

Norfolk County Council beats Apple in £385m iPhone row

[y' yahoo.com/news/tech/norfolk-county-council-leads-385m-165028041.html](https://www.yahoo.com/news/tech/norfolk-county-council-leads-385m-165028041.html)

BBC



A person on their phone in front of the Apple logo

Apple has agreed to pay \$490m (£385m) to settle a lawsuit led by Norfolk County Council.

The class action alleged the tech giant's boss, Tim Cook

, defrauded shareholders by covering up lower demand for iPhones in China.

The council said a pension fund it administered lost money as a result of Mr Cook's actions.

In a statement, the Norfolk Pension Fund said it was "very proud of this recovery for investors".

The statement continued: "We are mindful that we are stewards of pensions relied upon by thousands of families and individuals.

"When and where it's warranted, we will take decisive action to recover losses when our participants' investments are harmed by fraud."

The BBC has approached Apple for comment.

The class action lawsuit - meaning it is on behalf of a group of claimants - centred around comments made by Apple's chief executive Tim Cook.

He told investors on 1 November 2018 that there was "sales pressure" in some countries but he "would not put China in that category".

However, two months later, on 2 January 2019, Apple downgraded its quarterly revenue forecast, citing tensions between China and the US - leading to a sharp drop in Apple's share price.

Within that two-month window, reports emerged that Apple had told its top smartphone assemblers to "halt plans for additional production lines" for the recently released iPhone XR.

The claimants in this case were all investors who had bought shares between November 2018 and January 2019.

They said they lost money because they had been falsely reassured by Mr Cook's comments in November.

The case was originally brought against Apple and Mr Cook by the US city of Roseville. Norfolk County Council, which administers the £4.9bn Norfolk Pension Fund, took over the lawsuit as lead plaintiff in 2020.

Apple had fought the litigation, and a trial was scheduled for later this year. This preliminary settlement - filed on Friday with the U.S. District Court in Oakland, California - should mean that will no longer happen, however it still requires approval by a judge.

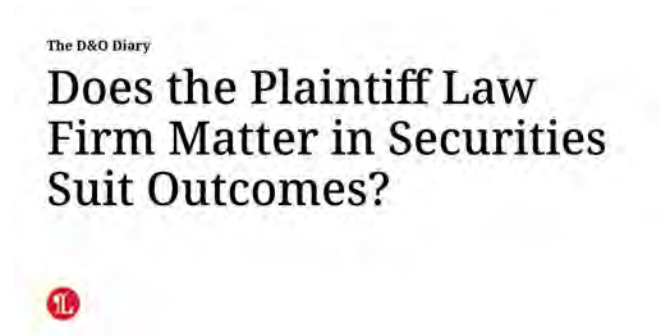
It is not known what portion of the settlement Norfolk County Council will receive.

Apple posted \$97 billion of net income in the last fiscal year. The pay-out equals a little under two days of profit for what is one of the world's wealthiest companies.

Does the Plaintiff Law Firm Matter in Securities Suit Outcomes?

K [dandodiary.com/2024/03/articles/securities-litigation/does-the-plaintiff-law-firm-matter-in-securities-suit-outcomes](https://www.dandodiary.com/2024/03/articles/securities-litigation/does-the-plaintiff-law-firm-matter-in-securities-suit-outcomes)

March 18, 2024



By Kevin LaCroix on March 18, 2024
Posted in Securities Litigation



We have all seen the various league tables showing which plaintiffs' firms have had the highest average securities class action settlements. But do these firms wind up at the top of the tables because they produce better outcomes for the plaintiff class, or do they produce these results simply because

they are better at winning the race to become lead counsel in the better cases? As three academics put it in their recent paper, "do the plaintiffs' lawyers matter"?

In their paper, New York Law Professor Stephen J. Choi, University of Richmond Law Professor Jessica M. Erickson, and University of Michigan Law Professor Adam C. Pritchard survey securities class action lawsuit settlements in order to determine whether the "top tier" plaintiffs' firms actually produce better outcomes for the plaintiff class. Interestingly, the authors conclude that while the top firms produce better outcomes in a narrow subset of cases, in most other cases they do not. The authors suggest these observations have important implications for both claimants and courts. The authors' paper can be found [here](#). The authors' March 12, 2024, column in the *CLS Blue Sky Blog* about their paper can be found [here](#).

The authors' analysis begins with the observation that while there are certain plaintiffs' firms that obtain larger settlements than other firms, the cases in which these firms are involved are fundamentally different as well. These law firms seek out and often with the lead counsel

spot in the most promising cases – such as a parallel government investigation, termination of top officers, or restatement of financials. These top firms also target defendants with larger market capitalizations, which typically permits the plaintiffs' counsel to seek larger damages.

In order to permit the results achieved by the top-tier firms to be compared with the results achieved by the lower-tier firms, the authors used a statistical technique ("inverse propensity score weighting") to balance out the differences in the types of cases in which the different tiers of law firms are involved. Using this approach, the authors were able to estimate the average effect of representation by the top-tier firms.

The authors then sorted the securities class action settlements into deciles based on the market capitalization of the defendants and compared the settlements of the top-tier firms with the settlements of the lower tier firms.

Using this methodology, the authors found no significant difference in the results obtained by the top-tier firms and the lower-tier firms in the market capitalization deciles 1-7 and 10. The only significant difference was in cases against companies whose market capitalizations were in deciles 8 and 9 – that is, the larger defendants but not the largest. In those larger cases, the top-tier firms did obtain better outcomes. This difference may be attributable to the variations in time and expense; the top tier firms invest almost twice the time and almost three times the expense in deciles 8-9.

The fact that the authors analysis shows that the top-tier firms did not produce better outcomes in most subsets of case "call[s] into question the preferential treatment that top-tier firms receive when it comes to lead counsel appointments and fee awards in securities class actions." The fact that these firms are able to tout their larger settlements and larger average settlements "may simply reflect the fact that these firms handle cases with better facts and larger potential damages."

The authors suggest that these findings may have implications for institutional investor plaintiffs. These institutional investors, the authors suggest, "should be wary of appointing a firm to lead counsel simply because it has a history of achieving large settlements." The firm's record "may simply reflect its luck in being awarded the role of lead counsel in cases with more promising facts. A "savvy plaintiff" should "look behind a firm's settlement numbers and inquire into facts of the firm's cases and the firm's specific role in increasing settlement value of these cases."

Courts, the authors suggest, "should also look more closely at a firm's specific contribution to the case." Judges "can be swayed by large settlement amounts, even if the settlements do not always reflect the law firm's efforts." Courts should be aware that "in most categories of cases, the top-tier firms do not obtain better results for shareholders," which, the authors suggest, that "the top-tier firms receive outsized fees for what may be baseline efforts."

Judges should “take a harder look at the lawyers’ specific contributions to the case, analyzing whether the firms actually went above and beyond in returning funds to shareholders.”

Finally, the authors suggest that Congress may want to revisit the lead plaintiff provision of the PSLRA. The provisions were written in order to encourage institutional investors to become lead plaintiffs so that the investors could take charge of the cases and ensure that the best law firms are brought in to litigate the cases. The authors suggest that their research “casts doubt on whether institutional plaintiffs are performing this role effectively.”

Discussion

I have no qualifications to assess whether the “inverse propensity score weighting” technique the authors used to balance out the different case characteristics of the cases led by top-tier firms and the cases led by lower-tier firms validly reduces the differences sufficiently to allow the outcomes of the cases to be compared.

However, I do have perspective on another key part of the authors’ analysis. An important part of the authors’ analysis is the categorization of plaintiffs’ law firms between top-tier and lower-tier. The authors found that among the many law firms that have been involved in securities class action settlements only a smaller number have been involved in as many as ten settlements. From within this smaller number of firms, only 15 firms have average settlements in excess of \$30 million. The authors designated these 15 firms as “top-tier.” The remaining firms with at least ten settlements but an average settlement below \$30 million are categorized as “lower-tier.”

