

Another Defendant Says Motley Rice Should Be Disqualified From Opioid Cases

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NEWS

Another Defendant Says Motley Rice Should Be Disqualified From Opioid Litigation

Express Scripts Inc., a pharmacy benefit manager facing upcoming bellwether trials over the opioid crisis, filed a March 13 brief referencing a subpoena that Motley Rice member Linda Singer sent to the company on behalf of the city of Chicago.

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Legal Ethics and Attorney Discipline

Amanda Bronstad 
staff reporter

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What You Need to Know

- On Dec. 15, another pharmacy benefit manager, OptumRx, owned by United HealthCare, filed its disqualification motion, insisting that Motley Rice used its subpoena power in prior government cases to obtain confidential information, which it could use in the opioid cases against the pharmacy benefit managers.
- In a Friday response, Motley Rice member Joe Rice and two other lawyers on the plaintiffs' executive committee in the opioid multidistrict litigation called the latest allegations 'meritless.'
- Motley Rice member Linda Singer, previously at Cohen Milstein Sellers & Toll, represented the city of Chicago, the state of Hawaii and the District of Columbia.

A second defendant has joined in the effort to disqualify Motley Rice from dozens of opioid cases, citing "newly discovered evidence."

Express Scripts Inc., a pharmacy benefit manager facing upcoming bellwether trials over the opioid crisis, filed a March 13 brief referencing a subpoena that Motley Rice member Linda Singer, then at Cohen Milstein Sellers & Toll, sent to the company on behalf of the city of Chicago.

The 2013 subpoena from Singer, identified as “special assistant corporation counsel,” asked for “documents and information in connection with a confidential, civil investigation into false claims that may have been submitted as a result of certain practices in deceptively marking opioids,” according to an attached exhibit of the document.

“This newly discovered evidence supports disqualification of Motley Rice for the reasons stated in OptumRx’s disqualification motion and supporting briefs,” Express Scripts attorney Jonathan Cooper, of Quinn Emanuel Urquhart & Sullivan, in Washington, D.C., wrote.

On Dec. 15, another pharmacy benefit manager, OptumRx, owned by United HealthCare, filed its disqualification motion, insisting that Motley Rice used its subpoena power in prior government cases to obtain confidential information, which it could use in the opioid cases against the pharmacy benefit managers.

Express Scripts previously refused to join in the disqualification motion. But with the subpoena, uncovered as part of discovery earlier this week, Express Scripts said it would join in the disqualification request.

In a Friday response, Motley Rice member Joe Rice, in Mount Pleasant, South Carolina, and two other lawyers on the plaintiffs’ executive committee in the opioid multidistrict litigation, Jayne Conroy, of New York’s Simmons Hanly Conroy, and Paul Farrell, of Farrell and Fuller in San Juan, Puerto Rico, called the latest allegations “meritless.”

“It’s ‘newly discovered evidence’—a subpoena served more than 10 years ago—was served on behalf of an MDL plaintiff for purposes of the opioid litigation that spawned this MDL,” they wrote. “Nothing about this subpoena supports OptumRx’s flawed motion to disqualify.”

The court filings are the latest chapter in an ongoing dispute over whether to disqualify Motley Rice, which OptumRx has insisted obtained confidential information while representing the city of Chicago, the state of Hawaii and the District of Columbia. Motley Rice sued OptumRx and Express Scripts on behalf of cities and counties over the opioid crisis.

U.S. District Judge Dan Polster, who is overseeing the opioid multidistrict litigation in the Northern District of Ohio, has lined up four bellwether trials against OptumRx and Express Scripts. The plaintiffs in those cases are Rochester, New York; Lincoln County, Missouri; Independence, Missouri; and Webb County, Texas.

The push for disqualification comes amid a discovery fight about whether OptumRx must turn over documents related to opioids.

OptumRx's motion says Motley Rice has violated both the American Bar Association's Rules of Professional Conduct and the Ohio Rule of Professional Conduct 1.11(c), which prohibits a lawyer with confidential government information about a person from representing a private client "whose interests are adverse to that person."



Linda Singer, Motley Rice member in Washington D.C. (Credit: Diego M. Radzinski/ALM)

But Motley Rice has insisted a Feb. 28 formal opinion on the ABA's model rule clarified that the cities and counties it represents in opioid cases are public entities, not "private clients" subject to conflicts.

At a hearing last month, Singer insisted that Motley Rice never shared the confidential information with other clients and, in the case of Hawaii, the lawsuit wasn't even about opioids. In court papers, the plaintiffs' executive committee also cited a 2015 decision by U.S. District Judge Jorge Alonso of the Northern District of Illinois that refused to disqualify Singer from representing the city of Chicago in its opioid case based on her firm's alleged "police powers."

But Polster, at the hearing, questioned Singer about her responsibilities as outside counsel in the prior government cases.

In an attached declaration to Express Scripts' brief, Quinn Emanuel's Sage Vanden Heuvel, of counsel in the Los Angeles office, said Chicago's subpoena sought confidential materials including contracts with drug manufacturer Purdue Pharma and an internal committee's minutes relating to prescription opioids.

On Thursday, Brian Boone, an Alston & Bird partner in Charlotte, North Carolina, added seven attorneys to OptumRx's legal team. These attorneys include Atlanta partner Andrew Hatchett and two other Charlotte partners who specialize in government investigations: Emily McGowan and Michael Hoernlein, who is also is a certified fraud examiner.

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Altria Settles Juul Marketing-to-Minors Claims for \$45.5 Million

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Class Action

- Altria agreement after Juul settled for \$255 Million in 2023
- Plaintiffs said Altria downplayed addictiveness, risks

Altria Group Inc. won final approval for a \$45.5 million deal settling claims that it deceptively marketed Juul e-cigarette products to minors who hadn't previously smoked by downplaying risks.

The US District Court for the Northern District of California granted final approval of the settlement Thursday. The court didn't designate attorneys' fees in its approval order.

The Altria settlement follows a Juul Labs Inc. settlement for \$255 million to resolve claims in more than 1,800 youth vaping suits that had been consolidated in a multidistrict litigation. That agreement won final approval in September 2023, and the court previously authorized up to \$6 million to cover settlement administration for both agreements, it said.

The settlements apply to consumers who purchased Juul products before Dec. 6, 2022. Judge William H. Orrick, who oversaw the litigation, said there were an estimated 2 million valid claims.

The multidistrict litigation was the result of hundreds of suits filed by individuals, school districts, and multiple other levels of governments. The suits alleged Juul and Altria conspired to improperly market vaping products to teenagers.

Altria acquired just over a one-third stake in Juul in 2018 for \$12.8 billion. It later swapped its heavily devalued \$250 million stake for intellectual property rights for some of Juul's heated tobacco products.

Juul also agreed in 2023 to pay \$462 million to six states over its marketing to children. It agreed to pay another \$439 million to 33 states over similar claims in 2022.

Though the founders of Juul claim their products were meant to help adult smokers quit, their products have been blamed for a youth vaping crisis. The food and drug administration banned Juul's products from the market in 2022, though other e-cigarette products have flourished since then.

Altria was represented by Wilkinson Stekloff LLP, Elliot Greenleaf PC, and Arnold & Porter Kaye Scholer LLP.

The case is *In re Juul Labs Inc., Marketing, Sales Practices, and Prods. Liab. Litig.* , N.D. Cal., No. 3:19-md-02913, 3/14/24 .

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Judge grants final approval to \$300 million class action settlement with vaping giant Juul

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Hillel Aron

Altria, which owns 35% of Juul, agreed to pay a class of plaintiffs \$45 million, on top of the \$255 million Juul Labs agreed to pay earlier this year.



A Juul electronic cigarette starter kit is seen at a smoke shop on Dec. 20, 2018, in New York. (AP Photo/Seth Wenig, File)

(CN) — A federal judge approved the final part of a class action settlement with the e-cigarette company Juul Labs and its parent company Altria, bringing the settlement total to just over \$300 million.

Filed in 2018, the plaintiffs charged Juul with misleading the public about the addictiveness and the risk of their e-cigarettes and nicotine cartridges — claiming, for example, that its pre-filled pods contained the same amount nicotine as a pack of cigarettes, when the pods actually contained significantly higher levels.

The plaintiffs also said Juul had targeted teenagers with candy-flavored Juul pods and "multimillion-dollar ad campaigns and social media blitzes using alluring imagery."

The case survived a number of hurdles: The judge denied multiple motions to dismiss the suit and agreed to certify four different classes of plaintiffs (a nationwide class, a nationwide youth class, a California class and a California youth class).

Juul and Altria, which owns 35% of e-cigarette maker, appealed the class certification; the appeal was still pending when both sides reached settlements.

In January, the judge gave preliminary approval to a \$255 million settlement between Juul Labs and the plaintiffs. Friday's ruling grants approval to Altria's payment of \$45,531,250. The sides have yet to reach an agreement on attorneys fees.

"Court finds that this monetary recovery is fair, reasonable, and adequate given the risks of proceeding to trial and the maximum recovery potentially available to Settlement Class Members if the Class Representatives had prevailed at trial," wrote U.S. District Judge

William Orrick in his order.

Last year, Juul agreed to pay six states \$462 million to settle claims that it had marketed its vaping products to teenagers. The year before that, it agreed to pay \$438.5 million to 33 different states and Puerto Rico.

Founded in 2015, Juul in just three short years became the dominant e-cigarette in the United States, with a market share of 72% by the fall of 2018. But by then, the backlash against vaping, and against flavored nicotine cartridges in particular, had already begun. During the next four years Juul agreed to pull many flavors from shelves and to limit its youth marketing campaigns. By the fall of 2022 its market share was down to 28%.

Also in 2022, the Food and Drug Administration denied authorization for Juul to continue selling its products — effectively a ban, although the order was put on hold by the D.C. Court of Appeals.

According to Orrick's order, 197 people have submitted requests to be excluded from the settlement class. As of last month, more than 14 million claims had been submitted, although many of those are believed to be duplicates as well as fraudulent.

"A substantial number of claims have one or more indicia of fraud," the judge wrote, "so the total number of valid claims will likely be significantly further reduced, with current estimates putting the number of valid claims around 2 million."

The settlement money will be divided not equally, but according to how much money the claimants spent on Juul products in the United States before December 6, 2022. Undocumented claims will be capped at \$300; those seeking more than \$300 will have to show receipts.

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BEST PRACTICES

What the Judges Had to Say at the Class Action Law Forum

A handful of the juiciest nuggets jurists let fly during the three-day conference at the University of San Diego School of Law last week.

March 18, 2024 at 07:30 AM



Ross Todd
Editor/columnist



We've already brought you [a couple of dispatches](#) from last week's Western Alliance Bank Class Action Law Forum. But since The Litigation Daily was lucky enough to score a virtual press pass and sit in on a handful of the insightful panels at the University of San Diego School of Law, we thought we'd dip back into the proceedings one more time.

With all due respect to the lawyers who spoke, it was the judges who most often caught our ears. It turns out that when you get a federal judge out of the courtroom and talking about topics tangential to their busy dockets, they tend to speak their minds.

The Use—and Abuse—Cases for AI

During the panel [featuring chief judges](#) from across California, Chief U.S. District **Judge Dana Sabraw** of the San Diego-based Southern District briefly quizzed Chief **District Richard Seeborg** of the San Francisco-based Northern District about a case being heard in his courthouse. In that case, lawyers asking Senior U.S. District **Judge William Orrick III** to approve a \$45.5 million consumer class action settlement involving e-cigarettes [told the judge](#) earlier this month they received more than 14 million claims, five times what they expected. Lawyers estimated about 80% of those claims—many allegedly fueled by AI and related technologies—were likely invalid or fraudulent.

Although Seeborg's chambers aren't far from Orrick's, he said he didn't know the details of his colleague's case. "I don't think we know enough about how that's operating yet, but it is certainly a cause for concern that AI can be utilized for these nefarious purposes," he said.

As to the wider use of AI in the law, Seeborg said opinions differ among the Northern District judges. Personally, he said he has no problem with lawyers using generative AI for research and drafting, so long as they do so responsibly. "As long as there's quality control ... somebody is checking to make sure the cites are correct and the like," Seeborg said. "I'm not giving a Pulitzer Prize. I want a brief that is helpful to me." But Seeborg said that he knows some of his other colleagues are "very offended" by the idea that lawyers would be submitting briefs that AI helped draft.

Southern District Chief Sabraw pointed out the Ninth Circuit Judicial Council has an ad hoc committee on artificial intelligence being led by Circuit **Judge Eric Miller**. Sabraw said Magistrate **Judge Allison Goddard** from his court is part of the committee and is serving as something of a local expert on the subject. “For our district, we’re holding off on any local rules,” Sabraw said. “We’re trying to let this AI develop, see what it looks like, and then decide whether we want to control it somehow.”

‘Transparency and Accountability’ in Privacy Cases

U.S. District **Judge Yvonne Gonzalez Rogers** of the Northern District, who has tried four class action cases in her Oakland courtroom during her decade-plus on the federal bench, was the lone jurist on a panel focusing on privacy class actions. She said that Northern District judges are seeing such a high volume of cases dealing with the Video Privacy Protection Act that they’ve created a repository of their decisions to make it easier to address them.

She said when she approaches these cases what she tends to worry about is “the next 10 years.”

“What precedents are we setting today that are going to impact our decisions later, in terms of how data is being used, collected, manipulated—without anybody knowing it?” she said. “I’m a big believer in transparency and accountability and a lot of what’s going on, we just don’t understand and we don’t know.”

An MDL Case Management Fast Break

Gonzalez Rogers, who has also managed four pieces of multidistrict litigation since 2011, said that from a case management point of view, it’s important to keep in mind that MDL judges are busy, even before the mega-cases hit their dockets. She’s currently overseeing the MDL targeting social media companies for personal injuries to adolescents which involves cases brought by 36 attorneys states’ attorneys general, 300 school district cases, and more than 400 individual cases.

“You have to remember we’re busy and because we’re busy we’re always looking for ways to be efficient,” she said.

Gonzalez Rogers said that lawyers often come in on the defense side raising potential due process issues and promises that they have the “golden bullet” to knock out the whole MDL early. To that, she rolled her eyes.

“What we do is we try to have you outline everything that it is that you want to do,” she said. “Then we take a look and we figure out ‘Okay, what is the most likely [way] we get the most bang for the buck?’ And then we start phasing.”

She said getting these cases to run efficiently is like basketball. “It looks easy when you do it right,” she said. “But it’s hard.”

‘Don’t Engage In a Lot of B.S.’

Let’s stick with Gonzalez Rogers for one more nugget on oral argument.

“Don’t engage in a lot of B.S. Just don’t do it,” she said.

In particular, the judge said that it’s important for lawyers who come before her to be willing to concede on some points. “We will ask you questions knowing that you should [concede],” she said. If you don’t, she said, that means that you’re likely a person she can’t trust. “If I have oral argument, it’s because I have questions,” she said. “You can either answer my questions and try to engage or you’ve lost your opportunity.” If you don’t engage, she said, she’s just going to go back to her chambers to have those philosophical and legal arguments with her law clerks. “You wanted to focus on what was in your brief and you wanted to dig in, so you lost your chance,” she said.

AI’s Application to Mass Torts

Senior U.S. District **Judge Roger Benitez** spoke Thursday as part of a panel focusing on the ethical implications of using artificial intelligence in the law. “I want to make sure that whenever a lawyer files something in my court, that they have in fact looked, read and understand what it is that they’re filing,” he said. “Because if they have not looked, read and understood what they’re filing, they’re not going to be able to explain it to me.” Benitez says he sees the potential for that problem to compound moving forward.

But the judge said that he could see positive applications for AI, particularly in the mass torts MDLs where lawyers often file fact sheets on behalf of individual plaintiffs. “We want to weed out those cases that are not really meritorious,” the judge said. He said plugging fact sheets into AI tools could allow judges to group cases into subgroups of those that appear not to be meritorious, those that might be, and those that definitely appear to be. He said such tools could look at things like the dosage of a particular patient in drug cases or the alleged injury to further refine results and help judges and the parties weigh what’s on the docket.

Naughty or Knotty?

Here’s one last anecdote from Benitez that he said illustrates the value of keeping a human in the loop in AI-related issues. Benitez discussed a transcript that was produced after a Zoom hearing he presided over. The judge said he was discussing an issue in a case that he considered something of a Gordian Knot. He referred to it as a “knotty” issue.

How did the automatically-generated transcript capture it?

A “naughty” issue.

Said Benitez: “Had we not had someone who actually reviewed it and put the human in the loop, who knows what might have happened when it got to the court of appeals?”

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Didi Must Face Class Suit Over China Compliance Issues in IPO

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Didi Global Inc., its directors, and underwriters must face allegations they concealed compliance issues and drew scrutiny from Chinese regulators following the ride-hailing company's 2021 US market debut, US District Court for the Southern District of New York has ruled.

Judge Lewis A. Kaplan rejected Didi's argument the case should be tossed for failure to state a claim, finding that investors sufficiently allege the company's management was aware that regulatory sanctions were likely if the company went forward with its initial public offering, flouting directives from the Cyberspace Administration of China.

The plaintiffs, who are holders of Didi's American Depositary Shares, also adequately allege that Didi failed to disclose the CAC's specific warning against going forward with the IPO, Kaplan said in his order finding that the fraud allegations satisfy the pleading standard.

The consolidated complaint also plausibly alleges that Chairman and CEO Will Wei Cheng, President Jean Qing Liu and other directors were motivated to hold Didi's IPO despite the regulatory risks, given the benefit they could have gained from listing the company on a US exchange at a moment when the Chinese government was cracking down on technology companies, Kaplan ruled.

Didi had argued that the profits from the IPO were "short-lived," citing the losses that defendants suffered as a result of the listing and subsequent delisting of the company.

Just a few days after its \$14-per-share US market debut, the Chinese regulator announced it was prohibiting the company from registering any new customers and subjected it to a cybersecurity review, later announcing prohibitions on Didi's primary app, Didi Travel.

By July 23, the company's ADS price had fallen more than 40% from its IPO price, closing at \$8.06 per share. Didi announced a plan to delist from the New York Stock Exchange in December 2021 and ultimately left the exchange in June 2022.

Underwriters' Argument

The judge also rejected underwriters' argument that they lacked liability for misstatements or omissions in Didi's registration statement, since that statement contained an underwriting agreement that included alleged misrepresentations, according to the March 14 opinion.

The IPO underwriters included Goldman Sachs Asia LLC, Morgan Stanley & Co. LLC, JPMorgan Securities LLC, Barclays Capital Inc., and Citigroup Global Markets Inc., each of whom were named as defendants.

Individual investor Cao Junhong, who alleged more than \$3.6 million in personal losses, was appointed lead plaintiff in October 2021 and seeks to establish a class with thousands of investors who acquired Didi ADS between June 30 and July 21, 2021.

The Rosen Law Firm PA is lead counsel and Glancy Prongay & Murray LLP serves as additional counsel for plaintiffs and the proposed class.

Skadden, Arps, Slate, Meagher & Flom LLP and Quinn Emanuel Urquhart & Sullivan LLP represent Didi. O'Melveny & Myers LLP represent the underwriter defendants.

The case is In re Didi Glob. Inc. Sec. Litig. , S.D.N.Y., No. 21-cv-05807, 3/14/24 .

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March 15, 2024, 2:21 PM PDT

B. Riley Allegedly Hid Ex-Franchise Group CEO's Suspected Fraud

By Ben Miller

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [2:24-cv-02121](#)

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B. Riley Allegedly Hid Ex-Franchise Group CEO's Suspected Fraud

By Ben Miller 2024-03-15T17:21:58000-04:00

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [2:24-cv-02121](#)

B. Riley Financial Inc. and its top executives failed to tell investors that they knew, or were “recklessly unaware” of, Franchise Group Inc. ex-CEO Brian Kahn’s allegedly illicit business activities before helping him lead a management buyout of the company, according to a proposed shareholder class action.

The \$2.8 billion take-private deal, which closed in August, was largely financed by B. Riley without disclosing Kahn’s alleged role in a conspiracy to defraud investors of \$294 million, which drew regulatory scrutiny for the company and prompted stock declines, according to the complaint filed Friday in US District Court for the Central District of California.

Franchise Group owns brands including Vitamin Shoppe and Sylvan Learning. B. Riley plans to sell the tutoring company early this year and had garnered interest from around 50 potential buyers as of December.

Kahn was implicated, but not charged in a \$294 million fraud scheme orchestrated by John Hughes, president of Prophecy Asset Management. The Justice Department and Securities and Exchange Commission each brought enforcement actions related to that fraud in November 2023.

Hughes pleaded guilty to conspiracy to commit securities fraud in November, while Kahn has denied wrongdoing.

[READ MORE: B. Riley Posts Loss, Cuts Payout Amid Review of Kahn's Role \(1\)](#)

The day after regulators announced their enforcement actions, short seller The Friendly Bear mentioned B. Riley's potential knowledge of Kahn's involvement in the scheme in a social media post, commenting that the DOJ's charging document clearly implicated him in Hughes' crime and speculating that he was likely to be indicted, the complaint says.

B. Riley's stock price fell more than 21% the next trading day to close at \$30.37 on Nov. 6, the stock's biggest single-day drop in nearly a decade, according to data compiled by Bloomberg.



KL Kamholz Joint Revocable Trust, which filed the proposed class action, highlights another Friendly Bear report on Nov. 9 that alleged after the company disclosed details about the FRG transaction that the company engaged in "funny business to avoid consolidation" and gave Kahn control.

