 fitness boutiques with over 1,900 franchises in North America, including Club Pilates, Cycle Bar and Pure Barre. The suit alleges that for over two years following Xponential's July 2021 initial public offering, the company and its executives misled the public about the success of its franchises and deceived many of its franchisees into opening franchises by misrepresenting the financial profitability and profile of its studios.

A short-seller report and news report published last year revealed that the company had made several misleading statements about its profitability, and that its CEO Anthony Geisler had "a track record of combative management," according to the suit.

The reports revealed, among other things, that Xponential had failed to disclose to investors that the company permanently closed at least 30 stores, eight of its 10 brands were operating at a monthly net loss, and more than 60% of the company's revenue was one-time and not recurring.

In addition to nominal defendant Xponential, individual defendants in the suit include Geisler, Xponential Chief Financial Officer John Meloun and four of the company's directors.

The suit also accuses Geisler and Meloun of engaging in insider trading. Both sold over a million shares of artificially inflated Xponential common stock for personal profits in excess of \$47.5 million, the suit alleges.

The suit's relevant period begins July 26, 2021, shortly after Xponential's IPO, during which the company sold more than 10 million shares for \$12 each.

Following the IPO, Xponential conducted two additional registered stock offerings and repeatedly assured investors it had sufficient internal controls. The defendants concealed that Xponential's franchisees were "in substantial debt, experienced high attrition rates and operated non-viable studios that had no practical path to profitability," the suit claims.

On June 26, 2023, short-seller Fuzzy Panda uncovered Geisler's long history of misleading investors and permanent studio closures that the company had concealed, the suit states.

Following the report's publication, shares of Xponential declined by \$9.39, or over 37%, to close at \$15.72, according to the complaint.

The company responded to the Fuzzy Panda report a couple of days later, but refused to address certain allegations regarding store closures and financial metrics, the suit asserts.

Several months later, on Dec. 7, 2023, a major news organization published an article with interviews from dozens of former Xponential workers who claimed the company misguided many franchisees into a "financial nightmare" and that Geisler deployed "growth-at-all-costs tactics" and unleashed

"aggressive reprisals against anyone who gets in his way."

Following the article's publication, Xponential shares declined more than 26%, closing at \$8.99 on Dec. 11, 2023, according to the complaint.

Additionally, the suit accuses Xponential of overpaying by more than \$26 million on stock repurchases during the relevant period due to the artificially inflated prices of the shares.

The suit accuses the defendants of violating the Exchange Act, unjust enrichment, gross mismanagement, abuse of control and wasting of corporate assets. Akande seeks damages and a court order requiring Xponential to reform and improve its corporate governance and internal procedures.

Counsel for Akande and a Xponential representative did not immediately respond to requests for comment on Tuesday.

Akande is represented by Robert C. Moest of The Brown Law Firm PC.

Counsel information for Xponential and the individual defendants was not immediately available on Tuesday.

The case is Gideon Akande v. Anthony Geisler et al., case number 2:24-cv-01928, in the U.S. District Court for the Central District of California.

--Editing by Kristen Becker.

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AT&T Offloaded Pensions In Risky Annuity Deal, Suit Says

By **Grace Elletson**

Law360 (March 12, 2024, 1:48 PM EDT) -- AT&T shirked its fiduciary duty and put 96,000 workers' retirement savings in jeopardy by transferring pension obligations to a "risky" annuity provider, according to a proposed class action filed in Massachusetts federal court.

Retirees LaNell Piercy, Willa G. Ward, Thomas L. Mazzeo and Sue Rush **filed suit** against AT&T Inc. on Monday alleging the company violated the Employee Retirement Income Security Act when it put profits before its workers' retirement benefits when it offloaded over \$8 billion in pension plan liabilities through the deal.

"Although AT&T is worth more than \$100 billion, and is the world's fourth-largest telecommunications company, the company decided to fatten its wallet by placing its retirees' futures in the hands of a risky new insurance company," the former workers said.

In April 2023, the workers said, AT&T paid an undisclosed amount to Athene Annuity and Life Co. and Athene Annuity & Life Assurance Co. of New York — both subsidiaries of Athene Holding Ltd. — to assume \$8 billion in pension liabilities owed to 96,000 of its employees and their beneficiaries. The deal effectively removed the employees from AT&T's retirement plan, the workers said.

The company purchased group annuity contracts from Athene, and in exchange, Athene promised to pay the plan participants' retirement benefits — a move known as a pension risk transfer, which also put the beneficiaries outside the bounds of ERISA's protection, the workers said. They said AT&T earned \$363 million in profits from this deal.