There is a certain numerical coherence to this approach. However, I do think it is a fair question to ask whether there really are as many as 15 plaintiff-side securities law firms that can be categorized as “top tier.” In my humble opinion, there are far fewer than 15 top-tier plaintiffs’ firms. I have no way to show this, but my intuition tells me this: The inclusion of as many as 15 firms within the “top-tier” inevitably has the effect of diluting the analysis. Or to put it another way, the outcome of the authors’ analysis might look different if the results of only the truly “top-tier” firms are considered.

I recognize I am attempting to insert a qualitative consideration into what is a very deliberately objective and numeric analytic process. But without references to the qualitative consideration, it is hard for me to assess the conclusion that the “top-tier” firms don’t produce better outcomes; it may well be that the firms that qualitatively are the “top-tier” firms do in fact produce better outcomes, when the analysis is not diluted by the outcomes produced by other firms that are not qualitatively “top tier.”

On the other hand, it may be that I have no business whatsoever attempting to comment on the authors' analysis. Even if I do have some familiarity with securities class action litigation, the exercise the authors have undertaken depends on a methodology that is entirely alien to me. For that reason, there is a good case to be made that I should forebear from commentary altogether. Moreover, their analysis has produced an unexpected conclusion that is worth consideration. Certainly, their question – that is, whether the plaintiffs' lawyers matter – is an interesting and important one, and their analysis of this issue is sure to provoke further discussion of the issue. Along those lines, it would be interesting to hear the viewpoints of a wide variety of securities litigation practitioners of the question of whether the plaintiff' lawyers matter.

In Securities Fraud Class Actions, Do You Get What You Pay For?

clsbluesky.law.columbia.edu/2024/03/12/in-securities-fraud-class-actions-do-you-get-what-you-pay-for

March 12, 2024



When it comes to recovering money for shareholders injured by corporate fraud, do the plaintiffs' lawyers matter? Intuitively, the answer seems like it must be yes. The most talented lawyers should develop more creative legal theories and uncover more evidence of wrongdoing. Lawyers who are better financed can chase down more leads and be more aggressive in litigating their cases.

Yet there is little empirical support for this intuition. There are a variety of lists that purport to identify the top plaintiffs' firms, but these lists typically rely on law firms' average settlement amount or the total value of their settlements in a given year. Although the plaintiffs' law firms considered to be at the top of their field typically get larger settlements than other firms, their cases are fundamentally different as well. These law firms seek out and often win the lead counsel spot in cases with more promising facts, such as a parallel government investigation, termination of top officers, or restatement of financials. These law firms also target defendants with larger market capitalizations, which under the damages formula used in securities class actions typically leads to larger estimated damages.

In a new paper, we use inverse propensity score weighting (IPW) to compare the results in cases led by top-tier firms with those brought by lower-tier firms. This technique, which has been used in studies of law firm performance in other areas of the law, addresses case selection effects by using all of the cases led by a top-tier firm and then weighting the cases led by lower-tier firms based on how similar these cases are to the cases led by top-tier firms. This weighting allows the sample of cases led by top-tier firms to more closely resemble the sample of cases led by lower-tier firms. Using this approach, we can estimate the average effect of representation by a top-tier law firm.

We find that top-tier lawyers only obtain better outcomes for shareholders in a narrow subset of securities class actions. We find that most of the difference in the results obtained by top-tier and lower-tier firms disappears when we balance observable characteristics using the IPW technique. Sorting the settlements into deciles based on the market capitalization of the defendants, our proxy for the potential monetary stakes of the class action, we find that there is no significant difference in the results obtained by top-tier and lower-tier firms in market capitalization deciles 1-7 or 10. The only significant difference was in cases against companies whose market capitalizations were in deciles 8 and 9 – i.e., the larger defendants, but not the very largest.

We also look at investments by the law firms in these cases. We find that top-tier firms invest more hours and money in cases against companies in all deciles of market capitalization other than the very largest. We find that top-tier firms invest considerably more hours and expenses in cases in deciles 8 and 9. Using our reweighted samples, top-tier firms are predicted to invest almost twice the time and almost three times the expenses in deciles 8-9. The greater settlement amount for the top-tier firms in these deciles may reflect these greater investments.

These findings call into question the preferential treatment that top-tier firms receive when it comes to lead counsel appointments and fee awards in securities class actions. These firms may tout their record of success to lead plaintiffs and judges, but their records may simply reflect the fact that these firms handle cases with better facts and larger potential damages. Top-tier firms are spending more, but they are not necessarily getting better results.

It is more difficult to determine what factors are driving the results in deciles 8 and 9. One possibility may be unique financing challenges in these cases. Perhaps the cases against small and mid-sized corporate defendants are more streamlined and do not require law firms to obtain additional financing, while the cases against the very largest defendants promise enough financial return that even lower-tier firms can find the funds necessary to litigate, either through partnerships with other firms or litigation funders. The lower-tier firms litigating cases in deciles 8 and 9, however, may encounter a gap in financing options, as these cases

are not small enough for lower-tier firms to finance on their own but also not big enough to attract outside funders. The greater internal resources of top-tier firms may give a litigation advantage for top-tier firms in deciles 8 and 9.

Our findings suggest some takeaways for participants in securities fraud class actions. Institutional plaintiffs should be wary of appointing a firm to be lead counsel simply because it has a history of achieving large settlements. A firm's track record may simply reflect its luck in being awarded the role of lead counsel in cases with more promising facts. Accordingly, a savvy plaintiff should look behind a firm's settlement numbers and inquire into facts of the firm's cases and the firm's specific role in increasing settlement value of these cases. Not all plaintiffs will be willing to conduct this type of inquiry, but it would help match cases to the firms that will do the most to return value to shareholders.

In awarding fees, judges should also look more closely at a firm's specific contributions to the case. Our prior research has found that judges do not always take into account the objective factors that make settlement more likely when setting fees. Instead, they can be swayed by large settlement amounts, even if the amounts do not necessarily reflect the law firm's efforts. Yet the top-tier firms collect more than three-quarters of the total fees in securities class actions. Our study reinforces these concerns, as we find that in most categories of cases, the top-tier firms do not obtain better results for shareholders. This finding suggests that the top-tier firms receive outsized fees for what may be baseline efforts. In awarding fees, judges should take a harder look at the lawyers' specific contributions to the case, analyzing whether the firms actually went above and beyond in returning funds to shareholders.

Finally, lawmakers may want to revisit the lead plaintiff provisions of the Private Securities Litigation Reform Act. This legislation reflected a hope that large, institutional plaintiffs would select the best law firms to litigate securities class actions. Our research, however, casts doubt on whether institutional plaintiffs are performing this role effectively. If the top-tier firms are generally not producing better results than other firms, then these institutions may simply serve as an entry ticket into the most lucrative cases, rather than the monitor that Congress envisioned.

This post comes to us from Stephen J. Choi, Bernard Petrie Professor of Law and Business, New York University; Jessica M. Erickson, Nancy Litchfield Hicks Professor of Law, University of Richmond; and A.C. Pritchard, Frances and George Skestos Professor of Law, University of Michigan. It is based on their recent article, "Paying for Performance? Attorneys' Fees in Securities Fraud Class Actions," available [here](#).

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COMMENTARY

The Altria Class Action: A Case Study in AI-Fueled Fraud and Mitigation Strategies

The Altria case serves as a stark example of how fraudsters are leveraging AI to overwhelm class action settlements with bogus claims.