The next day, B. Riley's stock price fell more than 14% to close at \$25.89 on Nov. 10, and declined another 14% over the next trading session to close at \$20.54 on Nov. 13, according to Bloomberg data.

The Kamholz trust seeks to recover damages for a class of investors who acquired B. Riley securities between Feb. 28, 2022 and Nov. 9, 2023, alleging that the company and its top executives violated the Securities Exchange Act. The trust plaintiff also seeks legal fees.

B. Riley didn't immediately respond to a request for comment.

Pomerantz LLP and Wohl & Fruchter LLP represent the plaintiff and the proposed class.

The case is KL Kamholz Joint Revocable Trust v. B. Riley Financial, Inc. , C.D. Cal., No. 2:24-cv-02121, complaint filed 3/15/24 .

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B. Riley Fails to File Audited Results as Grace Period Ends (2)

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March 15, 2024, 3:08 PM PDT

Sally Bakewell

Bloomberg News

B. Riley Financial Inc., the boutique investment bank under attack from short sellers about its dealings with a former business partner, failed to file its audited results after an extension period ended.

The company said it continues to work with its auditors as it seeks to complete and file its annual report “as soon as reasonably practicable,” it said in a statement.

Shares in the bank were down about 6% as of 5:30 p.m. in New York, after falling about 16% year to date.

A representative for the bank declined to comment beyond the statement.

The delay has added to pressure on B. Riley, whose stock has been battered by concerns about its relationship with Brian Kahn, the founder of Franchise Group Inc. B. Riley helped Kahn arrange a buyout of Franchise Group, lent money to Kahn and used some of his assets to help back a loan that B. Riley obtained from Nomura Holdings Inc.

B. Riley missed the initial deadline for filing its annual report and attributed the delay in a Feb. 29 disclosure to the board’s review of the firm’s transactions with Kahn. He was labeled as an unidentified co-conspirator in a US Department of Justice criminal case prompted by the 2020 collapse of the Prophecy Asset Management hedge fund, Bloomberg News previously reported.

Kahn has categorically denied any wrongdoing and said he was among those who lost money when Prophecy collapsed. Riley has said it had no knowledge of what happened at Prophecy and wasn’t involved with the hedge fund.

The US Securities and Exchange Commission gives companies a customary 15-day extension to file overdue reports. B. Riley missed last year's initial deadline too, citing recent acquisitions, but was able to finish the job within the grace period. The firm said in its Feb. 29 filing that it didn't expect significant changes to the financial results it had posted for the fourth quarter and full-year of 2023.

Read More: B. Riley Faces Investors After Deals, Profits and Stock Go Sour

B. Riley, founded by Chief Executive Officer **Bryant Riley**, traces its roots to 1997 as a boutique stock-picking firm focused on smaller companies. It now offers a birth-to-death business model for smaller publicly traded clients, including stock and bond offerings.

(Updates with company response in fourth paragraph.)

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EV Maker Mullen Allegedly Had Merger Approved in 'Tainted' Vote

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- **COURT:** D.N.J.
- **TRACK DOCKET:** No. 2:24-cv-02908

A merger between Mullen Automotive Inc.'s predecessor and a payment technology platform should be unraveled because the companies' board members solicited the August 2021 vote with misleading public statements, a Mullen shareholder says in a new derivative suit.

An accompanying vote to divest the operations of the payment company, Net Element Inc., from the electric vehicle maker was also unsound, Marius Martis says in his complaint, filed Thursday in the US District Court for the District of New Jersey.

"Net's extremely valuable payment processing operations were divested for inadequate consideration," says Martis, who held Net stock before the merger and now owns a stake in Mullen.

Those soliciting the votes touted Mullen's predecessor, Mullen Technologies, Inc., as having partnerships, production timelines, and battery technology that it actually lacked, Martis says. Almost three years after the merger, Mullen "has not manufactured or sold any vehicles," Martis says.

EV companies have faced considerable difficulties lately. Some, including several formed through special purpose acquisition companies, such as Electric Last Mile Solutions Inc., Lordstown Motor Corp., and Lightning eMotors Inc., are the targets of shareholder lawsuits. Some of the suits have settled. A suit against Rivian Automotive Inc. and its initial public offering underwriters is proceeding on claims the company made misleading statements about its supply chain and underpriced its vehicles.

Mullen was sued in June 2022 by shareholders over an allegedly "outsized" CEO award.

Martis brings claims of proxy misstatements, securities fraud, breach of fiduciary duty, and rescission under Section 29(b) of the Securities Exchange Act. He seeks damages, an order invalidating the merger and divestiture vote proxy statement, and rescission.

Mullen didn't immediately respond to a request for comment on behalf of itself or the individual defendants that was sent through its web portal.

Squitieri & Fearon LLP and Moore Law PLLC represent Martis.

The case is Martis v. Michery , D.N.J., No. 2:24-cv-02908, complaint 3/14/24 .

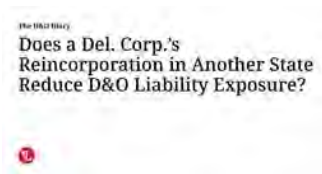
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Does a Del. Corp.'s Reincorporation in Another State Reduce D&O Liability Exposure?

K dandodiary.com/2024/03/articles/director-and-officer-liability/does-a-del-corp-s-reincorporation-in-another-state-reduce-do-liability-exposure

March 17, 2024



By Kevin LaCroix on March 17, 2024
Posted in Director and Officer Liability



It is an idea that suddenly is all the rage – that companies should shake the Delaware dust off their feet and reincorporate elsewhere. Elon Musk has famously said, in the wake of the Delaware Chancery Court's decision voiding his \$55.8 billion pay package, that he will seek to reincorporate Tesla in

Texas. (SpaceX, also a Musk company, has in fact already reincorporated in Texas.) The former Attorney General William Barr and another GOP official published a *Wall Street Journal* column arguing that Delaware's courts are driving corporations away (as discussed here), and suggesting that companies increasingly will find it more attractive to be incorporated in Nevada or another state. Some companies have indeed left Delaware and reincorporated elsewhere – including not just SpaceX, but also TripAdvisor, for example. Why would a company change its state of incorporation from Delaware to another state? And with reference to the focus of this blog, does a company's redomestication from Delaware to another state have implications for the potential liability exposures of the company's directors and officers?

Let's start with the most important question. What are the reasons why a company might want to incorporate in another state rather than Delaware? In an interesting March 11, 2024, post on the *California Corporate & Securities Law* blog entitled "Reason to Quit Delaware Are Getting' Bigger Each Day", (here) Keith Paul Bishop of the Allen Matkins law firm examines this question. Specifically, Bishop summarizes the specific reasons in the proxy statement given by the consumer products company Laird Superfood, in connection with its move its state of incorporation from Delaware to Nevada.

For starters, as the company explains in its proxy statement, in 2023, the company paid about \$200,000 in Delaware Franchise Taxes; it expects to pay only \$700 in annual fees to Nevada.

Second, the company specifically identified “potentially greater protection from unmeritorious litigation for directors and officers of the Company” as one of the important reasons for its redomestication. As Bishop notes in his blog post, “Nevada does not set the liability bar high.”

This is what the company said in its proxy statement, in reference to Nevada Revised Statute 78.138(3), with respect to Nevada law concerning the liabilities of directors and officers:

Nevada law permits a broader exclusion of individual liability of both officers and directors to a company and its stockholders, providing for an exclusion of any damages as a result of any act or failure to act in his or her capacity as a director or officer unless the presumption that the director or officer acted in good faith, on an informed basis and with a view to the interests of the company, has been rebutted, and it is proven that the director’s or officer’s act or failure to act constituted a breach of his or her fiduciary duties as a director or officer, and such breach involved intentional misconduct, fraud or a knowing violation of law.

Nevada law, the company said in its proxy statement, “provides greater protection to our directors, officers, and the Company than Delaware law.” The company goes on to say, with respect to the risk of litigation in Delaware that “The increasing frequency of claims and litigation directed towards directors and officers has greatly expanded the risks facing directors and officers of public companies in exercising their duties. The amount of time and money required to respond to these claims and to defend these types of litigation matters can be substantial.”

Nevada law, as the proxy statement notes and as Bishop emphasizes in his blog post, “takes a statute-focused approach that does not depend upon judicial interpretation, supplementation and revision.” Bishop gripes that “you can read Delaware General Corporation Law cover to cover and still know very little about Delaware corporate law.” Most of the important Delaware corporate doctrines are the by-product of case law. While Delaware’s judge made law does “evidence a high degree of legal sophistication,” Bishop notes, it also “imposes significant costs on corporations due to the inherent uncertainty,” and “encourages litigants to test new theories of liability.”

Nevada statutorily rejects Delaware and other state precedent; its statutes provide: “The plain meaning of the laws enacted in the Legislature in this title, including without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation ... must not be supplanted or modified by laws or judicial decisions from any other jurisdiction” and adds further that “judicial decisions or practices of another jurisdiction does not constitute or indicate a breach of fiduciary duty.”

I don't know for sure that the liability exposures of corporate directors and officers under Nevada law are categorically lower than in Delaware; as far as I know, there is not enough of a track record of D&O liability actions in Nevada courts, by contrast to the many decades of experience under Delaware law.

However, the idea that under the laws of Nevada, the directors and officers face a reduced liability risk exposure than they would under the laws of Delaware was one of the important reasons for Laird Superfood in its decision to redomesticate in Nevada. The company's move to change its state of incorporation show that this company at least believes the liability exposure is less in Nevada.

Over the last several weeks, I have received several inquiries asking whether D&O insurers price differently for Delaware corporations rather than they do for companies incorporated in other states. Although I have not been asked this question, it might also be asked whether Nevada companies should be priced at a discount relative to Delaware companies.

It is my perception that D&O insurers are not making price adjustments based on a company's state of incorporation. Moreover, in a competitive marketplace, characterized by ample insurance capacity and falling prices, insurers have little power to make subtle pricing adjustment on bases other than the broadest risk selection factors – e.g., industry, company size, and financial condition. So – when asked, I have told inquirers that I don't think insurers are adding a Delaware pricing load, or for that matter, applying a Nevada discount.

But just because insurers may not now be adjusting pricing based on a company's state of incorporation, that does not mean that it isn't something they *should* be doing. If you review the logic Laird Superfood followed to warrant the company's redomestication in Nevada, you certainly do have to ask yourself whether D&O insurers maybe *should* be offering Nevada companies a discount.

Of course, it would be hard to know how much of a discount to apply, especially in light of the relatively light track record around issues of liability for directors and officers of Nevada companies. And, as I noted, in a marketplace already characterized by falling prices, insurers may feel they don't have room for even further discounts. That said, it is at least something worth thinking about.

There is one other reason why D&O insurers might want to weight their company portfolio away from Delaware companies and in favor of companies incorporated in other states, and that is that the insurers with a portfolio weighted toward companies from other states would be less likely to have to litigate coverage issues in Delaware's courts. Delaware's courts, and its Superior Court in particular, have a well-earned reputation of a bias in favor of policyholders and against insurers. To be sure, the insurers could avoid Delaware's courts by adding a forum selection clause (and, belt and suspenders, a choice of law clause), but for

whatever reason, the marketplace seems resistant to making these kinds of policy changes. Just avoiding Delaware corporations altogether could accomplish the same thing without having to modify the policy form.

So – here's my question for the audience: Should D&O insurers be taking state of incorporation into account as part of the risk selection and pricing process? A great topic for further discussion. Maybe a topic for a panel at the next PLUS D&O Symposium.

Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/03/representing-elon-musk.html

Monday, March 18, 2024

Representing Elon Musk

By joanheminway

Sometimes, the scholarly enterprise offers one the opportunity to deeply learn while sharing embedded knowledge. I never thought that my 2022 Southeastern Association of Law Schools discussion group on Elon Musk and the Law would turn into such a rich learning experience. But it did.

In organizing the group, I knew folks would focus on all things Twitter (especially as the year proceeded). But because of the kind offer of the *Stetson Law Review* to host a symposium featuring the work of the group and publish the proceedings, I was able to dig in a bit deeper in my work, which focused on visioning what it would be like to represent Elon Musk. The resulting article, "Representing Eline Musk," can be found [here](#). The SSRN abstract follows.

What would it be like to represent Elon Musk on business law matters or work with him in representing a business he manages or controls? This article approaches that issue as a function of professional responsibility and practice norms applied in the context of publicly available information about Elon Musk and his business-related escapades. Specifically, the article provides a sketch of Elon Musk and considers that depiction through a professional conduct lens, commenting on the challenges of representing or working with someone with attributes and behaviors substantially like those recognized in Elon Musk.

Ultimately (and perhaps unsurprisingly, for those who have followed Elon Musk's interactions with the law in a business setting), the article concludes that representing Elon Musk or one of his controlled businesses would be a tough professional assignment, raising both typical and atypical professional responsibility issues. Taking on an engagement in which Elon Musk is the client or a control person would require deliberate lawyer leadership, including (among other things) patience, mental toughness, and empathy. As a result, the lawyer would be required not only to have the required legal expertise, sensitivity to professional conduct regulation, and practical experience to carry out the representation, but also to understand and know how to employ their talent, personality, character strengths, and leadership style in a demanding and mutable lawyering context.

The well-considered comments of so many folks helped to move this work along. While my author footnote mentions some, it could not mention all. As I thought through issues of client wealth, power, mental health, and neurobiological status, those who know more than I--

personally and professionally--were essential to my assessments.

I know that there is a lot more that can (and should) be written on representing clients in the varied lot of personal circumstances that life presents. I hope that I presented my thoughts in this piece in a way that is sensitive to the myriad issues involved in describing and considering client attributes and conditions. I also hope this work will encourage more reflection and writing on related issues.

Tesla settles race bias claims by Black former worker after \$3 million verdict

 [reuters.com/legal/tesla-settles-race-bias-claims-by-black-former-worker-2024-03-15](https://www.reuters.com/legal/tesla-settles-race-bias-claims-by-black-former-worker-2024-03-15)

Daniel Wiessner

Motorists drive past Tesla's primary vehicle factory after CEO Elon Musk announced he was defying local officials' restrictions against the spread of the coronavirus disease (COVID-19) by reopening the plant in Fremont, California, U.S. May 12, 2020. REUTERS/Stephen Lam/File Photo Purchase Licensing Rights , opens new tab

March 15 (Reuters) - Tesla (TSLA.O) , opens new tab has settled a long running lawsuit by a Black former factory worker who claimed he was subjected to severe racial harassment, according to a court filing on Friday, as the electric carmaker faces a series of other discrimination lawsuits.

Tesla and lawyers for Owen Diaz, a former elevator operator at the company's Fremont, California assembly plant, did not disclose details of the settlement in the filing in San Francisco federal court.

The agreement ends appeals that both sides were pursuing after a jury last year awarded Diaz \$3.2 million in damages. Tesla claimed it was not liable for the alleged discrimination and Diaz had argued that the company's lawyers engaged in misconduct warranting a new trial.

A different jury in 2021 had awarded Diaz \$137 million, one of the largest verdicts ever in a discrimination case involving a single worker. But a judge found that the verdict was excessive and ordered a second trial after Diaz refused a lowered award of \$15 million.

Diaz, who first sued Tesla in 2017, claimed that when he worked at the Fremont plant he was subjected on a daily basis to racial slurs, scrawled swastikas and other racist conduct, and that Tesla ignored his complaints.

Tesla and lawyers for Diaz did not immediately respond to requests for comment. The company has said it does not tolerate discrimination and has fired employees accused of racist conduct.

Tesla faces similar claims of tolerating race bias at the Fremont plant in a pending class action on behalf of 6,000 workers, separate cases from California and U.S. anti-bias agencies, and multiple lawsuits involving individual employees. The company has denied wrongdoing in those cases.

Reporting by Daniel Wiessner in Albany, New York Editing by Chris Reese, David Gregorio and Alexia Garamfalvi

Page Printed From:

<https://www.law.com/ctlawtribune/2024/03/18/lawsuits-are-flying-over-pfas-but-can-plaintiffs-prove-actual-injury/>



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NEWS

Lawsuits Are Flying Over PFAS. But Can Plaintiffs Prove Actual Injury?

"It just makes it sound like everybody can sue over it, and that does not seem workable for our legal system," attorney John Galvin said.

March 18, 2024 at 05:00 AM



News
Emily Cousins
Litigation Reporter



Litigants are filing suit across the country over alleged high exposure to per- and polyfluoroalkyl substances, PFAS, or “forever chemicals,” often used to make items waterproof, nonstick or stain repellant.

But the novelty of these suits leaves the courts to decide what qualifies as an injury.

For instance, the New Hampshire Supreme Court determined in May 2023, in *Hermens v. Textiles Coated*, that plaintiffs had not alleged an actual injury from exposure to PFAS, but had only brought claims of “increased risk of future development of disease.”

The plaintiffs had sought a remedy of medical monitoring, so that early detection of a disease could deter symptoms.

But the court was not convinced.

‘Lawsuits Being Brought Against Almost Everyone’

John Galvin of Thompson Coburn, a defense attorney handling complex litigation, said PFAS are “ubiquitous in society,” and that “there are lawsuits being brought against almost everyone who had anything to do with PFAS over the years.”

But Galvin said there are many boundaries for PFAS claims, and the New Hampshire Supreme Court’s decision was simply a reiteration consistent with hundreds of years of tort law.

“You can’t sue someone because you might get sick in the future,” Galvin said. “It’s after you’ve sustained an injury that you have a cause of action, a claim against someone. So it just makes perfect sense otherwise, especially with something like PFAS, because if you tested everyone in America, you would find in excess of 95% of the folks in America are going to have some level of PFAS in their system. If every one of those people, therefore, has standing to bring a lawsuit against everyone involved in using PFAS over the years, you’re just going to have runaway lawsuits, so it made sense for them to still tether a lawsuit with an injury.”

Winning Argument?

But Galvin notes a newer argument raised in a pending case might gain traction.

He points to a PFAS class action, *Depaul v. Kimberly-Clark*, which law firm Silver Golub & Teitell filed in Connecticut federal court at the end of February.

The complaint alleged the defendant, which produces diapers and tissue products for well-known brands in a New Milford facility, uses PFAS chemicals that traveled airborne and deposited forever chemicals in the drinking water wells belonging to the plaintiffs.

Instead of claiming a future injury, the plaintiffs claimed ingesting the contaminated water has caused “subclinical cellular changes” that increase the risk of cancers and other diseases.

“We are seeking compensation for the plaintiffs for immediate and expected future remediation needs, as well as the establishment of a medical monitoring fund,” Silver Golub partner Ian Sloss said in a statement.

‘Everybody Can Sue’

But PFAS litigation is still new, and plaintiffs attorneys are learning what is working to keep claims alive.

They might glean some insight though from a 2009 Massachusetts Supreme Court decision, which sheds light on how courts might respond to a “subclinical cellular changes” argument.

In *Donovan v. Philip Morris USA*, the plaintiffs claimed they were entitled to medical monitoring due to subclinical effects of exposure to cigarette smoke, which increased the risk of lung cancer.

The Massachusetts high court determined that the plaintiffs’ suit did bring a cognizable claim under the law.

The Connecticut Supreme Court has not shown which direction it might go on this issue yet, but Galvin anticipates it might follow its Massachusetts counterpart.

And if that happens, Galvin expects a negative impact because of the large number of Americans exposed to forever chemicals.

“It just makes it sound like everybody can sue over it, and that does not seem workable for our legal system in our society,” Galvin said.

‘Not Very Well Equipped to Handle Something Like This’

Another concern: Who would be the defendants?

Galvin notes, for instance, that some of the defendants are not the original creators of the chemicals, such as in the Kimberly-Clark case, where the PFAS allegedly went airborne.

“It’s really instructive that the scope of this litigation can go to almost anyone,” Galvin said.

To help Americans who have been exposed to high levels of forever chemicals, Galvin said a better route would be a legislative solution, because if left to the legal system, it will be expensive and targeted, but might miss big actors.

“Our civil justice system is not very well equipped to handle something like this,” Galvin said. “We’re very good when somebody’s got an actual injury and they think there’s an actual cause, and we go into court and decide if that person’s entitled to money. But when our civil justice system tries to go in and solve public health issues on a broader scale, we have a record of not doing a very good job with that.”

In addition, Galvin said the science is still underdeveloped when it comes to determining what diseases result from PFAS, and most data right now shows an association, rather than a direct effect of exposure.

“From the plaintiffs’ perspective, they have to do a lot of work to bring a case like this,” Galvin said. “It’s not going to be easy to prove any individual company is responsible and that somebody is going to actually have a disease that is related to exposure to whatever type of PFAS are involved.”

Read the complaint:

Case 3:24-cv-00271 Document 1 Filed 02/28/24 Page 1 of 40

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BETHANY DePAUL, ARLENE QUARANTA,
and MEREDITH QUARANTA, individually
and on behalf of all others similarly situated,

Plaintiffs,

v.

KIMBERLY-CLARK CORPORATION,

Defendant.

Case No. 3:24-cv-00271
COMPLAINT
DEMAND FOR JURY TRIAL

Plaintiffs Bethany DePaul, Arlene Quaranta, and Meredith Quaranta (collectively, “Plaintiffs”), individually and on behalf of all others similarly situated, allege the following against Defendant Kimberly-Clark Corporation (“Defendant” or “Kimberly-Clark”) based upon the investigation of Plaintiffs’ counsel, information and belief, personal knowledge, and a review of publicly available info-

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NEWS

Social Media Ads Inject New Angle in Ozempic Cases: 'It's Going to Be a Huge Focus'

The proliferation of advertising on social media for Ozempic and related drugs will be a key part of the lawsuits against Novo Nordisk and Eli Lilly.