Before this transaction, AT&T was obligated under federal law to ensure retirees received their benefits, and it was also required to continually monitor their assets to ensure their benefits' financial health, the workers said. But this deal allows AT&T to evade these responsibilities, the workers claimed.

"The ejected plan participants and beneficiaries are now entirely reliant on the solvency of Athene for their retirement benefits," the workers said.

And Athene is a "highly risky annuity provider," the workers claimed, as a private equity-backed insurer that engages in the "shadow banking" sector. Under ERISA, plan sponsors are governed by strict requirements that retirement benefits can be transferred from the federally regulated pension system to private annuity providers only when it's in the best interest of the plan participants, the workers said.

But Athene is "anything but" a safe and reasonable annuity provider to fulfill this obligation, the workers said. AT&T and State Street Global Advisors Trust Co., an independent fiduciary also named in the suit that helped organize the transaction, selected Athene because it was the cheapest option rather than other annuity providers that have a more reliable track record.

"AT&T, AT&T Services, and State Street ... have thus breached their fiduciary duties under ERISA, and the transaction was prohibited by ERISA," the workers said.

The former employees are seeking financial relief resulting from AT&T's profits and losses derived from its dealings, and an injunction requiring AT&T guarantee retirees receive their benefits promised

under the plan.

An AT&T spokesperson told Law360 that the company denies the allegations and will defend itself in court.

Counsel for the workers declined to comment. Representatives of State Street and Athene did not immediately respond to requests for comment.

The workers are represented by Douglas S. Brooks and Elizabeth N. Mulvey of Libby Hoopes Brooks & Mulvey PC, by Cyril V. Smith and Bryan M. Reines of Zuckerman Spaeder LLP, by Edward Stone of Edward Stone Law PC and by Elizabeth Hopkins and Susan L. Meter of Kantor & Kantor LLP.

Counsel information for AT&T and State Street was not available.

The case is Piercy et al. v. AT&T Inc. et al., case number 1:24-cv-10608, in the U.S. District Court for the District of Massachusetts.

--Editing by Roy LeBlanc.

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UnitedHealth Can't Get Early Win In Workers' ERISA Suit

By **Kellie Mejdrich**

Law360 (March 12, 2024, 5:50 PM EDT) -- A Minnesota federal court denied most of UnitedHealth Group Inc.'s bid for a pretrial win in a lawsuit alleging mismanagement of an employee 401(k) plan, finding Tuesday that allegations the company refused to ax underperforming funds to preserve a business relationship with Wells Fargo should go to trial.

In a **32-page order**, U.S. District Judge John R. Tunheim denied the bulk of UnitedHealth's motion for summary judgment in the Employee Retirement Income Security Act suit that UnitedHealth ex-employee Kim Snyder first brought in April 2021. Snyder alleged participants in United's 401(k) plan, with more than 200,000 participants and \$15 billion in assets under management, lost out on future savings because United's decision to retain Wells Fargo led to excessive fees and investment underperformance.

"Because a reasonable trier of fact could easily find that plaintiff Kim Snyder caught defendant UnitedHealth Group Inc. with its hand in the cookie jar, the court will substantially deny United's motion for summary judgment," Judge Tunheim said.

Judge Tunheim said genuine disputes of material fact remained over whether United breached ERISA's fiduciary duties of prudence and loyalty by investing employee 401(k) savings in underperforming Wells Fargo funds for more than a decade, and by "allowing United's business relationship with Wells to influence that allegedly imprudent retention."

The plan participant class alleged in their complaint that since it was added to the plan in 2010, a Wells Fargo target-date fund that United chose as the plan's default investment option underperformed. The **class period**, certified in February 2022, runs from April 2015 through the date of judgment, and allegations about fund underperformance stretch back as far as 2010 in the complaint. Wells Fargo is not named as a defendant in the suit.

In his Tuesday order, Judge Tunheim said a genuine dispute also remained regarding whether UnitedHealth engaged in a prohibited transaction under ERISA because fees charged by Wells Fargo were unreasonable. Judge Tunheim also rejected United's bid to remove United's president, David S. Wichmann, as a defendant in the case, finding that evidence suggested Wichmann was a functional fiduciary in charge of the ERISA plan, when viewed in a light most favorable to Snyder.

Judge Tunheim said that while the suit didn't hold United liable for pre-2015 events regarding its decision to retail the poorly performing Wells fund as the default investment option, the period of time before the certified class period "may still color the court's analysis of post-2015 retention."

"The court need not blind itself to the fact that United had already held the equal weighted funds for five years and been warned of their underperformance when evaluating the reasonableness of retention by the time the class period began," Judge Tunheim said.