March 19, 2024 at 09:30 AM

Class Actions

By Bryan Heller, ClaimScore | March 19, 2024 at 09:30 AM



The recent Altria class action settlement over Juul products highlights a growing concern in mass litigation: the exponential increase in fraudulent claims facilitated by generative artificial intelligence (AI). In consideration of this phenomenon, an analysis of this trending use of new technology’s impact on the Altria case provides an intriguing primer suggestive of smart strategies for law firms and businesses to mitigate associated costs and delays.

AI and the Surge in Fraudulent Claims

The Altria case serves as a stark example of how fraudsters are leveraging AI to overwhelm class action settlements with bogus claims. Initially expecting a manageable number of submissions, the settlement administrators were inundated with a staggering 14.4 million claims—nearly five times the anticipated volume. Lawyers attributed this surge to AI-powered programs, designed to automatically generate and submit fraudulent claims.

The ease with which AI can fabricate identities, purchase histories, and manipulate data allows these programs to exploit vulnerabilities in the claims filing process. This tactic not only strains the resources of the settlement but also complicates the process for legitimate claimants, delaying payouts and potentially diminishing their share of the settlement fund.

Claim Fraud: A Moving Target in Mass Litigation

Unfortunately, the Altria case isn’t unique. The sheer volume of claims in a class action creates an environment ripe for fraudsters who constantly adapt their tactics. As traditional methods of detection become more sophisticated, fraudsters turn to AI-powered tools that can circumvent established safeguards. This “moving target” nature of claim fraud necessitates a proactive approach to mitigation strategies.

The High Cost of Waiting

The traditional approach of addressing fraud only after the claims period closes creates significant problems. Validating millions of claims against a backdrop of fraudulent submissions is a mammoth task, driving up legal costs and delaying the case resolution for everyone involved. This delay hurts both plaintiffs, who have to wait longer for their compensation, and defendants, who are burdened with mounting legal fees and uncertainty.

In the Altria case, the sheer volume of suspect claims threatened to derail the settlement. The judge ultimately approved the settlement, but the process was protracted and expensive due to the need to sift through a massive number of likely fraudulent submissions.

The Rise of Programmatic Fraud and Mitigation Strategies

The rise of programmatic fraud underscores the need for a multi-pronged approach to combating it. In order to fight programmatic fraud, you need programmatic solutions. Law firms and businesses involved in class actions need to consider the following strategies:

- **Early Intervention:** Implementing AI-powered fraud detection systems at the outset of the claims period can be a powerful tool. These systems can analyze data points, purchase history patterns, and identify inconsistencies that might flag fraudulent claims.
- **Continuous Monitoring:** Fraudsters are constantly evolving their tactics, so relying on a single set of filters is insufficient. Continuous monitoring and refining of detection algorithms are crucial to stay ahead of the curve.
- **Collaboration:** Collaboration between law firms, claims administrators, and forensic accounting specialists fosters a more robust defense against fraud. Sharing expertise and best practices allows everyone involved to identify and address emerging threats more effectively.
- **Transparency:** Transparency throughout the claims process is essential. Clearly communicating eligibility requirements, claim submission procedures, and potential consequences for fraud can deter bad actors and build trust with legitimate claimants.

Conclusion

The Altria class action should serve as a cautionary tale for the future of mass litigation. AI-powered fraud is a growing threat with the potential to derail settlements and erode public trust in the legal system. By embracing proactive mitigation strategies, law firms and businesses can ensure a fairer and more efficient resolution for all parties involved.

This approach requires constant vigilance, collaboration, and a willingness to adapt as fraudsters refine their tactics. By staying ahead of the curve, we can protect the integrity of class actions and ensure that legitimate claimants receive the compensation they deserve.

Bryan Heller *is co-founder and chief product officer of [ClaimScore](#), the industry’s only provider of AI-based, real-time claim validation software.*

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NEWS

Opioid Judge Rejects DQ Motion, But Cautions Motley Rice: 'The Court Frowns'

U.S. District Judge Dan Polster on Monday declined to disqualify Motley Rice from dozens of opioid cases, but said he was "very uncomfortable" with its government client arrangements.

March 18, 2024 at 08:52 PM

Legal Ethics and Attorney Discipline



Amanda Bronstad
staff reporter



What You Need to Know

- The judge found the timing of pharmacy benefit manager OptumRx’s Dec. 15 disqualification motion to be suspect, particularly since it could have raised its concerns as early as 2018.
- Polster questioned OptumRx’s claim that Motley Rice obtained confidential documents in its prior government representations.
- The judge, however, found Motley Rice should have followed the ethical rules of government lawyers: 'Motley Rice and all other law firms should carefully take this into account going forward.'

A federal judge on Monday declined to disqualify Motley Rice from dozens of opioid cases, but said he was “very uncomfortable” with its government client arrangements.

U.S. District Judge Dan Polster, in the Northern District of Ohio, found the timing of pharmacy benefit manager OptumRx’s Dec. 15 disqualification motion to be suspect, particularly since it could have raised its concerns as early as 2018, when the judge appointed Motley Rice member Joe Rice to the plaintiffs’ executive committee in the opioid multidistrict litigation.

“If OptumRx always intended to move to disqualify Motley Rice as MDL co-lead counsel, then the court finds the timing of OptumRx’s motion somewhat troubling,” he held.

OptumRx, owned by United HealthCare, alleged that Motley Rice used its subpoena power in prior government cases to obtain confidential information, which it could use in the opioid cases against pharmacy benefit managers. Motley Rice represented Hawaii, the District of Columbia and Chicago in separate cases against OptumRx and other pharmacy benefit managers over insulin pricing.

But Polster questioned OptumRx's claim that Motley Rice obtained confidential documents while representing Chicago in a previous government case given that those materials should have been provided in the multidistrict litigation.

Polster agreed with OptumRx, however, that Motley Rice was, in fact, acting as a "public officer" in its prior government cases and is now representing private clients, even though they are cities and counties.

"The language of the retainer agreement cannot change what Motley Rice actually did," the judge, who [held a hearing last month](#), ruled. "The unavoidable fact is that, when Motley Rice served government subpoenas and received documents in response—even if it was acting on behalf of those governmental entities under a contingent fee, independent contractor agreement—it had been granted authority to wield the power of the government."

He cautioned members of the plaintiffs bar about potential conflicts in similar circumstances.

"The court is very uncomfortable with the malleability of this quasi-government-employment configuration," he wrote. "If private outside counsel, like Motley Rice, intends to enter agreements where it has the power to wield (and potentially abuse) government power, then it needs to adhere to all the same rules to which government lawyers are subject. Motley Rice and all other law firms should carefully take this into account going forward."

Rice, who sits on the plaintiffs' steering committee with Paul Farrell, of Farrell & Fuller, in San Juan, Puerto Rico, and Jayne Conroy, of New York's Simmons Hanly Conroy, said, "We are pleased to put this issue behind us and to continue to focus, as we have since the start of the litigation, to holding all responsible parties fully accountable for the opioid epidemic and obtaining some measure of justice on behalf of impacted communities across the country."

Brian Boone, an Alston & Bird partner in Charlotte, North Carolina, who represents OptumRx, did not respond to a request for comment.

'Room for Blame on Both Sides'

Polster has lined up four bellwether trials against OptumRx and Express Scripts Inc., another pharmacy benefit manager. 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 disqualification motion cites 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."

On March 13, Express Scripts [identified "newly discovered evidence"](#) to disqualify Motley Rice: a 2018 subpoena for confidential documents that Motley Rice member Linda Singer, then at Cohen Milstein Sellers & Toll, as "special assistant corporation counsel," served on behalf of Chicago in its opioid investigation.

But those same documents, Polster wrote, were ordered to be deposited in the opioid multidistrict litigation's repository.

"Neither Express Scripts nor the City of Chicago objected to the subpoenaed documents being produced into the MDL," he wrote.