March 15, 2024 at 03:40 PM

Mass Torts



Amanda Bronstad
staff reporter



What You Need to Know

- A surge of advertising, often in the form of personal testimonials, appears on such sites as YouTube and TikTok, where paid influencers have ratcheted up the popularity of the drugs.
- U.S. District Judge Gene Pratter, who is overseeing the multidistrict litigation in the Eastern District of Pennsylvania, held her first hearing on Thursday.
- Novo Nordisk, in a statement to Law.com, insisted paid influencers on social media aren't advertising the drugs on its behalf.

In a 14-minute video on her YouTube channel, Kai Michelle, dressed in a hot pink dress, demonstrates to viewers how to inject Ozempic, a prescription medication that’s all the rage for losing weight.

From her kitchen, she tells viewers about some side effects, such as stomach cramps. But in 12 weeks, she’s lost 20 pounds. Some days, she says, she has no appetite at all.

“I have been trying to lose weight for, like, forever,” she tells viewers. “I just want to lose weight and get into a comfortable size.”

The social media marketing of Ozempic and related drugs, which are designed for diabetes but used for weight loss, is a critical part of the legal claims lodged against drug manufacturers Novo Nordisk and Eli Lilly. A surge of advertising, often in the form of personal testimonials, appears on such sites as YouTube and TikTok, where paid influencers have ratcheted up the popularity of the drugs.

It’s what makes Ozempic stand out from most pharmaceutical cases.

“I can’t sit here and think of anything that comes close to that,” Motley Rice’s Sara Couch told Law.com. “And the real power in social media is it is incredibly tailored, and it is incredibly present. The patient and potential consumer are receiving these messages multiple times a day, not just one time at a doctor’s office, or a TV ad once a day.”

The lawsuits allege Novo Nordisk and Eli Lilly failed to adequately warn about the risks of gastroparesis, or stomach paralysis, leading to nausea, vomiting and often hospitalizations. Both Novo Nordisk and Eli Lilly have denied the allegations, noting that the labels warn about gastrointestinal issues, but plaintiffs lawyers insist the disclosures downplay the severity of the risks.

But it’s the promotion of the drugs on social media that is front and center in the litigation.

“It’s going to be a huge focus of the prosecution of this case,” Brad Honnold, a partner at Gonza Honnold in Overland Park, Kansas, told plaintiffs lawyers at a Feb. 9 webinar about the Ozempic litigation.

‘A Lot of Misleading Content From Third Parties’

More than 70 lawsuits have been filed over Ozempic and Novo Nordisk’s other weight loss medications, Wegovy and Rybelsus, as well as Eli Lilly’s Trulicity and Mounjaro. But lawyers predict at least 10,000 cases.

U.S. District Judge Gene Pratter, who is overseeing the multidistrict litigation in the Eastern District of Pennsylvania, [held her first hearing](#) on Thursday.

Although social media and online advertising of prescription medications aren’t new, Ozempic and related drugs have taken that trend to new levels, particularly with telehealth providers, such as Noom and Calibrate, which send the medication directly to a patient’s door or local pharmacy.

Honnold told Law.com that it’s the “first example of hyper-aggressive marketing,” both in the social media space and in the telehealth space, which became ubiquitous during the COVID-19 pandemic.

“It just really borders on exploitation of patients,” Honnold told Law.com. “This is strictly an encounter that happens like if you ‘friend’ somebody in the social media space. A telephone call that involves a very brief face-to-face with some of them, a tele-video sort of thing, and certainly not anywhere near what the patient would receive if they were receiving this information in due course from their regular physician.”

Couch, who is in Mount Pleasant, South Carolina, said there’s no real informed consent from patients who are able to qualify for the medication within five to seven minutes.

“Their sole purpose is to get as many subscriptions as possible,” she told Law.com.

She said the cases seek to uncover potential financial links between the telehealth providers and the drugmakers.

In a statement, Novo Nordisk acknowledged the social media advertising of its medications but insisted influencers are not posting content on its behalf.

“Patient safety is our top priority at Novo Nordisk, and we work closely with the U.S. Food and Drug Administration to continuously monitor the safety profile of our medicines,” the company said. “We agree that there has been a lot of misleading content from third parties that are promoting prescription drugs on social media—much of it from medical spas, medical clinics, telehealth companies and social media influencers.”

Novo Nordisk identifies and labels its social media content, the statement said, and does not work with influencers to share their personal experiences.

Eli Lilly, in a separate statement, said it does not provide its drugs, or their ingredients, to third parties.

“At Lilly, we are committed to acting ethically and responsibly in all that we do,” the statement said. “The same is not necessarily true for some companies advertising on social media, and we encourage people to check reputable sources before engaging with certain advertisements on social media.”

‘These Drugs Are Not Without Risks’

The use of telehealth providers and websites that aren’t transparent about the risks means there might not be adequate informed consent from patients, and that could open the door toward liability against the drug manufacturers, said Tara Sklar, a professor at the University of Arizona James E. Rogers College of Law who is following the Ozempic litigation.

“In a nutshell, the involvement of telehealth and online weight loss platforms in prescribing and promoting these medications could potentially complicate legal matters for the drug companies, especially if they are not following appropriate patient screening and monitoring protocols as these drugs are not without risks and could cause patient harm,” she said.

And the scrutiny of social media advertising of pharmaceutical drugs isn’t just in court.

Last month, U.S. Sens. Dick Durbin, a Democrat from Illinois, and Mike Braun, a Republican from Indiana, urged the U.S. Food and Drug Administration to crack down on what they called “misleading social media ads” for prescription drugs, particularly targeting children. Their Feb. 14 letter references Ozempic.

“The power of social media and the deluge of misleading promotions has meant too many young people are receiving medical advice from influencers instead of their health care professional,” they wrote.

But it’s not just their delivery of the drugs and the age of the patients that’s concerning. Sklar called the drug’s online advertising at times misleading because the claims lean more on the benefits than the risks.

“The marketing of Ozempic and Wegovy on social media has been extensive, even aggressive, with ads on TikTok, Facebook, Instagram, using influencers and celebrities, that seem to target a much broader segment of the population than traditional drug advertisements,” she said. And more weight-loss drugs are planned to hit the market. “All this combined with high drug costs cause alarms to ring for stronger boundaries around drug promotion,” she said.

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In real estate commission cases, a funny thing happened on the way to the forum

 [reuters.com/legal/litigation/real-estate-commission-cases-funny-thing-happened-way-forum-2024-03-14](https://www.reuters.com/legal/litigation/real-estate-commission-cases-funny-thing-happened-way-forum-2024-03-14)

Jenna Greene

REUTERS/Molly Riley Purchase Licensing Rights , opens new tab

March 13 (Reuters) - In real estate, the saying goes, location is everything.

How apt, then, that in the multibillion-dollar litigation that stands to upend the residential real estate industry, the place where the cases are heard has proven to be pivotal.

Because location doesn't just matter when you're buying a house. It can also prove fateful in litigation.

Later this month, a panel of judges will hear arguments to decide whether to consolidate about 20 cases naming more than 200 real estate industry players, including the National Association of Realtors, or NAR — and if so, where to centralize them.

Plaintiffs allege real estate agent commissions — typically 5% to 6% of a home's sale price — have been artificially inflated for decades, the result of an antitrust conspiracy to stifle competition.

The plaintiffs already scored a massive win in Kansas City, Missouri, when a federal jury in October awarded a class of home sellers nearly \$1.8 billion. (The penalty could top \$5 billion if U.S. District Judge Stephen Bough agrees to triple the damages.)

No surprise, that's where most plaintiffs' lawyers would like to keep on litigating , opens new tab.

As for defense counsel — a veritable Who's Who of Big Law — they stress that the allegations are without merit.

In a pending motion for a new trial, NAR argues that broker commissions are not fixed and that the jury verdict "defies precedent, logic, and the evidence."

If the Judicial Panel on Multidistrict Litigation decides centralization is in order, defendants are pushing for anywhere but Kansas City, suggesting Chicago, Pittsburgh or Plano, Texas, as alternative sites.

This won't be the first far-reaching forum decision in the litigation.

It's been a factor from day one, when 17 leading plaintiffs' lawyers filed a class action complaint , opens new tab in Chicago federal court on March 6, 2019.

Representing home sellers in 14 states and the District of Columbia, they alleged that NAR and the four largest national real estate broker franchisors violated the Sherman Act by implementing a rule that requires all brokers to make a “blanket, non-negotiable offer” of buyer-broker compensation when listing a property on a Multiple Listing Service.

“We could have filed (the case) anywhere,” Steve Berman, a name partner at Hagens Berman Sobol Shapiro, told me, given the geographically far-flung class.

Chicago made sense because they “liked the substantive law in the Seventh Circuit” pertaining to the case, he said, plus the National Association of Realtors is headquartered there.

But U.S. District Court for the Northern District of Illinois is no rocket docket. At the time, according to court papers [\[link\]](#), opens new tab, its judges had an average of 755 pending cases of all kinds, and the median time from filing to trial was 37.8 months.

The case is now inching towards trial before U.S. District Judge Andrea Wood, perhaps later this year.

About seven weeks after the original Chicago case was filed, a smaller group of lawyers led by Michael Ketchmark brought a similar complaint [\[link\]](#), opens new tab against the same defendants in Kansas City on behalf of Missouri home sellers.

It wasn’t identical – it covered different geographic areas on behalf of different class members and also alleged two Missouri causes of action.

Still, Ketchmark, who said the case was his “first foray into antitrust,” acknowledged the “common theme.”

“There’s no question from their standpoint, they filed the case first and came up with the idea,” he told me.

Such follow-on litigation isn’t unusual. As I’ve written before, in law (unlike other professions) it’s generally not considered unethical to draw upon or even copy the work of peers.

That doesn’t mean it’s not frustrating for those who developed the source material though.

“You spend lot of time thinking about” and putting together a case, Berman said, “and people copy you.” The danger, he continued, is if “you lose control of the case.”

In litigation of such magnitude and complexity, that’s uncommon, but it happened here.

“Pissed off,” is how Berman described his initial reaction to Ketchmark’s lawsuit, though the lawyers have since “come to an agreement on how to work together,” he said.

Which brings us back to the forum issue.

While judges in Chicago were swamped with work, the Western District of Kansas wasn't nearly as busy. Median time to trial there was 23.8 months, more than a year faster than the Northern District of Illinois, according to court papers [\[link\]](#), opens new tab. Sure enough, Ketchmark's case leapfrogged ahead.

For the Chicago lawyers, it "seemed like a bitter pill to swallow that we didn't get to try the case first," Benjamin Brown, co-chair of Cohen Milstein Sellers & Toll's antitrust practice, told me.

But he credits Ketchmark for skillfully litigating his case and delivering a verdict that provides powerful leverage in settlement negotiations, to their collective benefit.

Defendants Anywhere Real Estate and RE/MAX settled on the eve of trial, while Keller Williams cut a deal after the verdict.

Their combined \$208.5 million payout, subject to judicial approval, covers both the Kansas City and Chicago cases, as well as another follow-on case filed in 2020 in Massachusetts, according to court papers and a press release [\[link\]](#), opens new tab.

"I've really got to hand it to (Ketchmark) and his whole team," Brown said. "Knowing what we know today, I wouldn't do it differently."

The lawyers are now working together as co-counsel on two new [\[link\]](#), opens new tab real estate commission cases that seek nationwide classes. Filed in Kansas City, the complaints name new defendants, including a unit of Warren Buffett's Berkshire Hathaway. (Hello deep pockets.)

Other lawyers have filed copycat suits in venues, including New York, Pennsylvania, California and Texas in the wake of the blockbuster verdict.

As for the upcoming hearing to decide whether to consolidate the cases, a spokesperson for NAR in an email said the organization favors [\[link\]](#), opens new tab grouping them all in its home city of Chicago. Doing so would "promote efficiency and consistency in addressing the industry-wide issues these cases present," the spokesperson said. If so, it'll be a fitting full circle for the fight.

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Jenna Greene
Thomson Reuters

Jenna Greene writes about legal business and culture, taking a broad look at trends in the profession, faces behind the cases, and quirky courtroom dramas. A longtime chronicler of the legal industry and high-profile litigation, she lives in Northern California. Reach Greene at jenna.greene@thomsonreuters.com

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<https://www.law.com/2024/03/18/national-association-of-realtors-reaches-418m-settlement-to-resolve-antitrust-class-actions/>



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NEWS

National Association of Realtors Reaches \$418M Settlement to Resolve Antitrust Class Actions

"Probably the largest transaction that people will make is buying or selling a home, so for most Americans, being able to save a significant amount of money in connection with that transaction is really meaningful, and it's one of the reasons I wanted to work on this," Plaintiffs' attorney, Robert A. Braun of Cohen Milstein Sellers & Toll, told Law.com.

March 18, 2024 at 12:13 PM



Mason Lawlor



The National Association of Realtors (NAR) reached a \$418 million joint settlement with a nationwide class of home sellers last week, resolving claims in four antitrust cases alleging a scheme to inflate agent commissions by requiring illegal buyer broker fees.

A 2019 case, *Moehrl v. National Association of Realtors*, challenged the organization’s new rule that a largely non-negotiable offer of compensation be made to a broker buyer when listing a property on a “multiple listing service,” or MLS, most of which follow rules set by the NAR.

One of the top MLS groups, MetroList, was named in a similar [antitrust class action filed Jan. 18](#) in the U.S. District Court for the Eastern District of California.

Though it denied any wrong doing in connection with the MLS compensation rule, NAR will pay the \$418 million across four annual installments under the agreement, which is still awaiting court approval, according to a [statement](#) from the relators’ association.

“NAR has worked hard for years to resolve this litigation in a manner that benefits our members and American consumers. It has always been our goal to preserve consumer choice and protect our members to the greatest extent possible,” Interim CEO of NAR Nykia Wright said. “This settlement achieves both of those goals.”

The NAR settlement is in addition to \$208.5 million in settlements reached with other residential real estate defendants targeted in the cases, including Anywhere Real Estate, RE/MAX, and Keller Williams.

NAR also acknowledged their priority that cooperative compensation “remains a choice for consumers when buying or selling a home.”

The agreement provides for NAR or any other multiple listing service must prohibit any requirement that home offers are “blanket, or unconditional,” and to communicate that any broker commissions are fully negotiable and not required by law. It also requires NAR to “provide valuable cooperation in ongoing litigation against other defendants,” according to the statement.

Plaintiffs’ attorney, Robert A. Braun of Cohen Milstein Sellers & Toll, said the settlement opens the doorway to sweeping changes in the real estate industry, including making buyer broker commissions transparent, and making prices more competitive.

“We think that these practice changes will result in increased competition in the real estate industry, including price competition,” Braun told Law.com.

“Probably the largest transaction that people will make is buying or selling a home, so for most Americans, being able to save a significant amount of money in connection with that transaction is really meaningful, and it’s one of the reasons I wanted to work on this,” Braun added.

The commission policy allegedly incentivized broker buyers to avoid showing their clients homes where the seller offered lower commissions, which plaintiffs argued kept commissions unnaturally high across the industry despite the decreased role of broker buyers in recent years.

“For years, anticompetitive rules in the real estate industry have financially harmed millions of Americans. This settlement will bring sweeping reforms that will help countless American families,” the firm’s managing partner and antitrust practice co-chair Benjamin D. Brown said in a statement. “We are proud to play a leading role in addressing this industry’s long-running practices.”

The NAR was ordered in October to pay \$1.8 billion in damages to plaintiffs in *Burnett, et al. v. National Association of Realtors* by a jury of the U.S. District Court for the Western District of Missouri.

Attorneys at Susman Godfrey and Hagens Berman Sobol Shapiro also helped negotiate the settlements in the *Moehrl* and *Umpa v. NAR* cases. Boulware Law LLC, Ketchmark & McCreight PC, and Williams Dirks Dameron represented plaintiffs in the *Burnett v. NAR* and *Gibson v. NAR* cases.

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Trial of former Volkswagen CEO Winterkorn over diesel scandal set to start in September

 [courthousenews.com/trial-of-former-volkswagen-ceo-winterkorn-over-diesel-scandal-set-to-start-in-september](https://www.courthousenews.com/trial-of-former-volkswagen-ceo-winterkorn-over-diesel-scandal-set-to-start-in-september)

Associated Press

The company used software that recognized when vehicles were on test stands and turned emission controls on, then turned the emission controls off during normal driving.

In this Jan. 19, 2017, file photo Martin Winterkorn, former CEO of the German car manufacturer 'Volkswagen', arrives for a questioning at an investigation committee of the German federal parliament in Berlin, Germany. (AP Photo/Michael Sohn, file)

BERLIN (AP) — Former Volkswagen CEO Martin Winterkorn is to go on trial in September on charges of fraud and market manipulation linked to the automaker's diesel emissions scandal, a German court said Friday.

The state court in Braunschweig said the trial in what were originally two separate cases will start on Sept. 3. It added in a statement that it has scheduled 89 court sessions through September 2025.

Winterkorn, now 76, has denied wrongdoing. Proceedings against him have been delayed because of health problems.

Winterkorn resigned from Volkswagen days after the U.S. Environmental Protection Agency announced a notice of violation on Sept. 18, 2015.

The company had for years been using software that recognized when vehicles were on test stands and turned emission controls on, then turned the emission controls off during normal driving. As a result, the cars emitted far more than the legal U.S. limit of nitrogen oxide, a pollutant that harms people's health.

In the market manipulation case, Winterkorn is accused of knowing about the installation of an illegal "defeat device" in about 500,000 cars on the U.S. market and deliberately failing to inform stock markets in good time of a "significant financial risk" that had started to materialize in early 2015.

Volkswagen paid more than 30 billion euros (\$32.8 billion) in fines and settlements over the scandal.

Categories / Business, Criminal, International, Trials

VW's US finance unit to pay \$48.75 mln to resolve SEC diesel case

 [reuters.com/business/autos-transportation/vw-us-finance-unit-pay-4875-million-resolve-sec-diesel-suit-2024-03-15](https://www.reuters.com/business/autos-transportation/vw-us-finance-unit-pay-4875-million-resolve-sec-diesel-suit-2024-03-15)

David Shepardson

A new logo of German carmaker Volkswagen is unveiled at the VW headquarters in Wolfsburg, Germany September 9, 2019. REUTERS/Fabian Bimmer//File Photo Purchase Licensing Rights , opens new tab

WASHINGTON, March 15 (Reuters) - Volkswagen Group of America's wholly owned finance unit has agreed to pay \$48.75 million to resolve a government lawsuit that accused the German automaker and its former CEO of defrauding investors in U.S. bond offerings.

The Securities and Exchange Commission filed a civil lawsuit in March 2019 accusing Volkswagen AG (VOWG_p.DE) , opens new tab, two subsidiaries and former chief executive Martin Winterkorn of defrauding investors. The SEC is dismissing claims against Volkswagen AG and Winterkorn.

The settlement with Volkswagen Group of America Finance filed Friday marks the last significant legal action related to the diesel emissions scandal in the United States.

This cost the German automaker more than \$20 billion in fines, penalties and settlements after it admitted in 2015 it had cheated emissions tests by installing "defeat devices" and sophisticated software in nearly 11 million vehicles worldwide.

Volkswagen in 2017 pleaded guilty to criminal conduct as part of a \$4.3 billion Justice Department settlement and offered to buy back about 500,000 polluting U.S. vehicles. A Volkswagen spokesperson said its finance unit was "pleased to have reached an agreement with the SEC". The settlement requires approval by a U.S. judge in San Francisco. The VW finance unit did not admit or deny the SEC allegations.

The SEC, which did not immediately comment Friday, had sought about \$350 million plus interest.

The SEC complaint said from April 2014 to May 2015, Volkswagen issued more than \$13 billion in bonds and asset-backed securities in U.S. markets when senior executives knew more than 500,000 U.S. vehicles dramatically exceeded legal vehicle emissions limits.

VW could have faced another \$350 million if civil penalties had been imposed.

The settlement includes \$34.35 million and interest of \$14.4 million that will be distributed by the SEC to investors in the 2014 and 2015 bond offerings.

Reckitt Benckiser Group PLC**Reckitt chief vows to overturn baby formula verdict**

Kris Licht says consumer group will take 'all steps available' to challenge jury verdict that Enfamil caused death of infant



A US jury last week awarded \$60mn in damages to a mother who said her baby died after consuming the company's Enfamil baby formula

Madeleine Speed 2 HOURS AGO



Reckitt's chief executive has vowed to overturn the damaging verdict of a jury in the US that the company's Enfamil baby formula caused the death of a premature infant, insisting that the products are safe to use.

"The case in question is not concluded and we will take all the steps available to us to overturn it," Kris Licht told the Financial Times on Monday. "We don't currently believe we have a liability [and] we think it is important not to overreact to a verdict that we think is not correct."

[Reckitt](#) has not estimated its potential liability because it is confident it can appeal against the verdict. The company can either seek a post-trial dismissal motion or, if that fails, appeal to an Illinois district appellate court.

Shares in the consumer goods group fell 15 per cent on Friday last week as investors [digested the news](#) that a court in Illinois had instructed Reckitt to pay \$60mn in damages to a mother who said her baby died after consuming Enfamil.