Even though most of United's motion for summary judgment was denied, Judge Tunheim granted the insurance company a win on the second count of Snyder's amended complaint, which alleged United's conduct with regard to the Wells Fargo funds violated the plan's investment policy statement violating ERISA's requirements that plan fiduciaries act in accordance with plan documents.

"United did not breach any enforceable provision of its investment policy statement," Judge Tunheim

said.

Additionally, Judge Tunheim dismissed United's board of directors as defendants in the action, both collectively and individually.

"They were neither functional fiduciaries nor did they have a duty to monitor the 401(k) fund," Judge Tunheim said.

Charles Field, attorney for the class, complimented the ruling in a brief interview with Law360 on Tuesday.

"The language by the judge indicates to us that he's accepted our view of the case. And that is, that United inserted a business interest in its fiduciary decision-making process, which runs counter to ERISA," Field said.

Representatives of United didn't immediately respond to a request for comment on the decision.

Kim Snyder and the class are represented by Charles Field, Kevin H. Sharp, Leigh Anne St. Charles, David McNamee and Brent Hannafan of Sanford Heisler Sharp LLP and by Susan M. Coler of Halunen Law.

UnitedHealth Group Inc. is represented by Deborah A. Ellingboe and Drew M. Horwood of Faegre Drinker Biddle & Reath LLP and by Craig S. Primis, K. Winn Allen and Madelyn A. Morris of Kirkland & Ellis LLP.

The case is Snyder v. UnitedHealth Group Inc. et al., case number 0:21-cv-01049, in the U.S. District Court for the District of Minnesota.

--Editing by Nick Petruncio.

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Yardi, Landlords Say Hagens Berman Can't Lead Antitrust Suit

By Isaac Monterose

Law360 (March 12, 2024, 9:37 PM EDT) -- Property management software company Yardi Systems Inc. and multiple landlords are fighting a putative class's bid to appoint Hagens Berman Sobol Shapiro LLP as interim lead counsel for a rent price-fixing class action in Washington federal court.



Yardi "offers integrated solutions for residential, commercial, affordable housing, senior living and other real estate portfolios," according to the company's website. (Photo by Alexander Pohl/Sipa USA, via AP Images)

In their response to the bid, filed Monday, the companies argued that the motion from the named plaintiffs, McKenna Duffy and Michael Brett, did not cite required overlapping or duplicative litigation in federal courts that could be consolidated and that the putative class pointed only to a "substantially similar" suit filed in California state court.

"Other courts have rejected attempts by plaintiffs' counsel to stake their claim in a particular action before there is a demonstrable need to do so," the companies further argued, pointing to case law such as the Nevada federal court's July decision in *Gibson v. MGM Resorts International*.

The suit, **filed in September** in the U.S. District Court for the Western District of Washington, alleges that the landlords conspired to fix rent prices by using Yardi Systems' algorithm. The defendants tried to **escape** the suit in December but the putative class **urged** the court to reject their bid in February.

In March, the federal government weighed in and **stated** that the landlords can't use Yardi Systems' software to do things that would be illegal for a person to do.

Class counsel and counsel for the defendants didn't respond to requests for comment on Tuesday.

The putative class is represented by Rio S. Pierce, Theodore J. Wojcik, Breanna Le Van Engelen, Stephanie A. Verdoia, Xiaoyi "Kelly" Fan and Steve W. Berman of Hagens Berman Sobol Shapiro LLP.

Yardi Systems is represented by Maura K. Monaghan, Michael Schaper, Kristin D. Kiehn and Abraham Tabaie of Debevoise & Plimpton LLP, and by Matthew A. Carvalho.

Bridge Property Management LC is represented by Al Van Kampen of Van Kampen & Crowe PLLC, and by Michael W. Scarborough, Dylan I. Ballard, M. Kevin Costello, Madison Lo, Stephen Medlock and Mackenzie Newman of Vinson & Elkins LLP.

Calibrate Property Management LLC is represented by Hozafa Cassubhai and William Burnside of Bailey Duquette PC.

Dalton Management Inc. is represented by Brian S. Epley and Jon W. Monson of Cable Huston LLP.

LeFever Mattson Property Management is represented by Steven Rich and Ryan Sandrock of Shook Hardy & Bacon LLP.

Creekwood Property Corp. is represented by Paul E. Fogarty of Fogarty Law Group PLLC and by Michael Swarztendruber and Eliot Turner of Norton Rose Fulbright US LLP.

R.D. Merrill Real Estate Holdings LLC is represented by Christopher M. Wyant, Tyler Lichter, Lauren N. Donahue and Derek Sutton of K&L Gates LLP.

HNN Associates LLC is represented by David A. Perez, Elvira Castillo, Tiffany Lee, Marten King and Adrianna Simonelli of Perkins Coie LLP.