In a footnote, Polster rejected as untimely Express Scripts' move to join the disqualification effort.

In the end, he acknowledged the issue was "deeply personal" on both sides, but encouraged lawyers to focus on resolving the cases.

“There is room for blame on both sides in the present disagreement,” he wrote. “Optum had an opportunity to raise the disqualification issue long ago. Further, OptumRx has not been meeting its MDL repository obligations in full for some time, even after begin repeatedly reminded and asked to do by plaintiffs. The court frowns on this continued recalcitrance and will brook it no further; and warns OptumRx against pursuing this approach generally as discovery goes forward.”

But Motley Rice’s representation of private clients while also having the authority of a public entity poses its own potential risks and conflicts of interest.

“The court frowns on this activity as well, and warns firms against taking this risk in the future,” Polster wrote. “There is a real difference between a law firm’s representations of a governmental entity as a private client and a law firm’s wielding the authority of that government. The facts happen to work in favor of Motley Rice in this case: were it not for the standing repository obligations, and the nature of the investigation materials OptumRx produced, the court’s discussion and analysis in this order might have been different.”

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Court finds reps in the underwriting agreement - filed with the registration statement - are part of the RS and subject to Section 11.

The underwriting agreement contained more specific misreps than the actual RS, which is why SHs made the argument

law360.com/securities/art...

misstatement or omission.¹¹⁸ The Act, in turn, defines "registration statement" to include "any report, document, or memorandum filed as part of such statement or incorporated therein by reference."¹²⁰ And Schedule A, which lists information required "in" registration statements, expressly includes "a copy of any agreement . . . made with any underwriter."¹²¹ In sum: (1) a Section 11 claim may be based on misrepresentations or omissions contained in a registration statement; (2) a registration statement includes reports and documents filed as part of it; and (3) an underwriting agreement is "in" a registration statement. This language is clear on its face.

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Unity Software, Major Shareholders Shed Securities Class Action

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Unity Software Inc., and two of its largest shareholders won dismissal, for now, of a securities class action alleging they made misstatements and omissions to investors about its “audience pinpointer” tool.

Unity offers graphic tools to create, run, and monetize real-time 2D and 3D content for mobile phones, tablets, PCs, consoles, and augmented and virtual reality devices. Audience pinpointer is intended to help advertisers work around user data protections built into the latest iPhone models.

The lead plaintiffs Oklahoma Firefighters Pension and Retirement System and Indiana Public Retirement System alleged that Unity, Silver Lake Group LLC, and Sequoia Capital Operations LLC made materially false and misleading representations during earnings calls and publications by failing to disclose that the tool was losing customers and revenue.

“As a result of Defendants’ misrepresentations and omissions, Unity’s stock price was artificially inflated,” the complaint alleged. The plaintiffs acquired the company’s stock “at artificially inflated prices during the Class Period and suffered damages thereby,” the complaint alleged.

The claims fail because the plaintiffs didn’t allege that the tool “had serious known technical flaws during the Class Period,” Judge Edward J. Davila of the US District Court for the Northern District of California said March 15. The court, however, granted the plaintiffs until April 5 to file an amended complaint to try to address the identified deficiencies.

“Lead Plaintiffs’ pre-Class Period allegations here do not establish the falsity of the statements made during the Class Period,” Davila said. “Without more, ‘any inference that pre-Class Period practices continued during the Class Period amounts to unsubstantiated speculation,’” he said, citing a 2019 opinion from the Western District of Washington.

The plaintiffs brought claims of material representation or omission under Exchange Act Section 10(b) and SEC Rule 10b-5, and control person liability under Exchange Act Section 20(a). Having failed to establish a primary violation under 10(b) and Rule 10b-5, the 20(a) claim fails too, the court said.

Labaton Keller Sucharow LLP is lead counsel for the class. Hagens Berman Sobol Shapiro LLP is liaison counsel for the class. Morrison & Foerster LLP represents Unity. Simpson Thacher & Bartlett LLP represents Silver Lake. Quinn Emanuel Urquhart Sullivan LLP represents Sequoia.

The case is Das v. Unity Software Inc. , 2024 BL 87605, N.D. Cal., No. 22-cv-03962, 3/15/24

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Evoqua Water Technologies And Former Executive Resolve Books And Records And Internal Controls Matter

 fcpprofessor.com/evoqua-water-technologies-former-executive-resolve-books-records-internal-controls-matter

March 19, 2024

The Foreign Corrupt Practices Act has always been a law much broader than its name suggests.

Sure, the FCPA contains anti-bribery provisions which concern foreign bribery.

Sure, the FCPA's books and records and internal controls provisions can be implicated in foreign bribery schemes.

However, the fact remains that most FCPA enforcement actions (that is enforcement actions that charge or find violations of the FCPA's books and records and internal controls provisions) have *nothing to do with foreign bribery*. For lack of a better term, these enforcement actions have longed been called non-FCPA, FCPA enforcement actions by this site.

The latest example involves Evoqua Water Technologies Corp. and Imran Parekh (a former division-level finance director at the company).

In summary fashion, this complaint alleges:

“Beginning in 2016 and continuing at least until December 2018, Evoqua improperly counted (or “recognized”) revenue in violation of Generally Accepted Accounting Principles (“GAAP”), which is a common set of accounting principles, standards, and procedures that public companies must follow when they compile their financial statements, and is the accounting standard adopted by the Commission that must be followed by public companies in the United States. Evoqua’s improper revenue recognition caused the company to materially misstate the financial statements it incorporated into its November 2017 initial public offering (“IPO”) of stock and reported in its subsequent annual and quarterly financial statements filed with the Commission. Parekh was primarily responsible for the fraudulently inflated revenues at Evoqua.

[...]

Evoqua’s violations of the securities laws were the result of intentional or reckless conduct by Parekh, and negligent conduct at Evoqua’s corporate level in managing the financial reporting and accounting controls processes. The misconduct continued through Evoqua’s first year as a public company, resulting in inaccurate books and records and material misstatements of Evoqua’s financial condition reported in its registration statement and IPO Prospectus, as well as its Forms 10-K, 10-Q, and 8-K filed with the Commission between the end of 2017 and until December 2018.”

Evoqua was charged with, among other things, violations of the FCPA’s books and records and internal controls provisions. Parekh was charged with, among other things, aiding and abetting Evoqua’s violations of the books and records and internal controls provisions.

Evoqua consented to the entry of a final judgment that permanently enjoins it from violating, among other things, the books and records and internal controls provisions. As stated in the SEC release, “the final judgment would also order Evoqua to comply with certain undertakings, including an agreement to implement recommended improvements to its system of internal accounting controls, and to pay a civil penalty of \$8.5 million.”

Parekh also consented to the entry of a judgment that permanently enjoins him from violating, among other things, the books and records and internal controls provisions. The SEC release states: “the judgment also orders that Parekh will be ordered to pay disgorgement, prejudgment interest, and a civil penalty, the amounts of which will be determined by the court, and that the court will determine whether Parekh should be barred from serving as an officer or director of a public company and if so the duration of such a bar.”

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Securities Law

March 19, 2024, 5:20AM PDT

Matt Levine's Money Stuff: Slog Is Sorry Slerf Was Burnt (Correct)

By Matt Levine
Opinion

Bloomberg Law News 2024-03-19T13:11:40041829166-04:00

Matt Levine's Money Stuff: Slog Is Sorry Slerf Was Burnt (Correct)

By Matt Levine 2024-03-19T08:20:26105-04:00

Slerfed!

Here are some statistics from [Bloomberg's Olga Kharif](#) :

To pass the chartered financial analyst exams and put the "CFA" letters on your résumé, 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.