Since the news, analysts have been drawing up calculations to assess the financial extent of the litigation risk for the company and its shareholders. Roughly 450 cases have been filed in courts across the US.

Barclays concluded a realistic worst-case scenario was a few thousand plaintiffs settling in “the high hundreds of thousands of dollars per case”. An extreme worst-case scenario they calculated would result in £2bn of damages.

“Any multiple is simply not how tort litigation works in the US, and it’s not how this is going to unfold,” said Licht, who took over as Reckitt’s boss in October last year. “It’s very important not to rush to any judgment of simplistic math.”

Analysts have warned that shareholders have become increasingly frustrated with Reckitt in recent months, and are eager to see significant strategic changes when the company’s new chair, former Sky boss Sir Jeremy Darroch, takes up the role in May.

Some have speculated that Reckitt has been trying to sell Mead Johnson, the infant formula business it acquired for \$17bn in 2017. The FT reported that the company previously [sought a sale](#) of the business in 2022.

Licht neither confirmed nor denied that the company was exploring a sale.

“Mead Johnson is a good business and we will assess it against three criteria we set out for how we evaluate the portfolio,” he said. “I would not say that the verdict that we expect to overturn . . . changes my look at these things. The conversations about the portfolio are much bigger than that.”

Necrotising enterocolitis (NEC) is an often fatal condition in premature infants, and breastfeeding is known to reduce the risk. The plaintiff in Illinois successfully claimed that Reckitt failed to warn that infant formula feeding increased the risk of NEC.

In its defence, Reckitt has argued that medical professionals are aware of the increased risk of NEC associated with formula and that national clinical guidelines say premature infants should only receive formula when breastfeeding is impractical.

Analysts were reassured about the company's stance on the verdict by a call senior executives held with them on Monday morning.

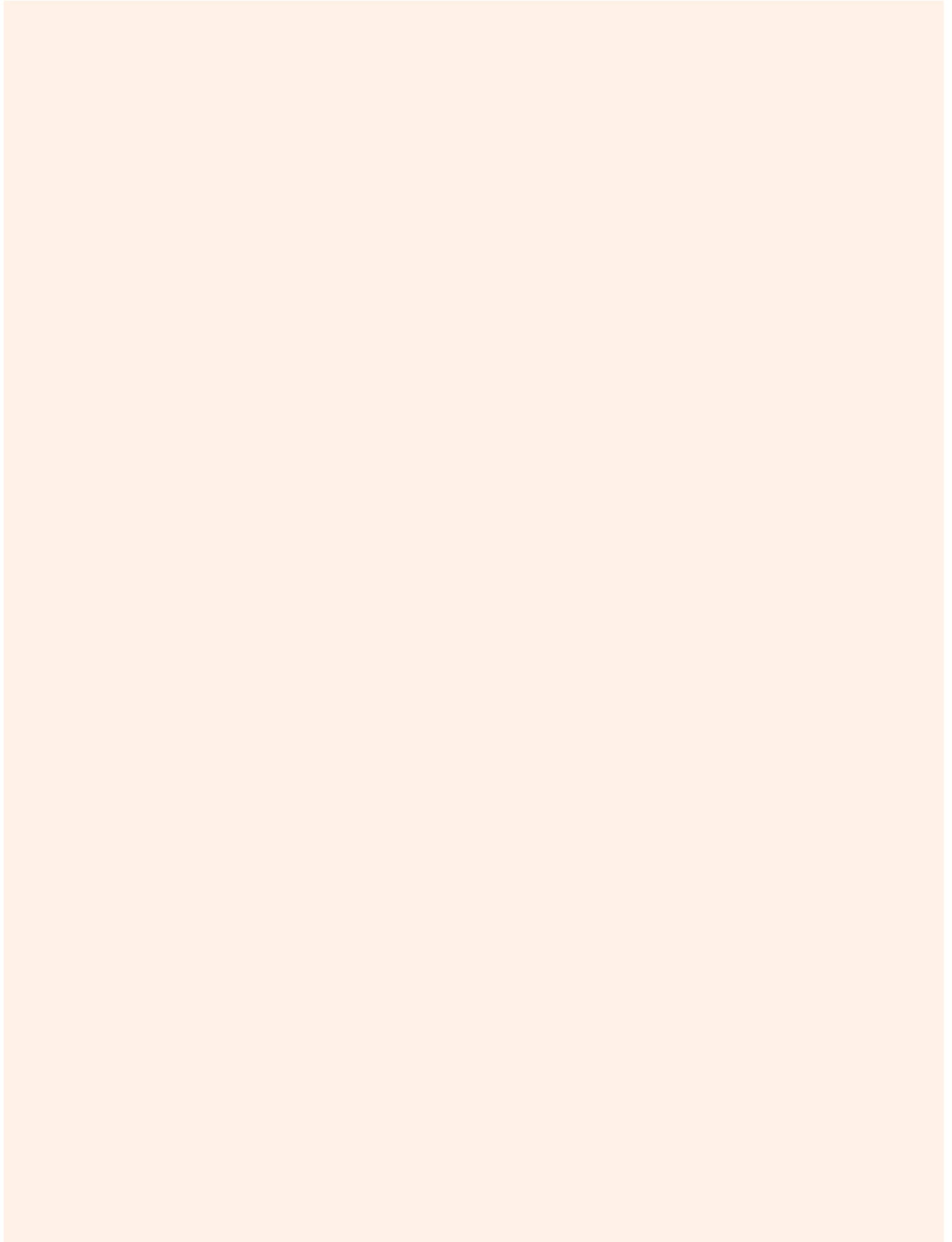
Bernstein analyst Bruno Monteyne said his initial concerns that Reckitt failed to adequately warn parents of the risk of feeding premature babies formula were assuaged because Reckitt explained that the products were exclusively used under the supervision of doctors, who should know the risk.

However, he added: "We are still unimpressed with the level of disclosure over the benefits of breastfeeding vs infant formula on the Enfamil website."

James Edwardes Jones, analyst at RBC Capital, said his concerns were addressed but that the scale of the litigation risk was still uncertain.

"While we still have no idea on the outcome of the ongoing lawsuits or appeals, we are reassured by management's confidence, as well as the fact that healthcare experts continue to use the product," he said.

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Opinion **Lex**

Reckitt's baby formula woes will stoke calls for a break-up

Enfamil judgment against the group marks just the latest in a long series of mis-steps



An Illinois court awarded \$60mn in damages last week to a mother whose child died after consuming Enfamil baby formula

19 MINUTES AGO

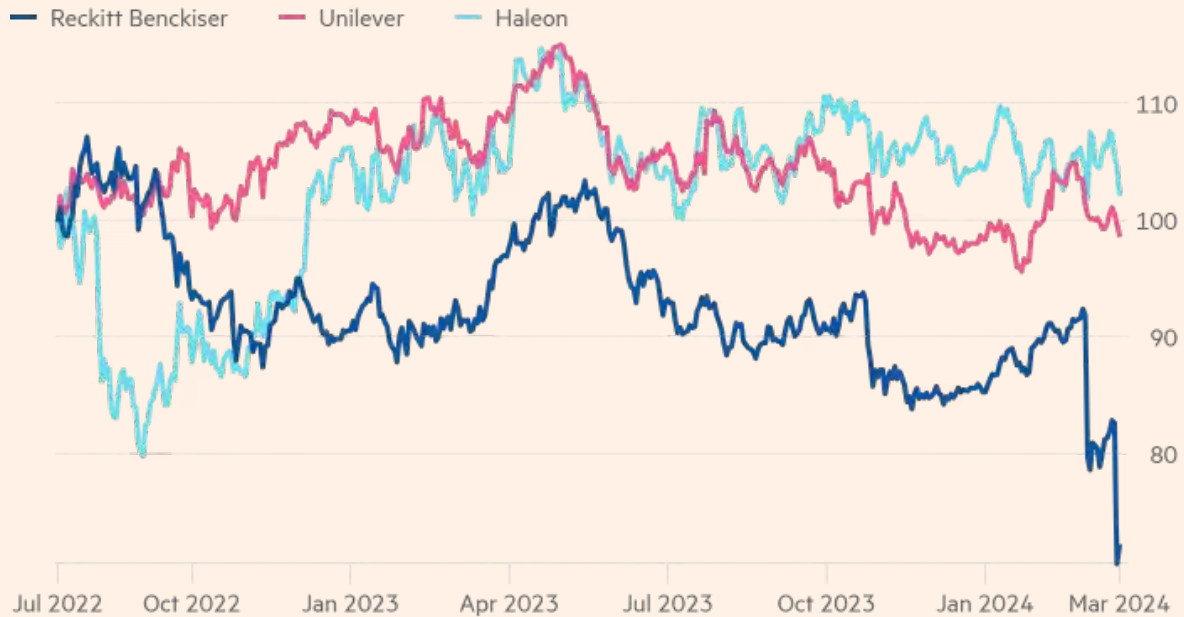


Quantifying litigation liabilities is a mug's game. In some cases, initial fears turn out to be overblown. At the other end of the spectrum, [Bayer](#) has so far paid \$20bn for lawsuits related to its acquisition of Monsanto and the allegedly carcinogenic properties of its glyphosate herbicide.

Reckitt investors will be pondering this dispersion as they prepare to do some litigation maths following another ill-judged acquisition. An Illinois court on Friday awarded [\\$60mn in damages to a mother whose child died after consuming Enfamil](#) baby formula. Reckitt acquired Enfamil when it bought [Mead Johnson in 2017](#) for \$18bn in including debt. The judgment has wiped £5bn — or some 13 per cent — off the group's market value.

Reckitt has underperformed consumer peers

Share prices rebased



Source: LSEG via markets.ft.com

© FT

It is not hard to see why. While this was a standalone case, a broader multi-district litigation action involves around 400 plaintiffs. On top of that, up to 9,000 preterm babies contract necrotic enterocolitis every year in the US. Many are formula-fed, and the fatality rate is high. That adds up to a lot of potential plaintiffs.

Yet Reckitt — which believes it [has strong grounds to overturn](#) this verdict upon appeal — warns against extrapolating overall potential liabilities from the size of one outcome. Sell-side analysts are positing individual settlements ranging from the hundreds of thousands to low single-digit millions per plaintiff, implying a maximum liability in the £2-7bn range for the company.

Regardless of how it shakes out, Reckitt's baby formula woes will pile pressure on the company to rethink its strategy, especially once Sir Jeremy Darroch takes the chair in May. This is just the latest in a [long series of mis-steps](#) which have led to disgruntled investors and a distinctly depressed valuation.

With an enterprise value of £40bn, Reckitt is worth a lot less than the sum of its parts. At the top of a valuation range, the group's infant nutrition and health businesses alone might be worth £40bn, estimates Barclays. In such a scenario, investors would be getting the home and hygiene arm's £1.5bn of ebitda for free.

Yet Friday's verdict puts the group in a tough spot. Reckitt, which was rumoured to be considering a [sale of its infant nutrition business in 2022](#), would probably struggle to find willing buyers for it today. Similarly, selling the valuable health business would risk leaving shareholders with wads of cash and an unattractive rump. A spin-off may be the best option left to unwind the problematic deal. While the share price fall makes a break-up more attractive, it also becomes harder to execute.

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Uber to pay \$178 million in Australia taxi class action settlement

 [reuters.com/business/autos-transportation/uber-pay-178-million-settle-lawsuit-with-australia-taxi-drivers-law-firm-says-2024-03-17](https://www.reuters.com/business/autos-transportation/uber-pay-178-million-settle-lawsuit-with-australia-taxi-drivers-law-firm-says-2024-03-17)

Reuters

SYDNEY, March 18 (Reuters) - Uber (UBER.N) , opens new tab has agreed to pay A\$271.8 million (\$178 million) to settle a lawsuit brought by Australian taxi operators and drivers, who say they lost income when the ride-hailing company moved into the country, a law firm said on Monday.

The settlement is Australia's fifth-largest, Maurice Blackburn Lawyers said in a statement.

The class action suit was filed in 2019 in the Supreme Court of Victoria state on behalf more than 8,000 taxi and hire car owners and drivers, accusing Uber of breaking laws requiring taxis and hire cars to be licenced.

Uber's 2012 arrival in the market took revenue from licenced taxi drivers while destroying the value of the licences they had paid for, according to the lawsuit.

Uber had said it never knowingly broke the law.

"Uber fought tooth and nail at every point along the way," Maurice Blackburn Principal Michael Donnelly said in a statement.

"After years of refusing to do the right thing by those we say they harmed, Uber has blinked," he said.

[1/2] Taxis wait for passengers along a street in Sydney, Australia May 8, 2018.

REUTERS/Edgar Su Purchase Licensing Rights , opens new tab

An Uber spokesperson said in an email that the company had contributed to state-level taxi compensation schemes since 2018 "and with today's proposed settlement, we put these legacy issues firmly in our past".

Uber did not disclose the proposed settlement in its response.

Former lawmaker and taxi driver Rod Barton, a member of the class action, said the settlement vindicated his belief that Uber had knowingly avoided the country's taxi licencing rules.

"They knew full well they were required to have their drivers and their vehicles fully licenced," Barton told the Australian Broadcasting Corp.

"They chose not to do that, and they did a lot of things that gave them a commercial advantage against the taxi industry, which established their foothold," he added.

The law was changed in 2015 which allowed Uber to operate without taxi licences while state governments set up compensation schemes for taxi drivers and licence owners.

(\$1 = 1.5246 Australian dollars)

Stay up to date with the latest news, trends and innovations that are driving the global automotive industry with the Reuters Auto File newsletter. [Sign up here](#).

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March 18, 2024, 5:23 AM PDT
Fallen Tech Star Lynch in Fight to Avoid US Prison for Fraud (1)
By Rachel Graf

- He's accused of deceiving Hewlett Packard in \$11 billion deal
- Three-month San Francisco trial follows earlier case in London

Bloomberg Law News 2024-03-18T12:34:41303839859-04:00
Fallen Tech Star Lynch in Fight to Avoid US Prison for Fraud (1)

By Rachel Graf2024-03-18T08:23:15681-04:00
He's accused of deceiving Hewlett Packard in \$11 billion deal
Three-month San Francisco trial follows earlier case in London

Once-prominent UK technology entrepreneur **Mike Lynch** already is facing [possible financial ruin](#) after losing a London civil trial over his ill-fated 2011 deal with Hewlett Packard Co.

Prison could be next.

It would cap a remarkable downfall for Lynch if he's convicted of accounting fraud in a three-month criminal trial set to kick off Monday in San Francisco federal court. He was the darling of the UK's tech industry before he sold his startup Autonomy Corp., then the nation's second-largest software company, to Hewlett Packard for \$11 billion.

Lynch, 58, has a chance for redemption if he can prove he's been [scapegoated](#) for the \$8.8 billion write-down Hewlett Packard took the year after the acquisition – which he claims was really the Silicon Valley giant's own fault.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/XEQKTHQ0000000?bc=W1siU2VhcmNoICYgQnJvd3NlliwiaHR0cHM...> 1/4



Mike Lynch

Photographer: Chris Ratcliffe/Bloomberg

The jury probably won't be told about the London case, which dragged out over seven years and was among the longest and most expensive trials in modern British history. Instead, US prosecutors will have to build their case from scratch, said University of Michigan Law School professor **Barbara McQuade**, a former prosecutor.

"They can't just say, 'Well, a jury found in our favor in England, so therefore we rest on that,'" she said.

Famed Dealmaker Quattrone

The trial will feature much of the same evidence and witness testimony that helped HP persuade the London judge to conclude in 2022 that Lynch and Autonomy's former finance chief inflated Autonomy's revenue to induce the sale. Hewlett Packard has asked the UK judge for \$4 billion in damages, though he's said he'll likely award "substantially less."

US prosecutors may call as witnesses former employees of both companies, including **Leo Apotheker**, who was Hewlett Packard's chief executive officer when the Autonomy purchase was announced, and Christopher Egan, who headed Autonomy's US unit, as well as famed dealmaker Frank Quattrone, who advised Autonomy on the deal.

Egan previously admitted to wrongdoing in exchange for a [deferred prosecution agreement](#) with the US Justice Department. He aided the government in its case against **Sushovan Hussain**, the former chief financial officer at Autonomy, who was sentenced to five years in prison after he was convicted in 2018 of accounting fraud by a San Francisco jury.

Though Lynch fought hard against being sent to the US, he was [extradited](#) last year. US District Judge Charles Breyer then called Lynch a flight risk and ordered him to pay for his own 24-hour security and surveillance to ensure he doesn't leave San Francisco. At a bail hearing last year, Lynch's attorneys said he was worth \$400 million to \$450 million.

Blaming Whitman

Lynch is charged with 14 counts of wire fraud, one count of securities fraud and one count of conspiracy to commit wire fraud. The most serious charge carries a maximum 25-year prison term if he's convicted. Stephen Keith Chamberlain, who was Autonomy's vice president for finance, also will be on trial.

Lynch, who served as an adviser to two UK prime ministers, **David Cameron** and **Theresa May**, has spent years aggressively defending his role in the disastrous Autonomy deal. When he took the stand in London in 2019, he **told** the court that former Hewlett Packard CEO Meg Whitman – who took over after Apoteker was ousted in 2011 – was “out of her depth” and botched the integration of the \$11 billion deal.

Whitman **testified** in London that she believed Lynch wanted to conceal the fraud by keeping his firm separate from the rest of HP even after the takeover.

A one-time candidate for governor of California who is now the US Ambassador to Kenya, Whitman isn't expected to take the stand in San Francisco.

Hewlett Packard, one of the oldest fixtures of Silicon Valley, split in 2015 into two companies. Hewlett Packard Enterprise Co. took over the corporate computing and software divisions, while HP Inc. runs the printer and PC business. An HPE spokesperson said the company is not a party to Lynch's trial and declined to comment further.

A representative for Lynch declined to comment ahead of the trial.

Theranos Experience

Lynch's case marks the first major white-collar fraud trial in San Francisco since **Ismail “Izzy” Ramsey** took on the role of northern California's top federal prosecutor last year. A spokesperson for Ramsey declined to comment on the trial.

Two of the lead prosecutors in Lynch's case previously won convictions against **Elizabeth Holmes** and **Ramesh “Sunny” Balwani** for fraud in the spectacular collapse of blood-testing startup Theranos Inc.

When UK Judge **Robert Hildyard** issued his final judgment in the London case in May 2022, which was more than 500,000 words, he said the misconduct at Autonomy **wasn't as bad** as Theranos, but was still fraud.

While Autonomy did have “world-beating” technology, unlike Holmes's startup, it was dressed up to be much larger and more successful than it really was, Hildyard said.

“One of the tragedies of the case is clear: an innovative and ground-breaking product, its architect and the company will probably always be associated with fraud,” he wrote.

The case is US v. Lynch, 18-cr-00577, US District Court, Northern District of California (San Francisco).

(Adds McQuade's analysis in fifth and sixth paragraphs.)

--With assistance from **Jonathan Browning** and **Brody Ford**.

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Michael Lynch

Mike Lynch goes on trial in US over Silicon Valley's 'largest fraud'

Autonomy founder faces charges of falsifying accounts before HP bought his software company in 2011



Mike Lynch, once one of the UK's most successful tech entrepreneurs, faces a potential sentence of up to 20 years © Yui Mok/PA

Richard Waters in San Diego MARCH 16 2024



Mike Lynch, once one of the UK's most successful tech entrepreneurs, is set to go on trial in San Francisco on Monday, 13 years after what US prosecutors have called "the largest fraud in the history" of Silicon Valley.

Lynch, who sold his software company Autonomy to Hewlett-Packard for \$11.7bn in 2011, faces charges that he [falsified Autonomy's accounts](#) in the two years before the deal. He was extradited from the UK last year after a five-year battle.

Alongside Stephen Chamberlain, Autonomy's former vice-president of finance, Lynch will be tried on 16 counts of wire and securities fraud, which carry sentences of up to 20 years. The charges are similar to ones that have already resulted in a [five-year jail sentence](#) for former Autonomy chief financial officer Sushovan Hussain.

In a setback for [Lynch](#), some of the defence evidence he had hoped to rely on was chipped away during pre-trial hearings in recent weeks. Judge Charles Breyer, who will oversee the three-month jury trial, barred some of the main evidence that his lawyers had planned to present.

The acquisition of Autonomy's data analysis software played a central role in efforts to turn around HP, one of Silicon Valley's founding companies, which at the time was trying to rebuild itself around software.

But a year after the deal, Meg Whitman, HP's chief executive, accused Autonomy's former management of falsifying its accounts, leading to a \$5bn write-off. She later gave up on trying to remake HP and broke up the company.

Lynch sought to turn the accusations back on Whitman by claiming that he was being made a scapegoat for her own alleged mismanagement of Autonomy's business, putting the reputations of some of Silicon Valley's top names in the spotlight.

Besides Whitman, a former eBay chief executive who is now the US ambassador to Kenya, they include Frank Quattrone, Silicon Valley's top investment banker during the 1990s dotcom boom, who handled the Autonomy sale after also shopping it to other companies including Oracle and Cisco.

Quattrone has been listed as a potential witness by the prosecution, along with Léo Apotheker, the HP chief executive at the time of the deal. Lynch is also likely to appear, his lawyers have told the judge, though the case he wants to put directly to the jury has been hampered by the limitations on evidence he can use, his lawyers said.

The US has sought to portray the former Autonomy boss as a micromanager who had close control over its finances, including personally approving any payment above \$30,000.