Summit Management Services Inc. is represented by Todd A. Bowers of Gordon Rees Scully Manusukhani LLP and by Stephen W. Funk of Roetzel & Andress.

Manco Abbott Inc. is represented by Mathew Harrington and Valerie Walker of Stokes Lawrence PS and Jessica Nelson and Donald Heeman of Spencer Fane LLP.

Morguard Management Co. Inc. is represented by Heidi B. Bradley and Darin M. Sands of Bradley Bernstein Sands LLP.

The case is Duffy v. Yardi Systems Inc. et al., case number 2:23-cv-01391, in the U.S. District Court for the Western District of Washington.

--Editing by Karin Roberts.

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Camp Lejeune Water Plaintiffs Push For Jury Denial Appeal

By **Mike Curley**

Law360 (March 12, 2024, 8:00 PM EDT) -- The plaintiffs suing the U.S. government over contamination of water at Camp Lejeune are urging a North Carolina federal court to allow them to appeal an order striking their bid for a jury trial, arguing there is substantial room for disagreement over whether the Camp Lejeune Justice Act allows for jury trials.

In a **reply memorandum** filed Monday, the plaintiffs' leadership group told the court that the government's argument to the contrary is implausible, given the critically important and novel question presented in the case and the amount of analysis the court had to do to come to its decision.

"As far as the PLG has determined, the court's order is the first time in U.S. history that a federal court has held that a statute creating a cause of action against the government and expressly referring to the right to a jury trial is insufficient to authorize jury trials," the group wrote. "The court's 34-page opinion and its extensive analysis of text and precedent demonstrate that the legal question is far from open and shut."

In particular, the PLG wrote that the court acknowledged its interpretation left part of the act — a clause stating that "Nothing in this subsection shall impair the right of any party to a trial by jury" — with almost no work to do.

According to the reply, reasonable jurists could determine that the court's reasoning — that this preserves the right for time-barred, third-party complaints or fraud-claims against plaintiffs — is too attenuated, given neither of those claims are covered by the CLJA.

The consolidated litigation encompasses about 1,500 lawsuits that have been filed alleging that water on the North Carolina military base contained excessive levels of chlorinated solvents and other contaminants, causing bladder cancer, kidney cancer, lymphoma and other diseases. People living on the base between 1953 and 1987 were potentially exposed to the pollutants.

In February, the **judges struck** the plaintiffs' bid for a jury trial, agreeing with the U.S. government that the CJLA does not clearly and affirmatively grant a right to a jury trial, as is required under Supreme Court precedent.

The plaintiffs then **sought an appeal** of that decision, arguing the issue is a novel question of law as this is the first court to try cases under the act, and the order is the first decision to hold that a statute that creates a right of action against the government and refers to the right to a jury trial does not authorize jury trials.

In its response, the government argued that there's no room for disagreement about the issue because the parties agree about the general principle of statutory construction that applies, but in Monday's reply, the PLG disagreed, saying that courts have previously certified novel questions even when the applicable principles of construction are settled.

In addition, the court did not just mechanically apply the statutory construction principle, but instead used "numerous tools of statutory interpretation" to resolve the question, a process that doesn't fit the government's "simplistic summary" of the decision, the PLG wrote.

The case presents a fundamental question about what kinds of trials the CLJA authorizes, an issue that will influence the rest of the cases in the consolidated litigation, the PLG told the court, saying it is not merely a question of applying a legal standard to a particular set of facts.

The PLG also said the government did not fairly characterize the court's analysis when it argued that the court had concluded that all the relevant canons and methods of statutory interpretation lead to the same outcome, saying that in some places the court merely found that certain canons didn't decisively refute its conclusion, not that all of them supported it.

A spokesperson for the U.S. Department of Justice, representing the government, declined to comment Tuesday.

Representatives for the plaintiffs could not immediately be reached for comment Tuesday.

The plaintiffs are represented by Bell Legal Group LLC, Keller Postman LLC, Ward & Smith PA, the Dowling Firm PLLC and Lieff Cabraser Heimann & Bernstein LLP, among others.

The government is represented by Adam Bain and Haroon Anwar of the U.S. Department of Justice's Civil Division.

The case is Camp Lejeune Water Litigation v. U.S., case number 7:23-cv-00897, in the U.S. District Court for the Eastern District of North Carolina.

--Additional reporting by Travis Bland, Emily Field, Daniel Wilson, Matthew Santoni and Madeline Lyskawa. Editing by Linda Voorhis.

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Walgreens, Kenvue Unit Sued Over Benzene In Acne Products

By **Gina Kim**

Law360 (March 12, 2024, 7:55 PM EDT) -- Walgreens, Kenvue unit Johnson & Johnson Consumer Inc. and Genomma Lab face a trio of proposed consumer fraud class actions in California federal court by customers who alleged their acne treatment products contain unsafe levels of benzene, but that each of the companies failed to disclose its presence in their labeling.