Well. Sure. Look, I myself have spent at least [11 hours online](#) learning about crypto, and I do not want to be too skeptical about crypto education. But these numbers strike me as reasonable. Of course the CFA program should be harder than the crypto program. One model that you could have for crypto is that it is *finance* without the *content*.

So: A share of stock is an electronic token that you can buy or sell for money. Sometimes a lot of people want to buy a stock, and its price goes up. Other times, people want to sell it, and its price goes down. Why do they want to buy or sell it? Various reasons: Perhaps they got tax refunds or stimulus checks, perhaps the chief executive officer of the company that issued the stock did something interesting or got arrested, perhaps the company announced good earnings or bad earnings or a new product or a computer hack. But the *traditional* reason is that a share of stock represents a partial ownership interest in a company, and the long-term value of the stock is the present value of its future cash flows. You can estimate that value by projecting those future cash flows and performing math to compute their present value. Different people will have different estimates, so there will be trades, and those estimates will change over time – with the company's prospects, with discount rates, with macroeconomic conditions – so there will be volatility. And if you want to make money trading stocks, traditionally, you go and learn about companies and products and business models and accounting and discounted cash flow modeling and all the other things that go into estimating the values of stocks, either because you want to get good at estimating values or because you want to know what *other* people, the ones you are trading against, are up to.

A crypto token is also an electronic token that you can buy or sell for money, but in a purified form. There's no company, no product, no earnings, no cash flow. Sometimes a lot of people want to buy the token, and its price goes up; other times, they want to sell, and its price goes down. You have the most salient feature of finance – a volatile electronic token that you can trade – without any of the other features. There is less to learn!

Oh this is unfair and oversimplified, *your* crypto project is different, *your* crypto project is empowering communities with real products and not just an empty vessel for financial speculation. But Bloomberg's Muyao Shen [reported last week](#) :

The memecoin frenzy in the digital-asset market shows no signs of stopping, with trading volumes now at levels last seen just before the burst of the last crypto bubble more than two years ago.

Considered as some of the most speculative and volatile cryptocurrencies, memecoins such as Dogwifhat and Pepe are far outstripping the gains registered by market bellwether Bitcoin that has dominated the headlines. Trading volume for the top memecoins, which often trade for a fraction of a cent, reached nearly \$80 billion in the past week, according to data compiled by blockchain data firm Kaiko. That's the highest since October 2021. ...

Memecoins have been a long-existing phenomenon in crypto, as small investors and promoters see the microscopic prices of memecoins as an opportunity to quick post huge returns despite the lack of traditional fundamentals. ...

A group of dogwifhat token holders announced last week a public fundraising campaign to put the dogwifhat meme on the Las Vegas Sphere. The group has already reached its target goal of \$650,000 in the USDC stablecoin, based on the transaction history of the digital wallet for the fundraise. But it's unclear whether and when the fund will be used to promote the meme in Las Vegas.

What are dogwifhat's fundamentals? Well:

- 1. Its logo is a dog, with a hat.
- 2. If people kick in enough money, maybe they can put a picture of the dog with the hat on the Las Vegas Sphere, which might encourage more people to kick in more money.

What does the multiple-choice exam question about this look like? Or today we got the story of Slerf:

A new Solana-based memecoin, Slerf, has faced significant challenges after the project's developer accidentally burnt a major portion of the token supply – effectively losing \$10 million, or the entirety, of presale participants' money.

"Guys I f—ed up," the project's official X account wrote. "I burned the LP and the tokens that were set aside for the airdrop. Mint authority is already revoked so I can not mint them. There is nothing I can do to fix this. I am so f—ing sorry."

The Slerf team later went to an X Spaces to elaborate further on the situation. "I'm sick to my stomach," developer @Slerfsol said in a Space on X. "I'm literally about to throw up."

"I'm lost for words," they added. "I don't know what to do."

Poor Slerfsol. Basically the way crypto works is that an anonymous developer named makes up a token named Slerf, which is distinguished from other tokens by having a cartoon sloth logo. You send \$10 million of Solana crypto tokens to him, and he makes a note to himself that he owes you some Slerfs. Then he accidentally flushes that note down the toilet and, due to the irreversible nature of the blockchain, you get no Slerfs and your money is permanently gone, though the developer is very sorry. (An earlier version of this column incorrectly attributed these quotes to another panel participant who goes by the name Slog, but who did not in fact burn Slerf. I apologize to Mr. Slog.)

If this were a *company*, and Slerf was a *stock*, this would all be *bad*: It is bad for a company to lose all of the money it raises in a stock offering. (Also, though, it would probably be *reversible*. If a company just lost its list of shareholders, it could probably, like, go back through its emails and reconstruct the list.)

But Slerf is not a company or a stock: It is a crypto token, so absolutely nothing matters. Except that this is all sort of *funny*, and attention-grabbing, so of course Slerf went *up*. Arnold: "This mistake was very good for attention, and attention is the true value of any memecoin. So the obvious thing happened and the new tokens that were released shot up around 5,000%." You could spend another 10 hours and 55 minutes pondering this but I do not recommend it.

FTXed

Elsewhere in crypto founders who "f-ed up" and [went on social media to apologize](#) :

Sam Bankman-Fried came up with a lot of ideas to rehabilitate his image and launch a new crypto exchange after FTX went into bankruptcy.

Bankman-Fried thought he might "Go on Tucker Carlson, come out as a republican;" "Come out against the woke agenda;" tell people the team running his bankrupt former company "has no idea how to run FTX;" tell people he's "really glad" the bankruptcy team stepped in and "they're great."

In a Google document, which prosecutors attached to a court filing seeking to put Bankman-Fried behind bars for as long as 50 years, the fallen crypto king considered having author Michael Lewis interview him on TV, asking people what to do in a Twitter poll and leaking a document to the press.

The document lists 19 numbered "random probably bad ideas that aren't vetted." No. 12 is "Go head to head with Matt Levine on Odd Lots, really lean in to arguments." I don't think anyone will be surprised to hear that we (I and Joe Weisenthal and Tracy Alloway of Bloomberg's Odd Lots) also wanted this. We had a [few](#) good [chats](#) with Bankman-Fried back before FTX collapsed, and I would have cleared my schedule to do it again in, you know, [November 2022](#) . Tremendous content that would have been. It never happened; I'm not sure if that's because Bankman-Fried decided it was a bad idea, or his lawyers stopped him, or he was arrested before he could do it.

Oh Elon

The Elon Musk theory of corporate governance is that everything that Elon Musk does is good for his investors:

- 1. Elon Musk has made many hundreds of billions of dollars for investors in his various companies.
- 2. Those investor returns come, in large part, from Musk's personal attributes and efforts: Those companies would not be successful without his perfectionism, drive, management style, techno-optimism, etc.; nobody else could have built those companies, and even today they would not perform nearly as well without Musk's intense personal involvement.
- 3. Those personal attributes, which are good for investors, are inseparable from the rest of his personality, which is ... oh, you know. "I reinvented electric cars and I'm sending people to Mars in a rocket ship," Musk once said on *Saturday Night Live*; "did you think I was also going to be a chill, normal dude?" His personality only works as a complete package; you can't get the shareholder value creation without the bad tweets.
- 4. Therefore, the bad tweets are *also good*, because they enable the good stuff; they are the compost that feeds the flowers of shareholder value.

This theory is ... I mean, it's probably not *wrong*, is it? It is pretty unhelpful as a theory, though. It proves too much. It implies that any conflict of interest between Musk and his shareholders is *impossible*, because whatever Musk wants is necessarily good for shareholders – even if it is *bad* for shareholders, it is good, because the bad thing is just the price they pay for Musk's goodness.