Lynch's lawyers succeeded in persuading Judge Breyer to disallow evidence the prosecution had sought to bring showing that he delighted in comparing himself to James Bond villains, and that he kept a tank of piranhas in Autonomy's reception area.

However, the judge rejected the defence's attempt to bar two witness statements that Lynch had compared his company to the mafia, saying that, even if he was joking, it could be seen as relevant to the amount of control he exerted over the company.

In the biggest blow to the defence, the judge has ruled out almost all evidence that relates to the period after HP bought Autonomy, making it hard for Lynch to redirect the spotlight on to Whitman and other HP staff.



Meg Whitman, HP's chief executive from 2011 to 2015, accused Autonomy's former management of falsifying its accounts © David Paul Morris/Bloomberg

The judge also questioned the relevance of accounting evidence that sought to show that Autonomy's financial statements were in line with UK rules and that the fraud claims were just a dispute about different accounting conventions.

The former Autonomy boss has always claimed that HP's \$5bn write-off for the alleged fraud was inflated to make up for its own business failures. During Hussain's trial, HP estimated that the alleged accounting misstatements led it to overpay for the company by \$1.7bn-2.7bn.

A judge in the UK ruled two years ago that HP had "substantially succeeded" in proving a civil fraud case against Lynch, while also saying that any damages award would be significantly less than the \$5bn it claimed.

A 17th charge that the US has lodged against Lynch and Chamberlain, alleging conspiracy to conceal the fraud, would have opened the door to more evidence about events after the deal. However, Judge Breyer separated that count from the other charges and said it would not be heard in the trial that begins on Monday.

Commenting on Lynch's claim that HP made him a scapegoat for its own mismanagement, Judge Breyer said: "I have no opinion about whether that's correct. But I do have an opinion as to whether or not it's coming in in this case, and it's not."

He added: "There's no such thing as a hindsight fraud. It either occurred or didn't occur as of the dates that it's alleged to have occurred. If it didn't occur, whatever he did afterward makes no difference."

The ruling complicates Lynch's plans to appear as a witness in his own defence. His lawyers said much of his case would turn on his first-hand account of how he took a position at HP after the deal — something they said he would not have done had he been involved in fraud. They still hope to bring in some post-acquisition evidence, though Judge Breyer said it would only be allowed on a very limited basis, and only after he had a chance to vet Lynch's answers to particular questions.

According to the US charges, Lynch and Chamberlain artificially inflated Autonomy's revenues by backdating sales and engaging in round-trip deals in which customers were compensated for fake purchases of Autonomy's software. The alleged fraud also involved misrepresenting low-margin hardware sales as software deals, giving the false impression that Autonomy's software was growing much faster than it was.

The prosecution's case is likely to rest heavily on a number of witnesses who were closely involved with Autonomy at the time. They include Christopher Egan, the former head of the company's US business, who struck a deferred prosecution agreement with prosecutors and agreed to testify after also being charged.

Prosecutors plan to call Joel Scott, the former Autonomy general counsel in the US, whom they said would testify about Lynch's involvement in the sacking of a whistleblower who tried to reveal the alleged fraud.

KPMG Looks to Beat Big Law at AI by Leveraging Size and Capital

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XCHMUPG8000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XCHMUPG8000000)

- AI threatens 'core business model' for Big Law firms, says legal head Fuller
- KPMG partnering with Microsoft on AI tools for legal departments

KPMG sees an opportunity to grow its legal business by outspending major law firms on artificial intelligence tools.

The Big Four consultancy plans to invest "tens of millions of dollars" to help corporate legal departments streamline operations, including implementing generative AI, said Stuart Fuller, KPMG's head of legal services, in an interview. The technology eventually will "take away part of the core business model" for law firms by handling tasks usually assigned to junior lawyers, he said.

"The most critical difference between a Big Law firm and the Big Four is the ability to have capital provided by the organization to invest in your own business," Fuller said in an interview. "Creating technology-enabled solutions and investing in AI takes capital."

KPMG reported more than \$36 billion in gross revenue last year, more than five times that of the world's largest law firms.

The Big Four have intermittently been seen as a rival for Big Law firms since they began amassing lawyers and selling adjacent legal services more than a decade ago. Still, they have not proven to be a strategic rival for elite law firms, and they remain restricted from practicing law in the vast majority of the U.S.

Fuller leads KPMG Law's 3,850 legal professionals across 84 jurisdictions. He was previously the global managing partner of King & Wood Mallesons, a large firm in the Asia Pacific region.

Generative AI tools will soon be able to handle certain legal work faster, more accurately, and cheaper, he said. The company in November announced it is partnering with Microsoft to implement the software giant's AI expertise for corporate legal departments.

"We've seen the very powerful business model of the law firms survive a whole range of things," Fuller said in an interview. "The difference we see with generative AI is it goes to the core of what lawyers do, which is language and words. The transformational effect of it is significant."

Spending Money on AI

Australia-based Fuller joined KPMG Law in 2018 and became global head of legal services a year later.

KPMG Law revenue rose between 10% and 15% last year, he said, declining to provide a specific figure. The company's legal services arm expanded in the Asia-Pacific region in late 2022 with the addition of 275 lawyers from Zico Law.

Legal services is among 11 sectors targeted for growth in a recent companywide strategy review, he said. That decision led to the "tens of millions" Fuller said KPMG will invest in its business.

To justify the internal investment, Fuller said KPMG Law is targeting three internal metrics: revenue growth, the share of KPMG large clients who purchase legal services, and client feedback.

Legal tech companies have invested heavily in generative AI, and law firm leaders have discussed it as a potential game-changer. But the new tools have yet to make a dramatic impact.

Any sort of generative AI "transformation" is in its early stages, Fuller said. He is focusing on educating his workforce on the technology, rolling out a global training program in collaboration with Microsoft.

Most clients are at the earliest stages of deploying generative AI solutions, Fuller said. When they discuss possible use cases, they focus on legal research, document summaries, document creation, information extraction and document drafting, he said.

He anticipates the market will quickly consolidate around a handful of AI technology providers. The difference will be in who can best wrangle their own internal data, such as advice a company has historically received from law firms, to be used by those tools, he said.

"We now need people who are just mentally curious about how the practice of law will change and who are agile in changing their thinking," he said.

Billable Model

Big Law's business model has survived previous predictions of its demise. "Underestimate the strength of the law firm business model at your peril," Fuller said.

He expects clients will force law firms to use generative AI for tasks it can do more cheaply and efficiently than work traditionally done by junior lawyers. That will cause stress on the traditional billable hour model, he said, and create tension between law firms and their clients.

Law firms will be seeking a return on their investment in technology, he said, but clients will be expecting to recoup some of the cost savings created.

“That’s where the opportunity lies, but also the challenge,” he said.

Bloomberg Law competes in this market and sells AI-based tools that provide contract solutions.

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March 18, 2024, 9:48 AM PDT

Adani Says Report on Bribery Probe by US Prosecutors Is False

By Sidhartha Shukla

(Bloomberg) --

Adani companies haven't received any notice from the US Department of Justice regarding a probe into whether the Indian group may have engaged in bribery, according to exchange filings.

The company "states that it has not received any notice from the Department of Justice of US in respect of the allegation referred to in the said article. The company states that the report is false," listed Adani companies Adani Ports and Special Economic Zone Ltd., Adani Enterprises Ltd., ACC Ltd., Ambuja Cements Ltd., Adani Power Ltd., Adani Total Gas Ltd., Adani Wilmar Ltd., New Delhi Television Ltd. and Adani Energy Solutions Ltd. said in separate filings Monday.

Bloomberg News reported last week – citing people with direct knowledge of the matter – that US prosecutors have widened their probe of the Adani Group to focus on whether an Adani entity may have engaged in bribery as well as the conduct of the conglomerate's billionaire founder Gautam Adani. The probe, which is also looking at Indian renewable energy company Azure Power Global Ltd., is being handled by the US Attorney's Office for the Eastern District of New York and the Justice Department's fraud unit in Washington, Bloomberg had reported.

At the time, the Adani Group had said, "We are not aware of any investigation against our chairman. As a business group that operates with the highest standards of governance, we are subject to and fully compliant with anti-corruption and anti-bribery laws in India and other countries."

READ: US Prosecutors Expand Adani Probe to Review Potential Bribery

Several of Adani Group's dollar bonds fell the most in more than a year when markets reopened Monday, and most of the group's shares declined.

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Securities Law

March 18, 2024, 8:05 AM PDT

China Evergrande Inflated Revenue by \$78 Billion, Regulator Says

By Evelyn Yu

- CSRC fines Evergrande founder Hui over inflated results
- Hui banned for life from participating in securities markets

Bloomberg Law News 2024-03-18T12:36:58537037614-04:00

China Evergrande Inflated Revenue by \$78 Billion, Regulator Says

By Evelyn Yu2024-03-18T11:05:40554-04:00

CSRC fines Evergrande founder Hui over inflated results

Hui banned for life from participating in securities markets

The former chairman of China Evergrande Group , the defaulted developer at the heart of China’s real estate crisis, was accused of inflating business revenue by more than \$78 billion over two years, according to the nation’s top securities regulator.

Evergrande’s onshore unit Hengda Real Estate Group boosted revenue by about 214 billion yuan (\$29.7 billion) in 2019 by recognizing sales in advance, and another 350 billion yuan in the 2020 annual results, the developer said in a [filing Monday](#) , citing a notice from the China Securities Regulatory Commission. The inflated figures accounted for half of total revenue in 2019 and 79% in 2020, according to the regulator.

The CRSC imposed a fine of 47 million yuan on former Evergrande Chairman and founder **Hui Ka Yan** over the falsified results as well as other alleged crimes, and banned him for life from participating in capital markets activities.

CSRC said Hui “instructed other personnel to falsely inflate” the company’s annual results in 2019 and 2020. Hui was the responsible supervisor, and the methods used were particularly “egregious,” the regulator said. Hengda was fined 4.18 billion yuan, according to the preliminary decision by the CSRC.

The regulator also said some Hengda bonds were issued in 2020 and 2021 citing data from 2019 and 2020 reports that had false records and were suspected of fraudulent issuance.

Read more: [Why China Property Giant Evergrande Faces Liquidation: QuickTake](#)

Evergrande was once one of China’s biggest developers, taking on massive amounts of debt to expand across the country as condo sales boomed. Hui’s empire began to unravel after regulators imposed tight restrictions on borrowing, while an economic slowdown and the pandemic crimped sales.

Hui was placed under a type of police control in September. Authorities notified Evergrande at the time that Hui had been subject to “mandatory measures,” due to “suspicion of illegal crimes.”

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Once Asia's second-richest man, worth \$42 billion at his peak in 2017, Hui's wealth has plummeted to about \$1 billion since then after the developer defaulted on its debt, while its stock tumbled and was eventually suspended from trading.

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Securities Law

March 16, 2024, 7:00 AM PDT

Want to Be 'Certified Crypto Expert?' You Need 11 Hours and \$229

By Olga Kharif

- Spot-Bitcoin ETFs linked to rise in demand for courses
- Many are 'just money grabbing gimmicks,' says Duke's Harvey

Bloomberg Law News 2024-03-18T12:53:15200072496-04:00

Want to Be 'Certified Crypto Expert?' You Need 11 Hours and \$229

By Olga Kharif 2024-03-16T10:00:000000-04:00

Spot-Bitcoin ETFs linked to rise in demand for courses

Many are 'just money grabbing gimmicks,' says Duke's Harvey

To pass the chartered financial analyst exams and put the "CFA" letters on your resumé, at least 900 hours of study are recommended. Hitting the books for 300 to 400 hours is advised for the certified public accountant exam, which is usually taken by prospective CPAs who have completed an undergraduate degree in the subject.

However, to become a "Certified Cryptocurrency Expert," or CCE, all you need is \$229 and time for 11 hours of online coursework offered by Blockchain Council. If that's too much of a time commitment, you can receive a "Cryptocurrency and Blockchain Certificate" elsewhere by taking just four hours of coursework, passing a 20-question test and shelling out \$795.

The lack of a widely recognized professional accreditation in the cryptocurrency industry has left a vacuum that a variety of organizations are trying to fill, and Bitcoin's rally to records this year is stoking interest in them. Yet as with many topics involving crypto, there are questions about what exactly – if anything – is worth the investment.

Contributing to the proliferation of online crypto-certification programs is the fact that many universities are behind the curve when it comes to offering sufficient coursework in the subject, according to Duke University finance professor **Campbell Harvey**.

"Many have seen this gap and are offering 'certifications,'" Harvey, who studies digital-asset markets, said in an email. "However, students need to be aware that some of these certifications are just money grabbing gimmicks. Buyer beware."

Emails to the Blockchain Council seeking comment were not returned, and repeated calls to the phone number on its website went unanswered. ACAMS, which offers the \$795 Cryptocurrency and Blockchain Certificate, didn't return emails seeking comment.

In at least one case, a crypto-education program has been linked directly to an alleged scam. The US Securities and Exchange Commission last month announced a settlement with Brian Sewell, founder of an online trading course called the American Bitcoin Academy, which the regulator said scammed 15 students out of more than \$1 million by persuading them to invest in a fake hedge fund. Sewell didn't return requests seeking comment.

As the price of Bitcoin surged back to record levels this year, there was an accompanying [jump in interest](#) in crypto from retail and institutional investors alike – and with it a corresponding surge in Web searches for “crypto certification,” according to Google Trends.

Asked about the various certifications available, a representative of the crypto association Coin Center responded that they weren’t familiar with any of them and that “might tell you all you need to know.”

Some major employers in the industry don’t pay much attention to the certifications as well.

“We look for notable experience and achievements in the crypto space over certifications,” said a spokesperson for Coinbase Global Inc., the biggest US crypto exchange. “We also value crypto passion and curiosity and have developed internal education to further develop folks.”

Still, some employers are finding value in certain certificates. Bitwise Asset Management has had more than 20 employees take the Digital Assets Council of Financial Professionals certification since 2021, as “a great way to ensure that they start with a strong foundation of crypto knowledge,” said **Matthew Hougan**, chief investment officer at Bitwise, which was one of the companies to launch a new spot Bitcoin ETF.

Inquiries about the Digital Assets Council of Financial Professionals’ certification courses have increased as much as 30% since the beginning of the year, as the first batch of ETFs investing directly in Bitcoin were approved in the US, said Founder Ric Edelman, who started Edelman Financial Engines.

“Now that these ETFs are here, and there’s so much consumer demand for them, we are seeing a significant uptick in inquiries,” Edelman said.

Thousands have taken the course so far, Edelman said. He said DACFP differentiates itself from other certification courses by not only talking about blockchain and crypto but also about understanding the financial planning, taxation and estate planning aspects of crypto.

For this new wave of consumer stepping into crypto, the challenge will be separating the chaff from the wheat.

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Crypto Titans Threaten to Unleash War Chest on Hostile Lawmakers

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- Pro-industry super PAC has around \$75 million to spend
- US policymakers weighing rules to regulate the asset class

The crypto lobby is putting US political candidates on notice: Side with us or risk defeat at the ballot box.

As evidence, it's pointing to the defeat of Democratic Representative Katie Porter in California's Senate primary last week. Deep-pocketed industry participants pumped \$10 million into an advertising and get-out-the-vote effort that they've said helped eliminate Porter in the open primary. That set a clearer path for her fellow Democrat Adam Schiff – seen as being more friendly to crypto – to take the spot in November.

Sympathetic billionaires are offering plenty of support, and money, for the cause. A pro-crypto super PAC, Fairshake, has amassed a war chest that now totals around \$75 million to spend on US elections. Backers include Coinbase Chief Executive Officer Brian Armstrong, Cameron and Tyler Winklevoss — founders of the digital-asset exchange Gemini — and Marc Andreessen of Andreessen Horowitz.

Crypto proponents acknowledge that the odds are slim that they will be able to unseat one of the industry's toughest critics, Massachusetts Senator Elizabeth Warren, who is running for reelection this year in a relatively safe seat. But they plan to use the example of Porter's loss to pressure the Democratic senator's more vulnerable allies.

Teaming with Warren "is going to make your election much more difficult," Kristin Smith, chief executive officer of crypto trade group Blockchain Association, said in an interview.

One of the candidates Smith's group says it's watching is Senator Sherrod Brown. The Ohio Democrat and chair of the Senate Banking Committee has been at the forefront of a group of lawmakers pushing for stricter limits on crypto.

"It's sort of an open question as to what, if any, moves he's going to make on crypto through the rest of the year," Smith said of Brown.

A spokesperson for Senator Brown's campaign declined to comment.

New Legislation

The industry has its eyes on legislative proposals aimed at combating illicit finance. Two bills, one backed by Warren and Republican Senator Roger Marshall, and another introduced by Senators Mark Warner, Jack Reed, Mitt Romney and Mike Rounds, would aim to apply anti-money laundering rules that currently exist for banks and other financial institutions to crypto firms.

Criminal networks have used cryptocurrency to move illicit funds around and taken advantage of tools to make transactions more anonymous.

Groups like the Blockchain Association and the Chamber of Digital Commerce have said the current bills would impose unworkable requirements and effectively kill the industry in the US.

An attendee during a “Stand With Crypto” rally in Los Angeles a day before the Super Tuesday primary.

Photographer: Mark Abramson/Bloomberg

The political tough talk represents a remarkable evolution from a year ago, when it seemed the crypto industry would never recover from a barrage of scandals and business failures that saw one of its most formidable figures, **Sam Bankman-Fried**, convicted on criminal charges.

Other moments of optimism around crypto have fizzled after scrutiny from regulators and a struggle to establish a practical use for the technology. Regulators continue to examine many aspects of the business.

Representative Brad Sherman, a Democrat on the House Financial Services Committee who regularly questions the usefulness of crypto, said the effect the industry is having on elections is probably overstated. But its ability to throw millions of dollars at races won't escape lawmakers' notice.

“Whether they actually are decisive may be less significant than a shot across the bow of the 430-some members of Congress whose races they're not involved in,” he said in an interview.

Super Tuesday was the first big test for the Fairshake super PAC. Key races it could jump into next, according to spokesman Josh Vlasto, are the Democratic Senate primaries in Michigan and Maryland — for the seats currently occupied by Debbie Stabenow and Ben Cardin, who are both retiring — and Senate Banking Committee member Jon Tester's race in Montana.

ETF Turning Point

The crypto market is rebounding thanks in large part to the approval by US regulators in January of spot Bitcoin exchange-traded funds. That decision lent a new aura of respectability to the most widely held cryptocurrency.

Getting to that point wasn't easy after a string of business failures in 2022 culminated in the implosion of one of the sector's most high-profile ventures, FTX. The company's co-founder Bankman-Fried is awaiting sentencing after being convicted last year for defrauding customers.

Others in the industry have been left to rebuild relationships on Capitol Hill as lawmakers consider a number of bills to regulate the marketplace, including measures to combat illicit finance and to rein in stablecoins, crypto tokens pegged to assets like the dollar. If adopted, the new rules could change how the businesses operate.

Meanwhile, the industry is waiting to see whether the Securities and Exchange Commission will approve ETFs tracking Ether, the world's second-biggest cryptocurrency.

Critics say that they remain skeptical of the industry's ability to sway elections. They note that some television advertisements that crypto-linked PACs paid for ahead of Super Tuesday avoided mentioning crypto, instead focusing on hot-button issues like reproductive rights and gun safety in the messages supporting Democrats, and lower taxes and inflation for Republicans.

"They know the public views crypto like kryptonite – it turns off more voters than it turns on," said Dennis Kelleher, president and chief executive officer of Better Markets, a group that pushes for greater market oversight. But "you can bet that wherever crypto spends a penny, they will claim they have influenced the outcome and expect the winners to pay them back."

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JPMorgan's Federally-Insured Bank Is Fined \$348 Million for Losing Track of "Billions" of Trades

 wallstreetonparade.com/2024/03/jpmorgans-federally-insured-bank-is-fined-348-million-for-losing-track-of-billions-of-trades

By Pam Martens and Russ Martens: March 18, 2024 ~

On Thursday of last week, two of JPMorgan Chase Bank's federal regulators fined the riskiest bank in the United States \$348 million dollars for engaging in "unsafe and unsound banking practices" for failing to supervise "billions" of trades on at least 30 global trading venues.

The Office of the Comptroller of the Currency (OCC) fined JPMorgan Chase Bank \$250 million while the Federal Reserve fined the bank \$98.2 million. The OCC said the misconduct occurred since at least 2019. The Fed said the bank had engaged in the misconduct over the span of nine years, from 2014 to 2023.



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

The key outrage embedded in these charges – that mainstream media failed to point out in its coverage last week – is that this "trading" activity did not occur at the registered brokerage firm of JPMorgan, which has properly licensed traders and trading supervisors. It occurred at the federally-insured bank, which is *not allowed* to have licensed traders – because casino banking brings on bank runs, bank panics and giant scandals that undermine Americans' confidence in federally-insured banks.

Under Jamie Dimon at the helm of this federally-insured bank, as both Chairman and CEO, JPMorgan Chase Bank has turned giant scandals into an art form. Its rap sheet reads like that of an organized crime family and includes an unprecedented five criminal felony charges.