On March 8, Wisner Baum LLP filed three separate suits on behalf of customers in California, Massachusetts and Nevada against the personal care product and pharmaceutical giants, alleging they marketed and sold acne treatment products made with benzoyl peroxide, including creams, soaps, face wash, scrubs and bars. The customers alleged that if any level of benzene is found in a product, it is rendered adulterated and, therefore, illegal to sell to the public.

Drugmakers must also alert the U.S. Food and Drug Administration about the presence or risk of any carcinogen like benzoyl peroxide in their products to issue voluntary recalls, the suits alleged.

"The [benzoyl peroxide] products marketed and sold by defendant decomposed into benzene rendering them materially different than advertised, i.e. by containing unsafe levels of benzene," the complaints alleged. "Benzene is a known human carcinogen. Studies dating to the 1800s have led to a consensus within the medical and scientific communities that benzene exposure, even in low amounts, increases the risk of blood cancers and other adverse effects."

Last year, an independent lab, Valisure LLC, tested a wide variety of products and discovered they contained dangerous levels of benzene, multiple times higher than what's allowed for any FDA-regulated product, the complaints alleged. Those results prompted Valisure to go to the FDA on March 5 to demand an immediate recall for the products, and that petition remains pending, the plaintiffs said.

The products tested by Valisure include brands such as Proactive, Target, Equate, Neutrogena, Clearasil, CVS, Walgreens, La Roche Posay and Clean & Clear, according to the complaints.

"Valisure found the BPO formulated products were not chemically stable and yielded benzene at levels well over 2 [parts per million], the maximum amount allowed in any U.S. regulated drug," the complaints alleged. "Some of the benzene levels were 800 times higher than 2 ppm reaching as high as 1700 ppm."

But Johnson & Johnson Consumer Inc., Walgreens and Genomma never disclose benzene in their products' ingredient lists, or anywhere else on the labels, containers, marketing materials or their websites, the shoppers claimed.

Nor do the companies warn customers their respective products are at risk for benzene contamination or degradation throughout the course of ordinary use, storage conditions, or exposure to heat when carried in backpacks, handbags, kept in lockers, or used in the shower, the complaints said.

Customers are also misled into thinking the products only contain the ingredients listed on their labels and are safe to use; furthermore, the companies have issued lengthy expiration dates of two to three years for the challenged products, the shoppers alleged.

Fresno County resident Chinyere Harris filed her suit against Genomma in the Eastern District of California on March 8, alleging she bought Asepxia Acne Spot Treatment Cream for Pimples and Blackheads, from July 2022 to November 2023.

That same day, Fresno County resident Grace Navarro and Massachusetts resident Chatham Mullins both sued Walgreens also in the Eastern District of California, taking issue with the pharmacy retailer's Maximum Strength Acne Foaming Wash and Daily Creamy Benzoyl Peroxide Acne Face Wash to treat pores, breakouts and blemishes.

They, too, claimed that Walgreens failed to disclose the risk of the presence or degradation of benzene in its products and that they were advertised as being safe to use.

Also on March 8, Los Angeles County resident Alan Montenegro and Carson County, Nevada resident Melissa Medina sued Johnson & Johnson Consumer Inc. in the Central District of California, challenging its acne treatment products sold under the Neutrogena and Clean & Clear brands.

Montenegro said he'd been using Neutrogena Rapid Clear Stubborn Acne Spot Gel from 2017 to 2021, while Medina alleged she's been using Clean & Clear Continuous Control Acne Cleanser from September 2020 to May 2023.

Medina and Montenegro both claimed Johnson & Johnson Consumer Inc. — which is behind other famous healthcare brands like Band-Aid, Neosporin, Tylenol, Motrin, Sudafed, Benadryl, Aveeno and Zyrtec — has held itself out as a company committed to safety and science, employing high standards for quality ingredients in their products, the manufacturing process, following government regulations, and conducting research.

"Defendant's broad claims of safety gave consumers a false sense of safety," Medina and Montenegro alleged. "Defendant's statements were meant to convey the BPO Products were safe and did not contain carcinogens such as benzene."

The customers all allege that the defendants have ignored regulators' call to test the products in 2022 and that none of their respective products have been recalled due to benzene contamination.

Each of the complaints asserts claims under California's Unfair Competition Law and Consumer Legal Remedies Act, false advertising law, and deceptive trade practices under the consumer protection statutes of several states, including California, Connecticut, Hawaii, Illinois, Missouri, Pennsylvania, Ohio, Rhode Island, Massachusetts, Nevada and Washington, breach of implied and express warranties, and unjust enrichment.