The most important application of this theory was probably when Musk asked Tesla Inc. to [pay him \\$56 billion](#) for his work as chief executive officer and then [mused](#) that he might need *another* \$50 billion to keep doing it. A Delaware judge struck down that pay package, finding that there was a conflict of interest (Musk controlled the board of directors that awarded him the pay) and that the pay was too much. Delaware does not subscribe to the Elon Musk theory of corporate governance. In that theory, there can be no conflict of interest, and no amount of pay that is too much, because anything that Elon Musk wants is necessarily in the best interests of shareholders.

Anyway, here is [Elon Musk on the Elon Musk theory](#) of corporate governance:

Elon Musk said that his prescribed use of ketamine alleviates periods of low mood and is in the best interest of investors in Tesla Inc. and the other companies he runs.

For Wall Street, "what matters is execution," Musk said in an interview with former CNN anchor Don Lemon streamed Monday on YouTube. "From an investor standpoint, if there is something I'm taking, I should keep taking it," he said referring to Tesla's success.

Musk said he takes the drug as prescribed periodically to treat what he described as "chemical tides" that lead to depression-like symptoms.

I am sure Elon Musk has good doctors, and I am not going to second-guess the *medical* advice he is getting, but the *corporate governance* theory here is "if there's something I'm taking, I should keep taking it." That logic applies to taking ketamine on medical advice, or taking cocaine against medical advice, or anything else. Whatever he does is necessarily good.

One could quibble. Tesla's stock peaked in November 2021. Arguably everything Musk did *up* to that point created hundreds of billions of dollars of shareholder value; everything he's done *since* destroyed shareholder value. I couldn't tell you if his drug regimen has changed, but for instance Musk launched his takeover of Twitter Inc. (now X) in about [March 2022](#), selling a bunch of Tesla stock to pay for it (and taking on a new full-time job that has arguably distracted him from running Tesla). Was that *bad* for Tesla shareholders? You might be tempted to look at the evidence and say it was bad. But on the Elon Musk theory of corporate governance, that's impossible.

Meme governance

Here's a stylized history of US corporate governance:

- 1. In the very olden days, corporations tended to be run and also *owned* by their founders, titans of business who tended to own controlling stakes in the companies they ran personally. Governance was fairly straightforward: The owner-managers ran their businesses however they thought best.
- 2. Then the "separation of ownership and control" developed, where corporations became large and impersonal, owned by thousands of diffuse small shareholders but run by professional managers. Corporate governance questions arose for scholars and lawyers and investors: The managers ran the corporation, theoretically on behalf of its owners (the shareholders), but figuring out how to make sure that the managers did what was best for the owners became an active area of research and debate.
- 3. Then institutional investors became bigger, more powerful, and more interested in the governance of their portfolio companies; when the "Big Three" index-fund firms own 20% of the stock of every company, presumably they have some ability to tell those companies what to do. This raised a whole new set of corporate governance questions: Now, instead of powerful managers and diffuse and passive shareholders, you have very large shareholders who overlap among all the companies. (You also have a new separation of ownership and control, because the people who manage investments at the Big Three are not actually the ultimate owners of those investments.) And there is a ton of scholarship and debate about these issues, [many](#) of [which](#) we have [discussed](#) around [here](#).
- 4. Meme stocks!

Meme stocks are *new* – it seems roughly fair to say that they [date to 2021](#) – so it is perhaps less clear what they mean for corporate governance. Maybe nothing. But you could sketch some theories:

- Meme stocks are basically companies whose shares are largely held by enthusiastic retail investors who are on Reddit a lot.
- In some ways, this resembles Phase 2 of my stylized history: You have diffuse retail shareholders and powerful managers who run the companies; the tools that institutional investors developed to supervise managers in Phase 3 don't really work at companies that don't have institutional investors.
- In other ways, though, it's completely new. The meme-stock shareholders are thousands of individuals, sure, but thanks to social media they are far more enthusiastic and coordinated than the retail investors of the past. If you're the chief executive officer of a meme-stock company, and you displease your retail shareholders, they probably can't mount a proxy fight or a hostile takeover, but they *can* say mean things about you on social media, possibly in ways that you find very personally unpleasant. Also your stock will probably be very volatile. Also maybe you *will* be vulnerable to a hostile takeover from an [activist](#) who is [better](#) able to harness meme-stock investors than you are.
- Also, in 2024, retail shareholders mostly *don't* vote at shareholder meetings, so any sort of corporate governance that relies on voting might not work at meme-stock companies. We have [talked about](#) things like AMC Entertainment Holdings Inc.'s APE preferred stock, designed to get around shareholder voting requirements, because if you're a meme-stock company you may not be able to get enough shareholders to vote on whatever you need them to vote on.

Here is a fun paper from Dhruv Aggarwal, Albert H. Choi and Yoon-Ho Alex Lee titled "Retail Investors and Corporate Governance: Evidence from Zero-Commission Trading":

We examine the effects of the sudden abolition of trading commissions by major online brokerages in 2019, which lowered stock market entry costs for retail investors, on corporate governance. Firms already popular with retail investors experienced positive abnormal returns around the abolition of commissions. Firms with positive abnormal returns in response to commission-free trading subsequently saw a decrease in institutional ownership, a decrease in shareholder voting, and a deterioration in environmental, social, and corporate governance (ESG) metrics. Finally, these firms were more likely to adopt bylaw amendments to reduce the percentage of shares needed for a quorum at shareholder meetings. Our results provide new insights into the effects of entry costs on investors and the role of retail investors in corporate governance.

One thing that I like here is just the method of identifying meme stocks: Loosely speaking, a meme stock is a company whose stock went up when retail brokerage commissions went away. If your stock went up when retail commissions went to zero, that *suggests* that you are a company beloved by retail investors, and it turns out that that fact correlates with a decrease in institutional ownership.

But then that fact – quasi-meme-stock-ness – also correlates with other facts that you'd expect about meme stocks. For instance: Retail shareholders don't vote. ("Studying proposal-level voting data, we find that these firms saw a significant jump in non-voting after the introduction of zero-commission trading," the paper says.) Therefore, the companies needed to lower their shareholder vote requirements if they're going to get anything done.

Also, it sort of looks as if ESG is a concern of institutional investors and retail shareholders don't care: "This deterioration in ESG scores is consistent with an increase in the (relative) influence of retail investors, who typically exert less pressure on corporations to prioritize ESG than institutional players." But this is maybe not the whole story:

Disaggregating ESG performance into the sub-scores for environmental ("E"), social ("S"), and corporate governance ("G") issues, we find that the post-2019 decline for the treatment group is concentrated in the governance component. We find no significant change in these companies' performance on "E" or "S" issues after the advent of zero-commission trading. Therefore, the best reading of the decrease in treated firms' ESG scores could be that the quality of their corporate governance declined after 2019, rather than that retail investor influence caused them to become less "prosocial." To investigate the determinants of this decrease in "G," we analyze changes in several corporate governance outcomes that retail investors could have affected: staggered boards, poison pills, majority voting standard, board independence, and board gender diversity. We find that treated firms become significantly less likely to have a majority shareholder voting standard for director elections after the introduction of zero-commission trading. We find no evidence, however, that treated firms perform any differently when we study staggered boards, poison pills, board independence, or gender diversity. Given our prior finding regarding retail investors' non-participation in voting, we believe it is significant that the only weakened corporate governance outcome we observe is directly related to the process of shareholder voting.

"Meme-stock companies are worse at ESG" is not quite right; the story might be more like "meme-stock companies are worse at *shareholder voting*, because their shareholders don't vote, and some shareholder voting procedures go into their ESG scores."

Fake AI

If you are an investment adviser, and you tell prospective clients "I will think very hard about what the best investments are for you, and then buy the ones that I think will go up and avoid the ones that I think will go down," and in fact you pick a bunch of stocks at random in five minutes and spend the rest of your time watching TikTok videos, will you get in trouble? Man, I don't know, maybe. Probably. But it is hard to *prove* that you *didn't* think seriously about your clients' investments. Nobody witnesses your thinking, or lack thereof; that is internal to you.