Just last year, its salacious activities with sex trafficker Jeffrey Epstein, to whom it doled out mountains of hard cash for more than a decade (which he then used to silence his underage victims and accomplices), generated news headlines around the world. The bank settled those charges last year, which had been brought in two civil lawsuits by his victims and by

the Attorney General of the U.S. Virgin Islands, for a combined \$365 million. (See JPMorgan's Settlements Reach \$365 Million Over Civil Claims It Banked Jeffrey Epstein's Sex Trafficking of Minors; Criminal Charges Could Lie Ahead.)

Adding to the outrage over the mild slap on the wrist from these two regulators last week is that this federally-insured bank was previously charged with engaging in unsafe and unsound banking activities when it used depositors' money from its federally-insured bank to engage in massive high-risk credit derivative trades in London in 2012 and lost \$6.2 billion of depositors' money. The case became infamously known as the London Whale scandal.

The OCC wrote as follows in its settlement document covering the London Whale matter in 2013:

"The credit derivatives trading activity constituted recklessly unsafe and unsound practices, was part of a pattern of misconduct and resulted in more than minimal loss, all within the meaning of 12 U.S.C. § 1818(i)(2)(B)"; and "The Bank failed to ensure that significant information related to the credit derivatives trading strategy and deficiencies identified in risk management systems and controls was provided in a timely and appropriate manner to OCC examiners."

The Securities and Exchange Commission (SEC) also settled charges with the bank in the London Whale matter. The SEC focused on JPMorgan's ineffective internal controls and failure to keep the Audit Committee of its Board informed in a timely manner as required under its own rules and under the Sarbanes-Oxley Act. The SEC also found the company violated securities laws by filing false information with the SEC: "As a result of its failure to maintain effective internal control over financial reporting as of March 31, 2012, and disclosure controls and procedures, and as a result of its filing of inaccurate reports with the Commission (specifically, the Form 8-K filed on April 13, 2012, and the Form 10-Q filed on May 10, 2012), JPMorgan violated Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 13a-11, 13a-13, and 13a-15 there under," the SEC said in its settlement document.

At the time of the London Whale scandal, a woman named Ina Drew was in charge of the unit of the federally-insured bank that oversaw the derivatives trading in London. That unit of the bank was called the Chief Investment Office. (That unit was created after Jamie Dimon took the helm at the bank.)

Ina Drew testified about the matter before the U.S. Senate's Permanent Subcommittee on Investigations on March 15, 2013. Drew told the hearing panel that beginning in 1999, she "oversaw the management of the Company's core investment securities portfolio, the foreign-exchange hedging portfolio, the mortgage servicing rights (MSR) hedging book, and a series of other investment and hedging portfolios based in London, Hong Kong and other foreign cities."

Drew told the Senate Subcommittee that the investment securities portfolio exceeded \$500 *billion* during 2008 and 2009 and as of the first quarter of 2012 was \$350 billion. But during the 13 years that Drew supervised massive amounts of securities trading, she had neither a securities license nor a principal's license to supervise others who were trading securities.

At the time, we asked numerous Wall Street regulators to explain how this is possible at Wall Street mega banks. One regulator who spoke on background only told us that Drew could not hold a securities license because she worked for the federally-insured bank, not its broker-dealer (a/k/a brokerage firm). Only employees of broker-dealers are allowed to hold securities licenses. But apparently, not having a securities license does not stop one from supervising a \$500 billion portfolio of securities that are, most assuredly, traded by someone.

It is a long-held requirement by U.S. securities regulators that if you are going to supervise persons holding a securities license, you must also hold the appropriate securities licenses yourself. Drew, without a license, was supervising traders in London who were registered with the Financial Services Authority (now Financial Conduct Authority).

In its 10-K (annual report) filing in February with the SEC, JPMorgan Chase indicated there is a third unnamed regulator that is currently investigating these billions of unsupervised trades. The bank said it was "also in advanced negotiations with a third U.S. regulator, but there is no assurance that such discussions will result in a resolution."

That third regulator should closely examine what is going on in JPMorgan's own Dark Pools, where the bank is preposterously allowed to trade large amounts of its own bank stock in its own Dark Pools. (See chart below as an example of what went on in the week of October 23, 2023.) Dark Pools are thinly regulated trading platforms inside the mega banks on Wall Street, and elsewhere, which lack the transparency of stock exchanges.

Dark Pool Trading in Stock of JPMorgan Chase Week of October 23, 2023

Total Shares Traded: 5,520,468

Total Trades: 86,815

**Percent of Shares Traded by
JPMorgan's Own Dark Pools: 9.25 Percent**

Largest Dark Pool Trading in JPM Stock	Shares	Trades
UBSA UBS ATS	1,076,191	21,807
INCR INTELLIGENT CROSS LLC	962,527	14,888
SGMT SIGMA X2	634,105	11,708
EBXL LEVEL ATS	399,028	6,334
JPMX JPM-X  Dark Pool Owned By JPMorgan	378,481	4,971
PURE PURESTREAM	290,990	12,256
LATS THE BARCLAYS ATS	231,308	2,774
MLIX INSTINCT X	198,081	2,567
MSTX MS TRAJECTORY CROSS (ATS-1)	188,000	815
MSPL MS POOL (ATS-4)	183,400	1,407
JPBX JPB-X  Dark Pool Owned By JPMorgan	132,056	836

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Apple, Investors Cut \$490M China Sales Deal Ahead Of Trial

By **Dorothy Atkins**

Law360 (March 15, 2024, 4:40 PM EDT) -- Apple has made a \$490 million deal to resolve a shareholder class action accusing the company and its top brass of misleading investors about iPhone sales in China in a legal fight that was slated for a September jury trial, according to court documents filed Friday in California federal court.

In their **motion**, the investors asked U.S. District Judge Yvonne Gonzalez Rogers to preliminarily sign off on the deal, under which class counsel plan to seek up to \$122.5 million, or 25% of the total settlement, for attorneys' fees, and up to \$3 million for litigation expenses.

The investors argued that the settlement is a "tremendous result for the class," and if approved, it would be the third-largest securities class action recovery ever in the Northern District of California. They said the proposed nine-figure settlement represents more than 20% of the maximum recoverable common stock damages estimated by the class's experts if the investors won at trial.

"Considering the risks of continued litigation and the time and expense that would be incurred to prosecute the action through trial, the \$490 million settlement is an outstanding recovery that is in the class's best interests," the motion said.

Class counsel Shawn A. Williams of Robbins Geller Rudman & Dowd LLP said in a statement Friday that the \$490 million recovery is an outstanding result for investors who purchased Apple securities during the two-month class period. He added that the deal is also "a testament to the perseverance of the lead plaintiff, the U.K.'s Norfolk Pension Fund, in pursuing the action to the brink of trial."

Counsel and representatives for Apple didn't immediately respond to requests for comment Friday.

A hearing on the motion is set for April 30 in Oakland before Judge Gonzalez Rogers. If approved, the settlement would resolve a yearslong dispute between the class of stockholders and the tech giant over statements about Apple's iPhone sales in China made by CEO Tim Cook and its Chief Financial Officer Luca Maestri in 2019.

The litigation, which was **consolidated** in August 2019, accuses Apple and its executives of failing to disclose that the "trade war" between the U.S. and China was taking a toll on demand for iPhones in what is considered to be one of the company's most important markets.

Apple hid this sales slump from its investors, leading them to believe that the company's financial prospects were stronger than they actually were, the class claimed.

The company, however, came clean in early January 2019 when it "slashed" its previously announced quarterly revenue forecast for the first time in 15 years, the suit said. Apple blamed the Chinese economy and the increasing tendency of customers there to replace their iPhone batteries rather than upgrade to new phones, investors alleged.

After Apple missed its revenue projections by up to \$9 billion, its stock dropped more than 9% the day after the announcement, according to the suit.

In November 2020, Judge Gonzalez Rogers **trimmed** claims that Apple made misleading statements about consumer demand for the new iPhone XS, finding that the investors had failed to sufficiently

plead that the statements were false.

But the judge kept alive claims concerning Cook's comments during an earnings call about iPhone demand remaining steady in China when, in fact, the country had experienced economic decline and trade tensions with the United States. She said Cook's comments suggested he "did not act innocently or with mere negligence."

The judge also kept alive a claim that Maestri violated a provision of the Securities Exchange Act by failing to correct Cook's statements and failing to explain to investors that Apple faced challenges in China that might undermine the company's earnings.

In February 2022, the judge **certified** the class of investors who acquired Apple stock from Nov. 2, 2018, through Jan. 2, 2019. But the court excluded options traders, finding that the plaintiffs didn't show how damages for the subgroup could be calculated on a classwide basis.

In June, Judge Gonzalez Rogers **refused** to grant Apple summary judgment, concluding that a jury could find that Cook knew facts that made the challenged statement false when he made it, rejecting the defendants' argument that facts indicating he otherwise acted in good faith prove he didn't have the requisite scienter.

And in July, she **scheduled** a jury trial to begin in May. However, earlier this year, the judge pushed back the trial date to September due to scheduling changes in her court docket. But the parties struck the proposed settlement before an upcoming pretrial conference.

Under the deal, the lead plaintiffs plan to seek no more than \$73,000 in total for their roles at class representatives, and class members can opt out of the deal or else receive a pro rata share of the settlement based on the type of security transacted and the relative size of their recognized claims.

"The amount of the payment will depend on, among other factors, how many class members file valid claims and the aggregate value of the recognized claims represented by valid and acceptable proofs of claim," the motion said.

The investors are represented by Shawn A. Williams, Daniel J. Pfefferbaum, Kenneth J. Black, Hadiya K. Deshmukh, Jacob G. Gelman, Mark Solomon, Ellen Gusikoff Stewart and Jason A. Forge of Robbins Geller Rudman & Dowd LLP and Thomas Michaud of VanOverbeke Michaud & Timmony PC.

The Employees' Retirement System of the State of Rhode Island is represented by Carol Villegas of Labaton Keller Sucharow LLP.

Apple, Cook and Maestri are represented by James N. Kramer, Alexander K. Talarides and Tristan K. Allen of Orrick Herrington & Sutcliffe LLP and Melinda Haag, Walter F. Brown Jr. and Meredith R. Dearborn of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In re: Apple Inc. Securities Litigation, case number 4:19-cv-02033, in the U.S. District Court for the Northern District of California.

--Additional reporting by Lauren Berg, Bonnie Eslinger and Emilie Ruscoe. Editing by Dave Trumbore.



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Didi Can't Shake Investor Class Over Regulatory Disclosures

By **Katryna Perera**

Law360 (March 15, 2024, 5:07 PM EDT) -- A New York federal judge has ruled that Chinese ride-hailing giant Didi Global Inc. cannot escape a class action suit claiming it misled investors about the risks of a disciplinary crackdown from the Chinese government over alleged data security violations, saying the risk disclosures Didi provided investors were insufficient.

U.S. District Judge Lewis A. Kaplan in a Thursday **opinion** denied a dismissal motion filed by Didi, its top brass and the underwriters that participated in its 2021 initial public offering.

The consolidated suit stems from a **pair of investor complaints** filed in 2021, claiming Didi failed to disclose that Chinese regulators had previously asked it to hold off on an IPO and conduct a self-examination of its network security. The suits took aim at the registration statement for Didi's **smash \$4.4 billion U.S. IPO** in June 2021.

According to investors, despite requests from Chinese regulators, the company moved forward with its IPO, and within days, the Chinese government called on Didi to first suspend the registration of new users and later ordered the removal of its Didi Travel app from app stores in China, citing violations in the collection of users' personal data. This, in turn, caused Didi's share price to drop from its IPO price of \$14 to a low of around \$12 two weeks later in an apparent response to **China's restrictions**.

In its dismissal motion, Didi argued that the second amended complaint, filed in May 2022, did not explain why statements included in the company's IPO documents were false or misleading and that the plaintiffs have not sufficiently alleged the existence of any directives from the Cyberspace Administration of China, or CAC.

Judge Kaplan rejected both these assertions on Thursday and specifically noted that it is well known that the Chinese government "often works coercively" and that any "urge, suggestion, or pressure" from Chinese authorities equates to a true directive.

"The SAC incorporates numerous, detailed, and consistent news reports from reputable publications reporting that, among other things, the CAC 'suggested' that Didi 'delay its initial public offering and urged it to conduct a thorough self-examination of its network security.' Plaintiffs argue also that the speed with which the CAC sanctioned Didi following its IPO and the severity of those sanctions confirm that the CAC had warned Didi not to proceed," the opinion states. "The court is obliged to accept the truth of these purely factual and sufficiently particularized allegations for purposes of this motion."

Didi also argued that it was not obligated to disclose any alleged CAC directives to investors but that, regardless, the disclosures of regulatory risk it provided were sufficient.

However, Judge Kaplan disagreed, saying the disclosures were inadequate because they did not mention the CAC's requests.

"Didi's disclosures warned only of the general risk that its failure to comply with applicable laws and regulations jeopardized its future operations. They made no mention of the far more specific risk, known to Didi, that the company, in proceeding with the IPO, was defying the Chinese government's directives and thus inviting its wrath," the opinion states.

The judge added that this information would have been highly material to a reasonable investor, so there was an obligation to disclose it.

There is also strong evidence of scienter on the part of Didi and the individual defendants, Judge Kaplan said, because the plaintiffs have pled a "concrete and personal economic motive."

"[Plaintiffs'] allegations are specific to defendants' circumstances as a Chinese technology company and its corporate officers attempting to list on an American exchange at a moment when the Chinese government appeared poised to 'crack[]down' on Chinese technology companies and 'the window for high valuation Chinese IPOs in the United States could close very soon,'" the opinion states. "Disclosing the CAC's directives and complying with it, plaintiffs allege, could have caused Didi 'a lengthy delay ... and perhaps an inability to move forward in the U.S. at all.'"

Judge Kaplan also said the second amended complaint adequately pleads loss causation and that the underwriting agreements contained false statements.

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

The investors are represented by Laurence M. Rosen, Phillip Kim, Jing Chen, Daniel Tyre-Karp and Robin Bronzaft Howald of The Rosen Law Firm PA and by Gregory Linkh of Glancy Prongay & Murray LLP.

Didi Global is represented by Scott Musoff, Robert Fumerton and Michael Griffin of Skadden Arps Slate Meagher & Flom LLP.

The underwriter defendants are represented by Jonathan Rosenberg, Abby F. Rudzin, Shane A. Hunt and William K. Pao of O'Melveny & Myers LLP.

The individual defendants are represented by Quinn Emanuel Urquhart & Sullivan LLP, Wilson Sonsini Goodrich & Rosati PC, Gibson Dunn & Crutcher LLP and Sullivan & Cromwell LLP.

The case is In Re Didi Global Inc. Securities Litigation, 1:21-cv-05807, in the U.S. District Court for the Southern District of New York.

--Editing by Michael Watanabe.



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SolarEdge Hit With Derivative Suit Over 2023 Earnings Miss

By **Emilie Ruscoe**

Law360 (March 15, 2024, 8:01 PM EDT) -- Current and former executives and directors of equipment maker SolarEdge Technologies Inc. face an investor's derivative suit in Manhattan federal court alleging they concealed distributor order cancelations and other developments that would ultimately result in a low quarterly revenue outcome.

In a complaint filed Friday brought on behalf of nominal defendant SolarEdge, investor Abdul Hirani took aim at SolarEdge's CEO Zvi Lando, its chief financial officer and seven board members with claims that between May and October 2023, they'd breached their fiduciary duties by touting growth in the company's market in Europe despite the fact its European distributors didn't need as much of the company's inventory as had been anticipated.

According to Hirani, when the company finally acknowledged that the demand it expected wasn't present in Europe, SolarEdge representatives said that as a result, it expected that its quarter revenue, gross margin and operating income for the third quarter of 2023 to come in "below the low end of the prior guidance range," \$720 million to \$730 million, down significantly from its earlier expectation that it would see those numbers come in the range of \$880 million to \$920 million for the quarter.

When the company announced it was going to miss its earnings projection in October 2023, Hirani claimed, trading prices for its shares slid by about 27%, from about \$114 to under \$83, within a single trading day.

According to Hirani, the company's brass knew, or should have known, that certain statements they made in the second and third quarters about positive trends in the company's European growth were false or misleading when made.

For example, Hirani said, in May 2023 Lando told investors that "the European residential markets continues to be very strong for us this quarter," adding that "We expect this momentum to continue in the coming quarters."

Hirani also pointed to statements Lando made about its European market when commenting on its quarterly results in August 2023. The investor alleged that the August statements painted an incomplete picture of the company's real expectations for the coming quarter.

Hirani also claimed that the alleged misrepresentations would cause the company to lose and expend millions of dollars, citing a securities class action the company and two of its executives **face** in connection with the drop in its trading prices.

"The Securities Class Actions has exposed the company to massive class-wide liability," Hirani added.

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

Hirani is represented by Seth D. Rigrodsky, Timothy J. MacFall, Gina M. Serra and Vincent A. Licata of Rigrodsky Law PA and Joshua H. Grabar of the Grabar Law Office.

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

The case is Hirani v. Lando et al, case number 1:24-cv-01948, in the U.S. District Court for the Southern District of New York.

--Editing by Alex Hubbard.

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Ex-Autonomy CEO To Face Jury As HP Fraud Trial Boots Up

By **Bonnie Eslinger**

Law360 (March 15, 2024, 4:41 PM EDT) -- Former Autonomy CEO Michael Lynch's 2011 sale of the tech company he founded to HP for about \$11.7 billion earned him around \$804 million and acclaim in tech circles, but the British executive now faces up to 20 years in prison on federal fraud charges that he inflated revenue figures in a monthslong criminal trial slated to kick off Monday in San Francisco.

Prosecutors claim that the 58-year-old Lynch and other co-conspirators artificially inflated Autonomy's revenue figures when it was sold to the Silicon Valley giant, which announced a year after the sale that it had to write down the value of the company by billions as a result of the alleged fraud.

Sushovan Hussain, Autonomy's former chief financial officer, was convicted on related charges in 2018 and **subsequently sentenced** to five years in U.S. prison. Now it's Lynch's turn to go before a jury, which he'll do alongside former Autonomy Vice President Stephen Chamberlain.

The case is one of the largest frauds ever prosecuted by the U.S. Department of Justice, prosecutors told a U.K. court during extradition proceedings that the British tycoon **vigorously fought**.

"It's a lot of money, you're talking billions," said criminal defense lawyer Richard Cannon of U.K. law firm Stokoe Partnership Solicitors. "I think it's unusual to have criminal allegations on this scale in high-end commercial activity."

Autonomy was once ranked as one of the leading U.K. technology companies, Cannon said, and while Lynch was not generally known to the public, he was prominent in the tech industry and had influential friends, including some politicians.

After his **2023 extradition**, Lynch posted a \$100 million bond and surrendered his passport. He presently lives in a San Francisco home under video surveillance and wears a GPS ankle monitor, a representative for the businessman confirms. Court documents indicate that Lynch is also watched on a 24-hour basis by two armed guards that he pays for, and he is allowed out of the house from 9 a.m. to 9 p.m. under their supervision.

The government is expected to call dozens of witnesses, and its case in chief could last for more than six weeks, a federal prosecutor told the judge overseeing the case last month. Lynch and Chamberlain's defense could run about four weeks after that, their lawyers told the court, adding that the estimate could change based on the evidence presented by prosecutors. During a Feb. 28 pretrial hearing, a lawyer for Lynch told the judge that his legal team is "thinking very seriously about putting our client on the stand."

In its criminal case, the government has charged Lynch with conspiracy to commit wire fraud, wire fraud and securities fraud. Chamberlain has been charged with conspiracy to commit wire fraud and wire fraud. The defendants have pled not guilty.

Lynch's legal team has said in court documents that evidence from after HP's acquisition of Autonomy makes it clear Lynch is innocent. That includes evidence of HP mismanaging Autonomy leading to substantial revenue target misses, which Lynch says he witnessed during his tenure as CEO of the HP-owned Autonomy until May 2012.

Parallel **civil proceedings** brought by HP have been ongoing in London since 2015, with a **London judge** ruling in 2022 that Lynch and Hussain had used dishonest accounting techniques to "induce" HP to buy the firm.

At the start last month of a second-phase damages trial in the U.K. civil case, HP asked the court to order Lynch and Hussain to pay more than **\$4 billion** to make up the difference between what it paid for Autonomy and the true price of the British company.

Lynch also sued the U.K.'s Serious Fraud Office in January under a data protection law, seeking **all communications** between the agency and the DOJ or other American authorities between July 2015 and January 2019. In a **subsequent filing**, Lynch claimed that the DOJ might have requested international legal assistance from the SFO for the sole purpose of extending the statute of limitations on charging him. The information was needed, Lynch said in a motion to the court, to allow him to prepare his defense in the U.S. proceedings.

The SFO had previously announced that it had agreed to disclose some of the materials, but not all. Lynch **eventually settled** his document claim against the SFO, a spokesperson said earlier this month.

Lynch is a "man of considerable means," which allows him to pursue all possible legal avenues in his fight against the charges against him, Cannon said.

"He leaves no stone unturned," said the Stokoe criminal defense lawyer.

Before its acquisition by HP in October 2011, Autonomy was a company with dual headquarters in San Francisco and Cambridge, England, and about 68% of Autonomy's reported revenues came from the U.S. and other countries in the Americas as of 2010, according to the federal government.

Prosecutors say Lynch and the other co-conspirators artificially inflated Autonomy's revenues and made false and misleading statements to the company's independent auditor about recorded transactions related to the revenue and other items in Autonomy's financial statement. The defendants also made false and misleading statements to regulators as well as market analysts about the company's performance, according to the superseding indictment. And the defendants lied when they said that Autonomy was a so-called pure software company while concealing hidden, loss-making resales of hardware, prosecutors say.