All three suits ask the Eastern District of California and Central District of California to certify their respective proposed classes, order the defendant companies to disgorge their profits, and pay punitive, statutory and compensatory damages as well as attorney fees.

Representatives for the plaintiffs and defendants did not immediately return inquiries seeking comment Tuesday.

Johnson & Johnson Consumer Inc. is a subsidiary of Kenvue and is no longer a part of Johnson & Johnson. Johnson & Johnson announced the spinoff of its consumer health brands in **November 2021**, and Kenvue raised roughly \$3.8 billion in an IPO in **May 2023**.

The plaintiffs are represented by R. Brent Wisner and Stephanie B. Sherman of Wisner Baum LLP.

Counsel information for Genomma, Walgreens and Johnson & Johnson Consumer Inc. was not immediately available.

The cases are Chinyere Harris v. Genomma Labs USA Inc., case number 1:24-at-00197, and Grace Navarro et al. v. Walgreens Boots Alliance Inc., case number 1:24-at-00198, both in the U.S. District Court for the Eastern District of California, and Alan Montenegro et al. v. Johnson & Johnson Consumer Inc., case number 2:24-cv-01895, in the U.S. District Court for the Central District of California.

--Editing by Jay Jackson Jr.

Clarification: The story has been updated to clarify that one of the defendants is Johnson & Johnson Consumer Inc.

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Quaker Hit With False Ad Suit Over Pesticide In Oat Products

By **Gina Kim**

Law360 (March 12, 2024, 10:36 PM EDT) -- The Quaker Oats Co. faces a proposed class action in Illinois federal court alleging it markets its oat-based foods as being safe, healthy and nutritious while touting its commitment to high quality standards, despite omitting the risk of a toxic chemical pesticide in its products.

In a 20-page **complaint** filed Monday, New York resident Daniel Tepper took issue with Quaker's oat-based products that he claims contain or are at risk of containing a pesticide known as chlormequat chloride, which functions as a growth retardant and is often used on grain crops to keep plants from bending. Quaker is owned by multinational food, snack and beverage giant PepsiCo Inc., the maker of other popular brands like Tostitos, Lay's, Doritos, Cheetos, Bubly and Gatorade.

Tepper's suit references the nonprofit Environmental Working Group's peer-reviewed study published in the Journal of Exposure & Environmental Epidemiology, which revealed that certain oat-based products, including ones made and distributed by Quaker, contain the pesticide.

Tested products include Quaker's Old Fashioned oats, maple and brown sugar-flavored Instant Oatmeal, honey nut-flavored Oatmeal Squares, brown sugar-flavored Oatmeal Squares, honey and almond granola oats, and Quaker's dark chocolate Chewy Granola Bars, the suit says.

The amount of chlormequat in the Quaker products ranges from 70 to 291 parts per billion, well over the Environmental Working Group's recommended threshold of 30 parts per billion, Tepper alleges.

"Disturbingly, though, according to EWG, 'the chemical is linked to reproductive and development problems in animal studies,' which suggest 'similar harm to humans,'" Monday's filing said. "As shown above, all of the products had levels higher than that benchmark."

Tepper claims "good manufacturing practices" don't require companies to use the pesticide when processing and packing these types of products. Furthermore, food products distributed by Quaker's competitors, Whole Foods and Kroger — which market and sell similar products under the 365 Whole Foods Market and Simple Truth brands, respectively — didn't contain detectable amounts of chlormequat, the suit alleges.

Tested products that didn't contain detectable amounts of the pesticide include 365 Whole Foods Market Organic Chocolate Chip Chewy Granola snack bars, 365 Whole Foods Market Organic French Vanilla Granola, 365 Whole Foods Market Organic Old Fashioned Rolled Oats, Simple Truth Organic Instant Oatmeal Maple & Brown Sugar, Simple Truth Organic Oats & Honey Granola Clusters, and even Quaker's own Instant Oatmeal Organic Maple & Brown Sugar, Tepper says.

"If such substances are contained in (or risk being contained in) the food sold by a manufacturer, reasonable consumers expect that this will be disclosed on the products' packaging so that they can have full and fair information to decide for themselves whether to consumer the product and at what amount, if any," the suit alleged.

Tepper says he bought Quaker Maple & Brown Sugar Instant Oatmeal and Quaker's brown sugar-flavored Oatmeal Squares without knowing of the possible presence of chlormequat.

He says he'll buy the products again if Quaker stops using the pesticide in its products or rectifies its

conduct by taking corrective measures in its labeling.