On the other hand, if you say "I have an artificial intelligence system that will think very hard about your investments," and you don't, *that they can prove* :

The US Securities and Exchange Commission penalized two money managers for what it says were bogus claims about their use of artificial intelligence, stepping up a crackdown by Wall Street's main regulator.

The SEC said on Monday that Delphia (USA) Inc. and Global Predictions Inc. both made "false and misleading statements" about their purported use of the technology. Lawyers for each of the investment advisers didn't immediately respond to requests for comment.

SEC Chair Gary Gensler has been warning firms about over-hyped statements related to AI. The agency has specific authorities to oversee statements that money managers make to investors. In February, Gensler also warned publicly traded companies to avoid "AI washing" when talking to investors about their use of the technology.

Here are the SEC's press release and the orders against Delphia and Global Predictions. Delphia's patter was, in addition to being false, also impenetrable:

Delphia claimed that its advice was "powered by the insights it makes when individuals . . . connect their social media, banking, and other accounts . . . or respond to Delphia's questionnaires" which make its investment decisions "more robust and accurate[.]" Delphia also stated that this client data was used in "a predictive algorithmic model" for the selection of "stocks, ETFs and options[.]"

In a December 2019 press release, Delphia claimed that it was "the first investment adviser to convert personal data into a renewable source of investable capital . . . that will allow consumers to invest in the stock market using their personal data." Delphia further stated that "Delphia uses machine learning to analyze the collective data shared by its members to make intelligent investment decisions."

Starting in November 2020 through August 2023, Delphia's website claimed that Delphia "turns your data into an unfair investing advantage" and that Delphia "put[s] collective data to work to make our artificial intelligence smarter so it can predict which companies and trends are about to make it big and invest in them before everyone else."

Delphia was *not* in fact using client's social media and banking data to make investment decisions, but what if it did? How would that be predictive? I could imagine that someone with, say, Robinhood Markets Inc.'s customer data could use it to make some predictions: Robinhood has a lot of customers, and its interface magnifies trends; knowing that a bunch of Robinhood customers are buying Stock X – or posting about it on social media for that matter – might help you predict that Stock X was going up. But Delphia “managed approximately \$7 million for about 29,000 individual retail accounts through robo-advisory services and approximately \$180 million for five pooled investment vehicles.” How much predictive power would you get from their social media posts?

Meanwhile, “Global Predictions represented on its public website that it offered tax-loss harvesting services that could save users ‘thousands of dollars,’ when it did not in fact offer any tax-loss harvesting services,” which is only barely an AI-washing matter.

Wine-tasting fraud

The classic wine fraud is that you put some \$20 wine in some 1945 Domaine de la Romanée-Conti bottles, you seal them back up real nice, and you sell them to a hedge fund manager for half a million dollars each. But here is a story about an alleged wine fraud run by Omar Khan, who apparently bought real bottles of fancy wine, opened them at fancy dinners, sold tickets for those dinners at high prices, and provided good value for money. (“Some of the most incredible vinous and culinary experiences I’ve ever had,” said one guest.) The alleged fraud is that he had investors in this business (mainly Krešimir Penavić, who made his money at Renaissance Technologies); they gave him money for a share of the ticket-selling profits, and he never gave them the profits. They sued, Khan was arrested, and a judge was puzzled:

The hearing was thin on details. At one point, the judge seemed confused. “You’re investing in someone else having dinner?” he asked.

Really anything can be a business, which means that anything can also be a scam.

Things happen

Social Capital AI Startup Deal Led Palihapitiya to [Fire Partners](#) . Nelson Peltz Fights Disney—and Turmoil at His Own Fund. “Consulting firms ... have gotten their own destiny wrong.” Reddit removes CEO pay incentives in signal of reduced hopes for IPO. China Turns on the Charm for Foreigners but Its Allure Has Faded. WeWork Stock Case Spurs [Criminal Charges](#) Over \$77 Million Tender Offer. ([Earlier](#) .) Mike Lynch goes on trial in US over Silicon Valley's ‘largest fraud.’ [Frontier Markets](#) Win Over Bond Investors With ‘Radical Shift.’ The Everything Rally Comes to [Derivatives Market](#) . The F-Bomb-Dropping Airline CEO About to Earn a \$100 Million-Plus Bonus. [EJMR](#) . Soho House is weirding out Portland. Abu Dhabi Speeds Up [Country Club Admissions](#) to Lure Hedge Funds. A Famed Danish Chef Is Offering High-End [Space Dining](#) for \$500,000. “I was amazed how easy it was to trade on Robinhood and how quickly—and effortlessly—I lost money.”

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(Corrects headline and 20th paragraph to clarify that Slorg did not burn Slerf.)

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- 1. Delaware does **understand** that theory, though. The judge wrote: “CEO superstardom is relevant to controller status because the belief in the CEO’s singular importance shifts the balance of power between management, the board, and the stockholders. When directors believe a CEO is uniquely critical to the corporation’s mission, even independent actors are likely to be unduly deferential. They believe that ‘letting the CEO go would be harmful to the company and that alienating the CEO might have a similar effect.’ They ‘doubt their own judgment and hesitate to question the decisions of their superstar CEO.’ They view CEO self-dealing as the trade-off for the CEO’s value.”

- 2. Also: Is Musk's ketamine use good for X shareholders? Has execution at X been particularly good?

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Tired of rivals hijacking its cases, this antitrust firm tries a strategy to stop it

 [reuters.com/legal/legalindustry/column-tired-rivals-hijacking-its-cases-this-antitrust-firm-tries-strategy-stop-2024-03-18](https://www.reuters.com/legal/legalindustry/column-tired-rivals-hijacking-its-cases-this-antitrust-firm-tries-strategy-stop-2024-03-18)

Alison Frankel

A British banker accused of involvement in bogus Cum-Ex tax reclaims of 440 million euros from the German state, takes out papers from his briefcase at a regional court in Bonn, Germany September 24, 2019. REUTERS/Wolfgang Rattay/File Photo Purchase Licensing Rights , opens new tab

March 18 (Reuters) - Private antitrust litigation is a tough business.

It's expensive to develop cases, which often requires plaintiffs' firms to hire experts before they even file a complaint. And then, as my colleague Jenna Greene pointed out in a column last week about litigation over real estate commissions, some other firm can come along and file a copycat complaint that capitalizes on your time and money.

Antitrust lawyers at Hagens Berman Sobol Shapiro don't like when that happens.

In the real estate commission case, for instance, Hagens Berman and co-counsel from Cohen Milstein Sellers & Toll and Susman Godfrey filed the first complaint against the National Association of Realtors and several other defendants in federal court in Chicago, only to see a different set of plaintiffs' lawyers file an admittedly similar complaint in federal court in Kansas City, Missouri, where dockets are less crowded and cases move more quickly.

Steve Berman told Greene he was "pissed off" about the rival litigation, although the two sets of plaintiffs' firms eventually teamed up on settlements , opens new tab worth more than \$600 million, including last week's \$418 million deal with the national realtors' group.

How can plaintiffs' firms stop rivals from hijacking their work? One way is to move fast to secure your appointment as class counsel. Once you're locked in as the lawyer for all class members, it's a lot harder for another firm to try to seize control of the litigation.

That's the tactic Hagens Berman is attempting in antitrust litigation , opens new tab against property management software company Yardi Systems and several large rental property firms accused of using Yardi software to conspire to reduce competition in rent prices.