Lynch and others also "intimidated, pressured and paid off persons who raised complaints about or openly criticized Autonomy's financial practices and performance," the Justice Department said in its 2023 announcement about Lynch's extradition. Lynch and Chamberlain also worked together to deceive U.S. investigators, in order "to cover up, conceal, influence witnesses to, and otherwise obstruct investigations of the scheme to defraud," the 2023 announcement states.

Autonomy, formed in 1996, served about 25,000 businesses worldwide and was known for its Intelligent Data Operating Layer platform that lets companies manage and search through massive amounts of information.

Back in October 2011, when HP announced that it had acquired control of Autonomy, the U.S. company said the deal positioned HP "as a leader in the large and growing enterprise information management space," since Autonomy "offers solutions that are complementary" and "strengthens the company's data analytics, cloud, industry and workflow management capabilities." Lynch would continue to lead Autonomy, which would operate as a separate business unit to HP, the company said.

One year later, HP went public with the alleged accounting concerns saying about \$5 billion of the **\$8.8 billion** write-down was the result of "serious accounting improprieties" at Autonomy.

While Chamberlain is also on trial, it's clear that the government has pinned its case on Lynch. In a pretrial motion, federal prosecutors said the proceedings "will place before jurors a sophisticated, multi-year conspiracy" involving numerous Autonomy employees — who all acted at the direction of Lynch.

Representatives for the government and Lynch declined requests for comment on the case.

The government is represented by Robert S. Leach, Adam A. Reeves and Kristina N. Green of the U.S. Attorney's Office for the Northern District of California and Zachary G.F. Abrahamson of the U.S. Department of Justice's Antitrust Division.

Michael Lynch is represented by Christopher J. Morvillo, Celeste L.M. Koeleveld and Daniel S. Silver of Clifford Chance LLP and Jonathan M. Baum, Reid H. Weingarten, Brian M. Heberlig, Michelle L. Levin, Nicholas P. Silverman and Drew C. Harris of Steptoe LLP.

Stephen Chamberlain is represented by Gary S. Lincenberg, Ray S. Seilie and Michael C. Landman of Bird Marella Rhow Lincenberg Drooks & Nessim LLP.

The cases are U.S. v. Mike Lynch et al., case number 3:18-cr-00577, and U.S. v. Stephen Keith Chamberlain, case number 3:18-cr-00577, in the U.S. District Court for the Northern District of California.

--Additional reporting by Richard Crump and Christopher Crosby. Editing by Jay Jackson Jr. and Emily Kokoll.

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Hagens Berman Defends Bid To Lead Yardi Price-Fixing Suit

By **Henrik Nilsson**

Law360 (March 15, 2024, 11:39 PM EDT) -- A putative class on Friday continued to push for the appointment of Hagens Berman Sobol Shapiro LLP as interim lead counsel for a rent price-fixing class action in Washington federal court after property management software company Yardi Systems Inc. and multiple landlords opposed the bid.

The renters wrote in a reply that Yardi and the landlords incorrectly **suggested in their opposition** that there's no need for interim lead counsel without multiple competing suits, saying "the prevailing consideration in appointing interim class counsel is to protect the interests of the class."

Additionally, "appointment of interim class counsel is a valuable tool for maximizing and streamlining those pre-certification efforts here, given the complexity of this antitrust action, the involvement of 11 defendants, and the existence of a competing case pending in another court," they argue.

The suit, **filed last September**, alleges that the landlords conspired to fix rent prices by using Yardi Systems' algorithm. The defendants tried to **escape** the suit in December 2023, but the putative class in February urged the court to **reject their bid**.

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.

In their Monday brief, Yardi and the landlords argue that the plaintiffs' motion to appoint Hagens Berman did not cite required overlapping or duplicative litigation in federal courts that could be consolidated, adding that the putative class pointed only to a "substantially similar" suit filed in California state court.

The plaintiffs say Friday that the defendants cite no cases to support that appointment of interim lead counsel "apply differently depending on whether the overlapping class suit is filed before a federal or state court."

"Courts regularly appoint interim lead or co-lead counsel with two pending actions," the plaintiffs add.

Counsel and representatives for the parties did not immediately return a request for comment.

The putative class is represented by Rio S. Pierce, Theodore J. Wojcik, Breanna 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 Matthew A. Carvalho.

Bridge Property Management LC is represented by Al Van Kampen of Van Kampen & Crowe PLLC, and 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 Hozaifa 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 Michael Swartzendruber and Eliot Turner of Norton Rose Fulbright.

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 Mansukhani LLP and Stephen W. Funk of Roetzel & Andress LPA.

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.

--Additional reporting by Isaac Monterose. Editing by Kristen Becker.

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Apple Wants 'ConvolutEd' iPhone App Antitrust Suit Tossed

By **Dorothy Atkins**

Law360 (March 15, 2024, 7:06 PM EDT) -- Apple Inc. asked a California federal judge Thursday to toss a proposed antitrust class action alleging that Apple Inc. illegally controls which apps are viewed on iPhone web browsers to boost iPhone prices, arguing that the consumers don't have standing to bring their "highly convoluted and speculative" claims.

In a 33-page motion, Apple asked U.S. District Judge Richard Seeborg of the Northern District of California to dismiss the litigation at the pleading stage, arguing that the claims are untimely and that the three named plaintiffs lack Article III standing to bring their antitrust claims given their "convoluted," "attenuated and speculative" theory of harm.

"The complaint must be dismissed because plaintiffs lack standing to pursue their tortured claims, and they fail to state a viable or timely claim under Sections 1 and 2 of the Sherman Act," the motion says.

The dismissal bid comes roughly two months after three iPhone owners — Luisa Bakay, Elisa Jones and Leticia Shaw — sued Apple in **January**, challenging Apple's purported restrictions on the latest iteration of web applications, called progressive web apps, which do not need to be downloaded from the iPhone App Store and are instead accessed via a smartphone web browser.

The suit notes that Apple implements rules, commissions and policies for app developers and serves as the "sole gatekeeper" for its App Store, which has been the target of **separate widespread antitrust litigation**. But the litigation at hand claims that the tech giant also maintains an illegal stranglehold over progressive web apps viewed on iPhones in a browser engine.

According to the complaint, Apple has signed deals with browser makers, including Google, Microsoft and Firefox, stipulating that web browsers can only be installed on iPhones if Apple's WebKit browser engine is used, which does not enable certain web apps.

Under Google's agreement with Apple, its web browser, Chrome — which uses Google's own browser engine Blink on every platform other than iOS — has to use Apple's WebKit engine on the iPhone, the complaint says.

The consumers claim that Apple's WebKit agreements restrict browser engine functionality on iOS to ensure that no true cross-platform browser engine can exist in the United States, thereby further protecting Apple from competition in the marketplace and allegedly allowing Apple to charge supracompetitive prices for iPhones in alleged violation of Sections 1 and 2 of the Sherman Act.

The lawsuit names only Apple as a defendant and not the browser makers.

In Apple's motion to dismiss Thursday, the company argued that the lawsuit asserts a "fatally flawed," "wending" and implausible theory of harm that requires a series of at least eight steps to occur if Apple got rid of its WebKit requirements in order to somehow cause iPhone prices to fall, and the plaintiffs' theory assumes that third-party app developers and web browsers will take certain actions to push new competitors to enter the market.

But that theory of causation is "far too indirect and speculative," would magnify the risk of duplicative damages and create "intractable apportionment complexities" if the court were to accept it, the

company said.

In addition to the alleged standing deficiencies, Apple argued that the claims were untimely because any act by Apple giving rise to the alleged injuries occurred "far outside the four-year statute of limitations."

"Plaintiffs do not (and cannot) allege any continuing conduct by Apple that has inflicted a new and distinct injury as opposed to acts that merely reaffirm Apple's long-established decision to require WebKit," the motion says.

Apple noted that the company initially only allowed its own Safari web browser on iPhones. But in 2008, Apple opened its iOS platform to third-party browsers, while still requiring browsers to use WebKit to ensure third-party browser compatibility with iOS and to maintain compliance with Apple's purported "high standards for security, privacy and technical performance."

A hearing on Apple's motion to dismiss is currently set for June 13 in San Francisco before Judge Seeborg.

Counsel for the consumers declined to comment Friday, and representatives and counsel for Apple didn't immediately respond to requests for comment.

In the yearslong separate antitrust litigation over Apple's App Store policies, the company has argued at trial and before the Ninth Circuit that its App Store requirements are necessary to protect consumers from malware and hacks — an antitrust defense argument, which recently came under scrutiny by a Ninth Circuit panel last month.

In that case, the panel **appeared open** to reviving a putative class action alleging that Apple misrepresented the safety of its App Store after users' cryptocurrency was stolen from an app, with two judges questioning why the allegations can't survive when Apple has consistently touted its security in separate antitrust litigation.

The plaintiffs are represented by Yavar Bathaee, Brian J. Dunne, Edward M. Grauman and Andrew C. Wolinsky of Bathaee Dunne LLP.

Apple is represented by Cynthia E. Richman, Daniel G. Swanson and Julian W. Kleinbrodt of Gibson Dunn & Crutcher LLP.

The case is Luisa Bakay et al. v. Apple Inc., case number 3:24-cv-00476, in the U.S. District Court for the Northern District of California.

—Additional reporting by Bonnie Eslinger. Editing by Karin Roberts.



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Chiquita MDL Experts Aren't Reliable, Parties Say

By **David Minsky**

Law360, West Palm Beach (March 15, 2024, 9:24 PM EDT) -- A Florida federal judge overseeing the multidistrict litigation against Chiquita Brands weighed arguments Friday on what evidence should be excluded in two upcoming bellwether trials, with each side insisting the other's experts should be disqualified from testifying about claims that the company funded a deadly right-wing Colombian paramilitary group.

During a hearing in West Palm Beach, Florida, U.S. District Judge Kenneth A. Marra considered Daubert motions from Chiquita Brands International Inc. and victims of right-wing paramilitary group Autodefensas Unidas de Colombia who alleged the banana grower helped the AUC brutalize civilians during Colombia's decades-long civil war. The two bellwether trials over Torture Victim Protection Act claims are scheduled to commence April 22 and July 15.

Both parties sparred in court Friday over admitting each other's expert witnesses, including Stanford political science academic Terry Karl, a self-described "Latin Americanist" whose testimony Chiquita wants to exclude because she isn't an expert in Colombia. James K. Green of James K. Green PA, who represents several of the victims, offered Karl's report to provide context on Chiquita's relationship with the region, although Judge Marra questioned how it's connected to atrocities committed by the AUC.

"How is it relevant that they bought land at fair market value or under, what difference does it make to whether or not they were paying AUC illegal contributions and whether it facilitated or assisted ... the AUC killing your decedents?" the judge asked. "Why don't you just focus on the deal they made with the devil?"

According to the victims, in 1995, Chiquita made a deal with the AUC to pacify banana plantations amid increasing activity by left-wing guerrilla groups. Chiquita paid the AUC more than \$1.7 million in regular monthly payments that were listed in books and records as "security services" between 1997 and 2004, the plaintiffs asserted.

Evidence that Chiquita wants to introduce at trial includes proffered expert witness reports of Colombian Brigadier General Diego Yesid Sanchez Ruiz and Colombian Major General Gustavo Rincón Rivera on the AUC's role in the Urabá and Magdalena regions of Colombia, two areas relevant to the case. The victims argue that neither general was ever stationed in those regions.

Judge Marra also heard arguments over whether to exclude a report by Oliver Kaplan, a University of Denver professor who describes himself in the work as an "expert on Colombian politics and armed conflict in Colombia."

Michael L. Cioffi of Blank Rome LLP, counsel for Chiquita, told the court that Kaplan's report should also be excluded because it simply repeats information and doesn't indicate the author went to Colombia himself to conduct an investigation.

Additionally, Cioffi described information in Kaplan's report about Chiquita arming the AUC and supporting drug trafficking with the support of subsidiary Banadex as "rank hearsay."

"Kaplan is just talking about what other people did, and he's just recreating these historical events and hoping that the jury believes him," the attorney said.

Green described Kaplan as the foremost expert on the AUC conflict in Colombia. The reports were "a

cesspool of bribery, drug smuggling and gun smuggling" and it's inferred that Chiquita knew about illicit shipments in advance, he said.

Chiquita asserted that in 1997, the AUC's supreme commander issued an ultimatum to Banadex's general manager: Begin making payments, or its operations would become a military target of the group.

But Green contended on Friday that testimony from the professors should be allowed to contextualize Chiquita's extortion defense and to "connect the dots" that the company is complicit in the AUC's actions.

"This was not duress, this was not extortion but is consistent with prior behavior," he told the judge. "Chiquita is a big boy, it knows what it's doing and it plays rough."

The plaintiffs are represented by James K. Green of James K. Green PA, John Scarola of Searcy Denney Scarola Barnhart & Shipley PA, Marco Simons and Marissa Vahlsing of EarthRights International, Paul D. Wolf of the Law Offices of Paul David Wolf and Gabriela Paola Valentin Diaz.

Chiquita is represented by Michael L. Cioffi, Melissa F. Murphy and Frank A. Dante of Blank Rome LLP.

The case is In re: Chiquita Brands International Inc., Alien Tort Statute and Shareholders Derivative Litigation, case number 0:08-md-01916, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Carolina Bolado. Editing by Covey Son.

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Sugar Giants Hit With Antitrust Suit Over Alleged Price-Fixing

By **Jared Foretek**

Law360 (March 15, 2024, 8:53 PM EDT) -- A class action filed in New York federal court Thursday alleges that the biggest players in the domestic sugar industry have been engaged in a price-fixing scheme for years.

According to the suit, American Sugar Refining, which owns Domino Sugar; Michigan Sugar; and United Sugar Producers & Refiners, which purchased Imperial Sugar in 2023, have been sharing nonpublic information on pricing, capacity and demand with each other through a purported industry analyst known as Commodity Information and its principal, Richard Wistisen, both of whom are also listed as defendants in the suit.

"Because of the defendants' anticompetitive conduct: (1) competition in the granulated sugar market has been reduced or eliminated, (2) prices for granulated sugar have been maintained at supracompetitive levels, and (3) United States purchasers of granulated sugar have been deprived of the benefit of price competition," the sugar-buying plaintiff, New York-based KPH Healthcare Services, wrote in the complaint.

The alleged scheme has been running since at least 2019, when United first employed Wistisen to coordinate with ASR/Domino, according to the complaint. But according to the suit, Wistisen and his company, the Delaware-incorporated, Utah-based Commodity Information, have no public presence.

KPH claims that despite not having a website, advertising, publishing reports or conducting surveys, Commodity claims to be a sugar industry analyst and not simply a go-between for insider information.

"The purpose of their sharing was to enable United, Michigan Sugar, and ASR/Domino to raise, fix, maintain, stabilize, or coordinate prices of granulated sugar in the United States," the suit claims. "Using the non-anonymized competitively sensitive non-public information exchanged through Commodity, the producing defendants ensured that they would not undercut each other's prices and cause prices to decrease as they would in a competitive market."

Wistisen also figured prominently in the U.S. Department of Justice's unsuccessful bid to block United's acquisition of Imperial Sugar in 2023. In a proposed finding of fact from 2022, the DOJ wrote that refiners have monitored each other in ways "not acceptable under existing antitrust laws."

The DOJ added, "As direct evidence that the market is vulnerable to coordinated interaction, United and Domino have for years shared competitively sensitive information — including current pricing, future pricing, and sold positions — with one another through intermediaries such as Richard Wistisen, an industry analyst."

Since Wistisen first linked with ASR/Domino, KPH says, sugar prices have been on a historic run, even after reaching a low point in 2014. From 2014 to 2019, the suit claims, the producer price index — which measures average changes in prices — for sugar, as calculated by the Federal Reserve Bank of St. Louis, rose from 87.6 to 97.4. But from 2019 to the end of 2023, when **United finalized its acquisition of Imperial** over the Department of Justice's objections, the number jumped to 123.2.

According to the plaintiffs, the granulated sugar industry hit \$13.2 billion in sales in 2023, more than half of which went to the defendant producers. And the industry's high levels of vertical integration

and high barriers to industry have made it ripe for anticompetitive conduct in the past and present, KPH says. In the 1970s, the DOJ accused refiners of price-fixing, resulting in a consent decree with several players. And now, a series of acquisitions and mergers have left the market even more concentrated and ripe for illegal coordination, the suit says.

United and ASR/Domino also have connected ownership interests, KPH claims, allowing the two companies to send price signals to each other.

The proposed class would include direct purchasers of granulated sugar from the defendant producers in the U.S. from January 2019 to the present. The complaint requests treble damages and injunctive relief.

"As a result of defendants' unlawful agreement, direct purchasers of granulated sugar in the United States ... paid supra-competitive prices for granulated sugar sold by defendants," the complaint reads.

When asked for comment, a spokesperson for ASR/Domino said the company would "vigorously defend against the suit."

"There is no basis for this case," the spokesperson said.

The other defendant companies could not immediately be reached for comment Friday.

KPH Healthcare Services and the proposed class are represented by Scott Martin, Michael Hausfeld and Michael Lehmann of Hausfeld LLP, Michael L. Roberts, Erich P. Schork and Sarah E. DeLoach of Roberts Law Firm PC, and Joseph C. Kohn, William E. Hoese and Douglas A. Abrahams of Kohn Swift & Graf PC.

Counsel information for the defendants was not immediately available.

The case is KPH Healthcare Services Inc. v. ASR Group International Inc. et al., case number 1:24-cv-01941, in the U.S. District Court for the Southern District of New York.

--Editing by Michael Watanabe.



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How AI May Be Used In Fintech Fraud — And Fraud Detection

By **Jacques Smith, Mattie Bowden and Rebekkah Stoeckler** (March 15, 2024, 4:29 PM EDT)

Artificial intelligence and machine learning have revolutionized sectors across the globe. As industries embrace these technologies and a host of innovative ideas, however, heavily regulated industries will face an increasingly complex landscape of liability, regulation and enforcement.

Recently, the government has pursued liability for firms and individuals in the cryptocurrency and finance sectors who oversold their AI application's capabilities to induce payments from their investors or customers.

These actions, discussed below, should serve as a cautionary tale to those involved in securities or cryptocurrency trading given that the use of AI and machine learning will increasingly form the basis of government claims of fraud and abuse in finance and fintech industries.

Meanwhile, the federal government continues to utilize its own AI and machine learning innovations to enforce anti-fraud regulations, and detect and investigate fraud and abuse.

AI-Enabled Fraud in Fintech

AI and machine learning have enabled remarkable advancements in the fintech, banking and finance, and healthcare industries.

Ubiquitous to these industries is the accumulation of mass data — large, complex, fast-moving or weakly structured data. In the finance and banking sectors, mass data empowers AI and machine learning to transform services, introducing automated trading, risk management, customer service via chatbots and predictive analytics for future market trends.

Similarly, in fintech, AI and machine learning have played a crucial role in developing cryptocurrencies, algorithmic trading and blockchain technologies.

AI and machine learning certainly have the potential to revolutionize industries; however, the government has a demonstrated appetite to pursue liability for those who fraudulently oversell their AI application's capabilities, or fraudulently exploit their AI application's capabilities or the data that drives it.

For example, government authorities have pursued civil and criminal fraud charges for individuals or firms that oversell their AI or machine learning capabilities to attract and defraud investors.

Recently, the U.S. Securities and Exchange Commission charged Brian Sewell, the owner of an online crypto trading course, in connection with an **alleged scheme** to fraudulently induce students to invest in Sewell's hedge fund.[1]

According to the SEC, Sewell claimed that the investment strategies for the hedge fund would be guided by cutting-edge AI and machine learning. Instead of launching the fund or executing the



Jacques Smith



Mattie Bowden



Rebekkah Stoeckler

trading strategies, Sewell held approximately \$1.2 million from his students as bitcoin before his digital wallet was hacked and emptied.

Further, in December 2023, the U.S. Department of Justice charged David Saffron and Vincent Mazzotta with fraud, alleging that the two men conspired to induce individuals to invest in trading programs by falsely promising that the programs used automated AI to trade investments in cryptocurrency markets and return high-yield profits.[2]

Then, according to the DOJ, "[r]ather than investing victims' funds in cryptocurrency, [the defendants] allegedly misappropriated victims' funds" to pay for luxury personal expenses.[3]

Fundamental to the DOJ's charges in both of these fraud cases were the defendants' alleged use of false promises regarding the capabilities and use of AI and machine learning applications. It was these false promises that allegedly fraudulently induced their victims to part with large sums of money.

As the use of AI becomes ubiquitous across industries, heavily regulated industries can expect to see more government insight and enforcement. In fact, Deputy Attorney General Lisa Monaco **recently stated** that "[l]ike a firearm, AI can enhance the danger of a crime," and thus, the DOJ will seek harsher penalties for offenses made more harmful by the misuse of AI.[4]

Further, in recent remarks at Yale Law School, SEC Chair Gary Gensler promised that those who deploy AI to sell securities by fraud or misrepresentation should expect "war without quarter."[5]

This should be particularly concerning if the findings of a recent Berkeley Research Group **survey** of healthcare professionals are a bellwether for other heavily regulated industries like finance and fintech: It found that 75% of all healthcare professionals surveyed expected the use of AI to be widespread within three years, while "only 40% [had] reviewed regulatory guidance in preparing to implement the technology." [6]

Collectively, as heavily regulated industries embrace AI and machine learning tools, we can expect AI to serve as an increasingly common basis for government fraud charges.