Tepper wants to represent a proposed class of those who bought the Quaker products at issue in California, Illinois, Michigan, New Jersey and Missouri, as well as a proposed subclass of New York customers who bought the products.

He asserts several causes of action against Quaker, including unjust enrichment and violations of multiple state consumer fraud and deceptive business practice statutes on behalf of the multistate class, or, in the alternative, violations of New York General Business Law Sections 349 and 350.

Tepper asks the court to certify the proposed classes, appoint him as class representative and his attorneys as class counsel, find Quaker to have engaged in illegal conduct, block it from further engaging in the alleged conduct, and to pay the consumers statutory and punitive damages along with attorney fees.

Nearly a decade ago, Quaker Oats faced a putative class action in California federal court claiming it advertises its oatmeal as 100% natural and eco-friendly when it allegedly includes a carcinogenic herbicide and weed killer, glyphosate. The case was terminated in August 2017, more than a year after it was transferred to the Northern District of Illinois.

In a similar, consolidated case challenging Quaker's use of "100% Natural" claims on its oatmeal despite it containing glyphosate, an Illinois federal judge granted Quaker's bid to dismiss the case, **finding** the consumers couldn't challenge the labeling under state law.

On Feb. 29, General Mills was hit with a similar putative class action in New York federal court that alleged the company's labeling of its Cheerios cereal is deceptive since it doesn't disclose that the products could contain dangerous levels of chlormequat.

A Quaker representative did not immediately respond to an inquiry on Tuesday.

Tepper is represented by Janine L. Pollack, David J. George, Lori G. Feldman and Brittany Sackrin of George Feldman McDonald PLLC and Rebecca A. Peterson of Lockridge Grindal Nauen PLLP.

Counsel information for Quaker was not immediately available.

The case is Daniel Tepper v. The Quaker Oats Co., case number 1:24-cv-02055, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Henrik Nilsson and Emily Field. Editing by Linda Voorhis.



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Geico Policyholders Lose Cert. Bid In Pandemic Premium Suit

By **Bonnie Eslinger**

Law360 (March 12, 2024, 10:55 PM EDT) -- An Illinois federal judge on Tuesday denied class certification in litigation claiming that Geico profited off the COVID-19 pandemic by charging excessive car insurance premiums, ruling that the policyholders who filed the lawsuit had not shown that their damages model could be calculated on a classwide basis.

In her ruling, U.S. District Judge Sharon Johnson Coleman noted the U.S. Supreme Court's 2013 **Comcast Corp. v. Behrend** decision, which held that class certification in that case was inappropriate due to the proposed plan for establishing damages.

"Plaintiffs do not have a damages model," Judge Coleman stated.

Like in Comcast, if there's not a reliable methodology for assessing classwide damages, individual calculations will overwhelm any common questions, the judge said.

Because of the damages calculation issue, the judge said she didn't need to analyze whether class treatment is the best method for resolving the dispute at issue in the case.

"Consequently, the court denies plaintiffs' motion for class certification," the judge said.

Policyholders Roxanne Thomas and James Thomas sued Geico in July 2020, alleging their insurer was charging too much at a time when fewer people were driving and filing claims as a result of state-mandated closures that began earlier that year. The company's actions, they said, ran afoul of the Illinois Consumer Fraud and Deceptive Business Practices Act.

The complaint also claimed that a giveback program Geico launched in April 2020, providing new and renewing customers with a 15% credit on their premiums, was inadequate to compensate for the amount policyholders paid during the COVID-19 shutdowns. In addition, it was wrong for Geico to have not provided retroactive relief for consumers who had paid for vehicle insurance since the start of the pandemic, the complaint asserted.

In their motion for class certification, the plaintiffs proposed a 300,000 person class of Illinois residents who purchased or renewed personal automobile, motorcycle or RV insurance from Geico covering any portion of the period from March 21, 2020, to present, as well as a smaller subclass of about 6,000 policyholders who had reviewed details on Geico's website about the giveback program, including the company's "What if I'm driving less?" or "Why are we doing this?" responses within the program's "Frequently Asked Questions" section.

In order to determine appropriate damages for drivers, the plaintiffs and their counsel sought to bring in an expert named Bernard "Birny" Birnbaum, whose testimony Geico moved to strike, the judge noted. Birnbaum is the director of the Center for Economic Justice in Texas.

However, in their written filings and oral arguments, the plaintiffs did not show that Birnbaum's report relies on a recognized methodology for determining the reasonable relief, the judge said.

"The court cannot simply rely on plaintiffs' assertions that Birnbaum says that his methodology is rooted in industry standards," the judge stated. "Plaintiffs must instead show how Birnbaum's methodology is supported by industry standards. They have not."

As a result, in her Tuesday ruling, the judge also granted Geico's motion to strike Birnbaum's expert testimony.