AI-Enabled Fraud Detection

As with any other tool, AI can be harnessed for the common good. Both government agencies and industries are increasingly leveraging AI and machine learning to combat fraud effectively. By leveraging advanced algorithms and machine learning techniques, AI systems can sift through vast amounts of data to identify subtle indicators of potential fraud before it occurs.

It is also common for banks, healthcare facilities and other firms to use AI-powered software to monitor customers' financial transactions and employees' compliance with policies and regulations. The government's AI tools for fraud detection and resource management are similar.

For example, the IRS and the U.S. Department of the Treasury's Financial Crimes Enforcement Network use AI-powered software to quickly complete tasks that are typically laborious and prone to human error.

AI and machine learning-powered risk assessment tools harness the agencies' troves of mass data to enable more accurate and economical detection of fraud.[7] Likewise, the U.S. Department of Health and Human Services uses AI to identify fraudulent billing practices in Medicare and Medicaid.[8]

The DOJ has also deployed AI and machine learning, for example, to trace and classify the sources of illegal drugs, and to triage and understand the millions of tips the FBI receives.[9]

Meanwhile, Jonathan Mayer, the DOJ's chief AI officer and chief science and technology adviser, is **tasked with ensuring** that the DOJ is "prepared for both the challenges and opportunities that new technologies present," according to a press release announcing his appointment.[10]

In the coming years, the government and all industries will undoubtedly continue to utilize and develop AI and machine learning to achieve better outcomes, detect criminal or fraudulent conduct,

increase worker productivity, and maximize advantages.

As the government grapples with creating sophisticated regulatory frameworks to keep pace with industries and to prevent AI-enabled fraud and abuse, it is crucial that companies' leadership work closely with their innovators to ensure that the use of AI and machine learning does not run afoul of the existing and burgeoning regulations.

The future of AI and machine learning in regulated industries promises to be a dynamic and evolving landscape, but it requires savvy legal, regulatory and compliance know-how to avoid facing liability for AI-enabled fraud.

D. Jacques Smith is a partner at ArentFox Schiff LLP, and co-leads the firm's complex litigation practice and co-chairs the investigations group.

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[1] <https://www.sec.gov/news/press-release/2024-13>.

[2] <https://www.justice.gov/opa/pr/two-men-charged-operating-25m-cryptocurrency-ponzi-scheme>.

[3] See also <https://www.justice.gov/opa/pr/empiresx-head-trader-pleads-guilty-global-cryptocurrency-investment-fraud-scheme-amassed>. (In 2022, Joshua Nicholas plead guilty to conspiring to commit securities fraud in connection with a cryptocurrency-based scheme where he and his co-conspirators made fraudulent guarantees to investors and misrepresentations about a purported propriety bot that would use AI to maximize profit.).

[4] <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-university-oxford-promise-and>.

[5] <https://www.sec.gov/news/speech/gensler-ai-021324>.

[6] <https://assets.law360news.com/1807000/1807257/brg-report-ai-and-the-future-of-healthcare.pdf>.

[7] <https://home.treasury.gov/news/press-releases/sm663>.

[8] <https://law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf>;
<https://www.fau.edu/newsdesk/articles/medicare-fraud-big-data>.

[9] <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-university-oxford-promise-and>.

[10] <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-designates-jonathan-mayer-serve-justice-departments-first>.



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What Recent Study Shows About AI's Promise For Legal Tasks

By **Daniel Schwarcz** (March 15, 2024, 10:14 AM EDT)

Since at least the advent of the internet, no technology has produced as much hype as generative artificial intelligence.

This enthusiasm is particularly widespread in the law, where an ever-increasing collection of legal technology companies are developing and selling tools that incorporate generative AI.[1]

These tools promise to aid in virtually every element of lawyering, from legal research to contract drafting to regulatory compliance. Despite the widespread enthusiasm for AI's impact on lawyering, skepticism persists, highlighted by **recent occurrences** of lawyers **submitting filings** to courts containing **fake case citations** that ChatGPT **hallucinated**.[2]



Daniel Schwarcz

Yet remarkably limited empirical evidence exists regarding the impact of generative AI on lawyering. Although several studies demonstrate that tools like ChatGPT can perform reasonably well on law school exams[3] and the bar exam,[4] the implications of these results remain murky.

After all, real lawyers do not spend their time taking exams. Moreover, they have professional and ethical obligations to review all work product on which they rely to ensure its accuracy and that it advances their clients' best interests.

To better understand these trends, I, along with fellow law professors Jonathan Choi and Amy Monahan, conducted the first randomized controlled trial of AI's impact on ordinary lawyering tasks, like drafting legal memos, contracts and complaints.[5]

Although we found that giving law students access to GPT-4 only slightly and inconsistently improved the quality of their work product, we also found that it induced large and consistent increases in the efficiency of their efforts.

Because our results provide a conservative estimate of AI's capacity to improve the efficiency of legal services, we conclude that lawyers, judges and clients should proactively and continuously endeavor to incorporate AI into the practice of law.

A Randomized Controlled Experiment

We randomly assigned 60 students at the University of Minnesota Law School to complete four separate legal tasks, either with or without the assistance of the most advanced general purpose generative AI tool available at the time, GPT-4.

We selected the four assigned tasks — drafting a complaint, a contract, a section of an employee handbook and a client memo — because they typify the type of work performed by associates and other junior attorneys.

Prior to completing these tasks, study participants received several hours of training on how to use GPT-4 effectively, which we patterned on real training materials that we had previously delivered to hundreds of practicing attorneys.[6]

After participants completed the four assigned tasks, we blind-graded the results and tracked how long they took on each task. We also surveyed participants on their perceptions of how access to GPT-4 impacted their work on the assigned legal tasks.

Mixed Impacts on Quality, Consistent Improvements in Efficiency

We found that access to GPT-4 only slightly improved the quality of participants' legal work product, with improvements that were small in magnitude and inconsistent across tasks.

On average, AI helped produce slightly higher-quality work product for the contract and complaint drafting tasks, but not for the legal memo or employee handbook tasks.

Moreover, on the two tasks where AI was useful in improving quality, these benefits were disproportionately experienced by lower-skilled participants — as measured by their performance on the non-AI assisted tasks — in our study.[7]

Although the impact of AI on quality was therefore mixed, its impact on participants' efficiency was consistently positive. In fact, we found that AI assistance regularly induced large declines in the amount of time participants took to complete the tasks regardless of their baseline speed. These improvements in speed ranged from an average of roughly 12% for the client memo to roughly 32% for the contract drafting assignment.

In follow-up surveys, participants correctly understood GPT-4's strengths and weaknesses, reporting that they expected the improvements in speed to be greater than the improvements in quality, and correctly identifying the tasks at which GPT-4 induced larger quality improvements.

Participants also reported increased satisfaction on the tasks on which they used generative AI, and that as a result of their participation in the experiment they were more likely to use tools like GPT-4 for legal work in the future.

A Lower-Bound Estimate

Our results are notable not just for what they convey about the present capacity of generative AI to affect the law, but also for what they indicate about AI's future trajectory. That is because, for four reasons, our findings likely represent a conservative estimate of AI's capacity to improve the efficiency of legal services.

First, whereas our study participants used the general purpose AI GPT-4 to assist them with assigned tasks, lawyers are increasingly gaining access to specialized generative AI tools that incorporate automated techniques to enhance the benefits offered by generative AI.

Perhaps most importantly, these tools use retrieval-augmented generation to ground answers in relevant legal source materials, thereby reducing the risk of hallucinations and facilitating users' ability to confirm the accuracy of AI-produced output.

Second, our study participants only received several hours of training on GPT-4 before completing their assigned tasks. At least in part for that reason, they reported that their ability to use GPT-4 effectively improved over the course of the experiment.

By contrast, real lawyers that practice using AI-based tools will continually improve their ability to do so over the course of their careers.

Third, our study focused on evaluating the impact of generative AI on common tasks performed by young lawyers; it did not attempt to measure the potential impact of this technology on specific tasks that are most susceptible to AI-based solutions.

By contrast, at least one recent study from researchers at the New Zealand-based Onit AI Center of Excellence made headlines by reporting that GPT-4, when supplied with limited prompting, could, within minutes, perform certain contract review functions roughly as well as junior attorneys and contract attorneys who spent an hour or more on task.[8]

Finally, and perhaps most obviously, rapid AI innovation has continued since we conducted the experiment in the summer of 2023, and will almost certainly continue for the foreseeable future.

To take one important example, the version of GPT-4 that our study participants used had a limited context-window — roughly, its short-term memory — which often required them to construct artificially truncated prompts. In just the last several months since the completion of our experiment, the size of GPT-4's context windows have expanded significantly.

The Bottom Line: AI Will Significantly Impact the Future Of Lawyering

Our findings underscore the need for the legal profession to proactively engage with AI. Most obviously, they suggest that lawyers should affirmatively explore how to incorporate generative AI into their work.

As they do so, they should remain cognizant that AI's usefulness will vary by practice area, task, baseline skill, prior familiarity with AI and the stakes of the underlying matters.

This variation, as well as the rapid pace of technological innovation, means that lawyers must develop systems for continually reassessing when and how they can leverage the ever-expanding set of tools built on generative AI to promote their clients' interests.

Clients also should pay close attention to our results, reconsidering what types of legal matters should be sent to outside counsel rather than handled in-house, and how matters that are handled externally are managed and billed.

While the limitations of generative AI are real, clients should also recognize that lawyers face natural incentives to downplay the capacity of this technology to decrease bills or increase the quality and quantity of the work product they deliver.

Judges also should take note of our results. In recent months, an increasingly significant number of judges have issued **standing orders** regarding the use of AI by practicing attorneys, often requiring that attorneys certify the accuracy of any AI-produced text.

But such technology-specific orders risk inadvertently deterring lawyers from making use of tools that can decrease costs and increase the availability of legal services. This risk, moreover, is largely without any benefit, as these orders merely apply general principles of ethical and professional lawyering to the specific setting of AI.

In the evolving landscape of legal practice, our findings signal a clear call to action: The legal profession must not only adapt to current capabilities of generative AI, but also develop systems for continually reassessing when and how this powerful new technology can facilitate and alter the practice of law.

Daniel Schwarcz is the Fredrikson and Byron Professor of Law at the University of Minnesota Law School.

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[1] Prominent legal-tech tools that employ generative AI include CoCounsel, Lexis + AI, Harvey, Vincent AI, Patent Pal, SpellBook and many more.

[2] See Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. Times (May 27, 2023). One recent study found that legal hallucinations were quite common when users ask generative AI specific legal questions without providing the relevant source material. See Matthew Dahl et al., *Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models* (Jan. 2, 2024). See also <https://www.cbc.ca/news/canada/british-columbia/lawyer-chatgpt-fake-precedent-1.7126393>.

- [3] See Jonathan H. Choi, Kristin E. Hickman, Amy B. Monahan, & Daniel Schwarcz, ChatGPT Goes to Law School, 71 J. Legal Ed. 387, 388-89 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335905.
- [4] Daniel Martin Katz, Michael James Bommarito, Shang Gao & Pablo Arredondo, GPT-4 Passes the Bar Exam 3-4 (Apr. 5, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389233.
- [5] Jonathan H. Choi, Amy B. Monahan, & Daniel Schwarcz, Lawyering in the Age of Artificial Intelligence, 109 Minn. L. Rev. (forthcoming, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4626276.
- [6] This training drew heavily on Daniel Schwarcz & Jonathan H. Choi, AI Tools for Lawyers: A Practical Guide, 108 Minn. L. Rev. Headnotes 1 (2023). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404017.
- [7] In a prior study focused on the impact of access to generative AI on law students' ability answer law school exam questions, we found some evidence that access to generative AI actually harmed the quality of the highest performing students (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4539836.) See Jonathan H. Choi & Daniel Schwarcz, AI Assistance in Legal Analysis: An Empirical Study, 72 J. Legal Ed. (forthcoming, 2024).
- [8] Lauren Martin et al., Better Call GPT, Comparing Large Language Models with Lawyers (Jan. 24, 2024), <https://arxiv.org/html/2401.16212v1>.



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Innodata Suit Highlights 'AI Washing' Liability Risk For Cos.

By **David Shargel, Rachel Goldman and Patrick Morley** (March 14, 2024, 6:31 PM EDT)

Months after U.S. Securities and Exchange Commission Chair Gary Gensler warned[1] regulated business owners about potential securities law liability over conduct known as AI washing,[2] or misleading investors as to the company's true artificial intelligence capabilities, a class of plaintiffs has **filed suit** in New Jersey federal court, seeking damages under this novel theory. [3]

The Innodata Lawsuit

In February, a software and data engineering company, Innodata Inc., was sued[4] in the U.S. District Court for the District of New Jersey by a proposed class of investors alleging its stock price dropped more than 30% after a financial research firm, Wolfpack Research, published a report saying its artificial intelligence technology was "smoke and mirrors," and that its marketing claims were akin to "putting lipstick on a pig."

Innodata investor David D'Agostino filed the complaint against the company, its President and CEO Jack Abuhoff, interim Chief Financial Officer Marissa Espineli, and former CFO Mark Spelker on behalf of all individuals and entities that purchased or acquired Innodata common stock from May 9, 2019, through Feb. 14, 2024.

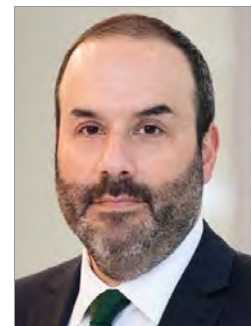
According to the complaint, over the preceding decades, Innodata's original data solutions business had slowly decayed as automatic data annotation made the company's historical business of offshoring manual data annotation less profitable. In 2019, Innodata had allegedly begun implementing AI and machine learning processes, and began marketing itself as an AI company.

The complaint asserts that, throughout the proposed class period, Innodata advertised its new AI-focused operations to investors, and the individual defendants repeatedly made positive statements about the company's AI expertise and capabilities, along with touting a growing number of Silicon Valley contracts.

But plaintiffs claim that Innodata's promises were falsehoods, and that while touting supposed new AI capabilities, the named defendants contradicted their own public statements by privately reducing Innodata's research and development spending, in a move that was not disclosed to investors.

The complaint further alleges that the defendants made material misrepresentations regarding Innodata's actual lack of any viable AI technology, that its Goldengate AI platform was rudimentary software, and that it was not going to use AI in any significant way to gain new Silicon Valley contracts.

Crucially, D'Agostino states that Innodata had been able to "pose as an AI company as a result of contracts with true AI companies to use its [data solutions arm] to outsource the labor intensive" task of using its own data to train large language models.



David Shargel



Rachel Goldman



Patrick Morley

The complaint alleges that public perception of Innodata, and therefore Innodata's stock price, began to plummet when financial research firm Wolfpack Research published a report, revealing Innodata's misrepresentations.

"While defendants touted Innodata's status as an AI pioneer, other companies were only hiring Innodata for cheap labor and its operations were powered by thousands of low-wage offshore workers, not proprietary AI technology," the complaint states.

A Preview of Future AI Washing Enforcement Actions

While the D'Agostino complaint does not explicitly label Innodata's actions as AI washing, the behavior alleged is identical to what the SEC has recently cautioned against using that same phrase.

Indeed, D'Agostino's allegations echo Gensler's admonition to regulated entities that "[y]ou can sell a security, you can promote an opportunity," but that an entity also must "fairly and accurately describe the material risks" as they relate to their AI capabilities. Nevertheless, it is notable that this theory is first being tested in private litigation instead of in the form of a government enforcement action.

While legal observers may have expected the SEC to act as the vanguard of a new era of AI-related securities litigation by bringing an initial enforcement action, especially in light of the SEC's recent rulemaking movement^[5] in that space, the regulator may want to allow private litigation to test these novel theories before wading in on its own.

Recent Comments From Regulators Underscore AI Washing Risk

Nevertheless, an enforcement action related to AI washing appears to be a question of when, not if, regulators will take that step.

To be sure, during a March 6 panel discussion at the American Bar Association's White Collar Crime 2024 conference in San Francisco, Gurbir S. Grewal, director of the SEC's Division of Enforcement, emphasized that the SEC has its eye on AI washing, once again drawing comparisons between it and so-called ESG washing.

"We saw a lot of issuers talk about their ESG practice and products, and those products didn't live up to what was stated," he said, comparing the two different modes of securities law violations.

"We see advisors saying they are incorporating AI when making investment decisions for individuals when they aren't," Grewal added, emphasizing that AI washing is certainly top of mind for the Enforcement Division, and also that it was a priority for its Examinations Division.

The SEC is not alone, and during the same March 6 panel discussion, Ian McGinley, the Commodity Futures Trading Commission's director of its Division of Enforcement, stated, "You can see [AI washing] also playing out with more sophisticated firms, where investors want to know what AI capability a firm has. Everyone will want to make sure [the disclosures] are entirely accurate."

Considerations for Covered Entities

Going forward, entities subject to SEC regulation should maintain a keen awareness as to the accuracy of their representations related to AI. Technology generally qualifies as AI only if it exhibits some level of learning, adapting and autonomy.^[6] Technologies providing advanced automation and statistical analysis are not necessarily considered AI.

Companies should be mindful of this distinction when representing their capabilities to current and potential investors, and should always make good faith efforts to describe capabilities accurately.

Entities should especially steer clear of touting their own AI-related advancements when they are instead privately reducing internal spending on research and development in that area, as Innodata is alleged to have done in the instant class action complaint.

As with all reporting, the best defense against future litigation and investigation related to AI

disclosures is a robust compliance program with controls for reporting and verification to ensure that all public statements are accurate and not misleading.

David A. Shargel is a partner at Bracewell LLP.

Rachel B. Goldman is a partner and co-head of the environmental, social and governance practice at the firm.

Patrick J. Morley is an associate at the firm.

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[1] <https://www.law360.com/articles/1773759>.

[2] <https://www.law360.com/articles/1780363/compliance-risk-after-sec-warning-against-ai-washing->.

[3] D'Agostino v. Innodata Inc. et al., 2:24-cv-00971 (D.N.J. 2024).

[4] <https://www.law360.com/articles/1805609/attachments/0>.

[5] <https://www.law360.com/articles/1803438/understanding-sec-s-focus-amid-lack-of-final-ai-rules>.

[6] <https://www.law360.com/articles/1780363/compliance-risk-after-sec-warning-against-ai-washing->.

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SEC, VW Reach \$48.7M Deal To End 'Clean Diesel' Fraud Suit

By **Mike Curley**

Law360 (March 15, 2024, 5:18 PM EDT) -- The U.S. Securities and Exchange Commission and Volkswagen Group of America Finance told a California federal court on Friday that they have reached a \$48.7 million settlement to end claims that the automaker defrauded U.S. investors in its scheme to cheat emissions standards in its vehicles.



Volkswagen will pay \$34.3 million in disgorgement and \$14.4 million in interest to end claims that the automaker defrauded U.S. investors in its scheme to cheat emissions standards in its vehicles. (Lars Penning/picture-alliance/dpa/AP Images)

In an **administrative motion**, the SEC and Volkswagen asked the court to enter a final judgment in the case, saying the settlement resolves all outstanding claims and was reached through good-faith negotiations.

The payment includes \$34.3 million in disgorgement and \$14.4 million in interest and, as part of the settlement, Volkswagen is enjoined from further violations of federal securities laws. The money will go into a fund for distribution by the SEC to affected investors, according to the motion.

According to court documents, the SEC had previously sought \$300 million in disgorgement, plus interest.

Volkswagen said in a statement Friday, "Volkswagen Group of America Finance is pleased to have reached

an agreement with the SEC, which fully resolves the last significant legal action related to the diesel matter in the United States. Volkswagen values a constructive relationship with regulators in all of our markets as we work to build the future of sustainable mobility."

A spokesperson for the SEC declined to comment Friday.

The SEC first sued Volkswagen AG, of which Volkswagen Group of America Finance is a subsidiary, in **March 2019**, with allegations that the company had defrauded U.S. investors in its scheme to cheat emissions tests by raising billions of dollars through bonds while failing to disclose that its "clean diesel" vehicles did not comply with emissions standards.

Years before, VW entered into a **\$14.7 billion settlement** with the U.S. Department of Justice, the U.S. Environmental Protection Agency and other regulators on claims related to the scheme, and as part of that settlement, the company admitted that it installed software in some of its vehicles that was capable of detecting whether a car was being driven or being tested to ensure that it met U.S. federal emission standards.

Last year, the company avoided sanctions in the suit, as U.S. Magistrate Judge Alex Tse **determined** that an employee's failure to appear for questioning wasn't a result of the automaker's bad faith, as Volkswagen had tried repeatedly to get him to appear for a deposition.

The SEC is represented in-house by Eric M. Phillips, Jake Schmidt, Raven A. Winters and Kevin A. Wisniewski.

Volkswagen Group of America Finance is represented by Robert J. Giuffra Jr., Sharon L. Nelles, Suhana S. Han, Matthew A. Schwartz and Christopher J. Dunne of Sullivan & Cromwell LLP.

The case is U.S. Securities and Exchange Commission v. Volkswagen AG et al., case number 3:19-cv-01391, in the U.S. District Court for the Northern District of California.

--Additional reporting by Jessica Corso, Sarah Jarvis and Linda Chiem. Editing by Janice Carter Brown.

Correction: This story previously misstated the parties to the settlement.