The **July 2020 suit** against Geico alleged that the insurer had been unfairly profiting off the pandemic, including by not applying the giveback program to premiums that customers have already paid or will continue to pay on policies existing pre-pandemic, according to the suit. Judge Coleman subsequently tossed the drivers' claims for frustration of purpose, unjust enrichment and breach of contract, but left intact the claims for unfair and deceptive conduct.

Two years later, in February 2023, the judge **denied Geico's motion** for judgment on the pleadings and then granted the insurer's request to **immediately appeal** the ruling.

The question for interlocutory appeal concerned the filed-rate doctrine, intended to prevent individuals from suing companies over any rates that are subject to approval by regulatory agencies.

The Seventh Circuit, however, denied Geico's petition, according to the court docket.

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

The plaintiffs and proposed class are represented by Matthew H. Morgan and Robert L. Schug of Nichols Kaster PLLP, Ryan F. Stephan, James B. Zouras and Teresa M. Becvar of Stephan Zouras LLP and David A. Neiman of Romanucci & Blandin LLC.

Geico is represented by Lisa T. Scruggs, Ronald M. Lepinskas and Damon N. Vocke of Duane Morris LLP.

The case is Thomas et al. v. Geico Casualty Co. et al., case number 1:20-cv-04306, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Jennifer Mandato, Lauraann Wood and Hailey Konnath. Editing by Michael Watanabe.



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Wells Fargo Shortchanges Its Fake-Account Victims, Suit Says

By **Sydney Price**

Law360 (March 12, 2024, 9:33 PM EDT) -- Wells Fargo has been hit with another proposed class action alleging that the bank engaged in a "deceptive campaign" by sending letters designed to give the appearance of correcting its practice of opening fake customer accounts and enrolling them in products without their consent, but offering no substantial reparations.

According to the complaint filed on Monday by plaintiff Winfred Thomas in California federal court, Wells Fargo sent letters to consumers informing them that the bank's records showed that they were improperly enrolled in at least one Wells Fargo product for a certain period of time. The suit alleges that while the letters instruct recipients to contact Wells Fargo for "care for any impact" caused by the unauthorized enrollment, the bank intentionally uses vague language to disincentivize consumers from following up, and offers very little compensation when they do.

Wells Fargo has faced several regulatory actions for the cross-selling pressure it placed on employees, leading them to open millions of unauthorized "fake" accounts for consumers between 2002 and 2016.

In his suit, Thomas said he received four letters from Wells Fargo stating that he had been enrolled in certain financial products in 2008. After contacting the bank about the letters, it offered him "pennies on the dollar" in compensation, he claims.

Thomas said that according to posts on websites like Reddit and X, the social media site formerly known as Twitter, several other consumers have had similar experiences.

The suit alleges that the letters looked like "phishing scams or junk mail," leading many recipients to ignore them. Those that did respond were offered unfairly low compensation for unauthorized charges they were issued, the suit claims.

"Wells Fargo relies on other additional procedural and administrative burdens to avoid, reduce and delay its ultimate liability and sweep under the rug its long-standing, intentional misconduct," the suit states.

In the letters, Wells Fargo said consumers had 60 days to contact the bank with their claims, according to the suit. Thomas calls the deadline "arbitrary."

"Wells Fargo waived, forfeited and abandoned statutes of limitations that may be argued to apply to plaintiff's and class members' claims through its actions in writing the letters and attempting to 'care for any impact this enrollment may have caused' to plaintiff and class members due to Wells Fargo's unlawful actions that give rise to this lawsuit," the suit states.

A representative of Wells Fargo told Law360 in an email on Tuesday that Wells Fargo has recently revamped its "structure, processes, controls and culture."

"As we work through legacy issues, the company conducted a review of add-on products offered to customers six or more years ago," the spokesperson said. "If any issues were identified, we are making things right with customers."

The suit accuses Wells Fargo of violating the Fair Credit Reporting Act and of unjust enrichment,

conversion and intrusion upon seclusion. Additionally, the suit proposes a Georgia subclass accusing the bank of violating the state's Fair Business Practices Act.

Wells Fargo is facing **another suit** in California federal court over similar claims related to the letters.

Thomas is represented by Timothy G. Blood and Paula R. Brown of Blood Hurst & O'Reardon LLP, James M. Evangelista of Evangelista Worley LLC and Jennifer S. Czeisler and Edward W. Ciolko of Sterlington PLLC.

Counsel information for Wells Fargo was not immediately available on Tuesday.

The case is Thomas v. Wells Fargo & Co. et al., case number 3:24-cv-01496, in the U.S. District Court for the Northern District of California.

--Editing by Rich Mills.

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