Yardi and the other defendants have moved , opens new tab to dismiss the lawsuit, arguing that Hagens Berman is trying to "manufacture" an antitrust conspiracy from the mere fact that several property management companies independently decided to use a Yardi product. Yardi also said in a statement , opens new tab on its website that its software does not enable collusion and that the lawsuit's allegations are "ill-conceived."

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Hagens Berman initiated the case last September in federal court in Seattle. On Feb. 29, after the plaintiffs' firm Cotchett, Pitre & McCarthy filed a similar complaint [\[link\]](#), opens new tab in state court in California, Hagens Berman asked [\[link\]](#), opens new tab U.S. District Judge Robert Lasnik of Seattle to appoint the firm as interim class counsel.

Hagens Berman said its early appointment would protect class members by allowing the firm that developed the classwide theory to control the case. Berman elaborated on that point in an email to me on Monday: "It's important to prevent [reverse] auctions where a defendant goes behind our back and does a cheap sell-out settlement with another team," he said. "If we are lead, that can be avoided."

I should note that Berman was speaking generally, not specifically about Cotchett. Three Cotchett lawyers who signed the firm's Yardi complaint did not respond to my email asking about Hagens Berman's lead counsel bid.

Berman said that he's concerned about additional competition in the Yardi case if he gets good early results, pointing to copycat suits in the real estate commissions case after a billion-dollar jury verdict in the Kansas City wing of the litigation.

"Firms came out of the woodwork with no shame that they were piling on," Berman said.

Yardi and its lawyers from Debevoise & Plimpton declined through a spokesperson to comment on the Hagens Berman motion. But all of the defendants filed a joint brief [\[link\]](#), opens new tab opposing the early appointment of Hagens Berman as class counsel, arguing that there's no need to protect the class because there is no competing case in federal court and no imminent jostling with the state court case.

What the defense brief also shows is that Hagens Berman has a habit of trying to cement its control even before there's much competition from rival plaintiffs' firms.

The brief cites two previous rulings in which courts rejected early class counsel appointment motions by Hagens Berman, a 2016 decision [\[link\]](#), opens new tab in antitrust litigation against Seagate Technology and a 2023 opinion [\[link\]](#), opens new tab in a case alleging that Las Vegas hotels use an algorithm to fix room prices. In both cases, federal judges concluded they didn't need to formalize Hagens Berman's leadership because there was no federal court competition.

I don't mean to suggest that Hagens Berman is the only firm that has used this particular tactic. In a reply [\[link\]](#), opens new tab filed on Friday, Hagens Berman cited several cases in which courts agreed to the early appointment of other antitrust plaintiffs' firms even when there was no imminent competition or when the only competing case was filed in state court. "Appointing Hagens Berman as interim lead class counsel will serve the best interests of the class and ensure this case is litigated without duplication of effort or incurring unnecessary expense," the firm said.

Of course, even an interim appointment does not necessarily guarantee ultimate control, as Hagens Berman knows all too well. Among the decisions cited in its reply brief on Friday was a 2023 order [\[link\]](#), opens new tab in which Lasnik appointed the firm as interim class counsel in a case accusing property management software company RealPage of conspiring to fix rental prices in the market for college student housing. (Lasnik is also overseeing the Yardi case.)

Hagens Berman and allied plaintiffs' firms hoped Lasnik's early order in the RealPage litigation would persuade the U.S. Judicial Panel on Multidistrict Litigation to consolidate all antitrust litigation against the software company, including claims by multi-family home renters, before the Seattle judge, giving them an edge in MDL leadership appointments. The panel instead sent the consolidated litigation to U.S. District Judge Waverly Crenshaw of Nashville. And although Hagens Berman asked Crenshaw to appoint the firm as lead counsel for a class of student housing renters, the judge appointed [\[link\]](#), opens new tab three other firms — Scott+Scott, Hausfeld and Robins Kaplan — as lead counsel for a combined renters' class. Hagens Berman had to content itself with a spot on the plaintiffs' steering committee.

Like I said, it's a tough business.

Read more:

Home buying costs could fall in big US real estate group settlement

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

The fight is on for control of RealPage antitrust litigation

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Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

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Class-Action Reform in France Awaits Parliament's Pleasure—and Waits, and Waits...

Because of disagreement between the two chambers, the French legislature is already a year late in passing a national law under the 2020 EU Representative Actions Directive. Until it does, group actions and litigation funding are stalled, lawyers say.

March 18, 2024 at 06:58 PM

Class Actions



Rick Mitchell

The original version of this story was published on [Law.com International](#)

France's decade-old regime for group actions is so complicated and limited that only a few dozen cases have been filed and only one has resulted in a final judgment of liability against a defendant.

That may soon change if the French legislature can agree on a draft bill on “actions de groupe” that, among other things, would write the [EU Representative Actions Directive](#) into national law, albeit more than a year late.

The 2020 directive, which member states were supposed to write into national law by December 2022, identified a need to better protect EU consumers. It pointed to expanded use of group actions as a means to achieve that.

A 2020 report in the French National Assembly—Parliament's directly elected lower house, which has more power than the Senate—identified similar needs in France but found that the country's 2014 group actions law had contributed little to achieving them.

The Assembly in December 2022 began considering a draft bill that includes measures to fix the regime's consumer protection shortcomings, such as expanding the kinds of groups that can file actions and empowering judges to hit egregious defendants with huge fines.

The pro-business Senate, Parliament's indirectly elected upper house, amended the Assembly's bill to tone down its pro-consumer tilt. But only the Senate's version would allow for litigation funding for group actions, a subject the directive left up to member states.

Before the bill can become law, the chambers have to appoint a joint committee to work out a compromise text that would go back to both chambers for new votes.

Complex Procedures and Confused Filers

For now, the 2014 French law still rules. It limits filings to low-value, opt-in consumer suits that can seek only material damages and that can only be filed by government-certified consumer associations and labor unions. Punitive damage awards and advertising to gather plaintiffs are prohibited.

Updates extended the regime's range to healthcare, employment discrimination, environmental, and personal data protection matters in 2016 and disputes over residence rentals in 2018.

White & Case disputes partner Alexandre Kiabski, based in Paris, told a recent webinar that the existing regime has confused filers with complex, very long procedures that can differ depending on the complaint's economic sector. Filers' misunderstandings of procedural requirements have led to cases getting thrown out, he said.

Out of the 35 cases under the 2014 law, 25 are still underway. Three were rejected on their merits and three were settled. Two were thrown out as inadmissible, and one was withdrawn.

The first case, filed in 2014 against the real estate management company Foncia, took eight years to be thrown out by an appeals court.

The one case that resulted in a final judgment was against the big pharmaceutical group Sanofi in 2022, in a case over the side effects of a medication. In that case, the judge set a five-year limit for alleged victims to opt in to get compensation, Kiabski said.

One Destination, Two Roads

The debate over group actions is divisive in France, as elsewhere, pitting consumer advocates against big companies and their advocates. France's existing law took many years to pass and the current bill has also dragged through Parliament.

After the Dec. 25, 2022, deadline passed for EU member states to write the Representative Actions Directive into national law, the French government in March 2023 put Parliament's bill on a so-called accelerated track. The Assembly adopted its bill a few days later, but the Senate took another year to pass its amended text in February. That's where things stand.

It's not clear when the two chambers will start the process of hammering out a compromise bill.

The Assembly's text would create a single French regime for group actions across all economic sectors, Clifford Chance partner Diego de Lammerville told Law.com International. The bill opens up the kinds of actions that can be filed and loosens restrictions on who can file cases, for example, dropping the need for government certification.

The Senate version pushes back, with an eye on protecting business. For example, it reinstates limitations on types of groups that can file cases.

The Assembly's bill would eliminate an existing requirement for plaintiffs to give defendants prior notice of complaints. That requirement, which the Senate version would keep, has gotten cases tossed, because filers didn't know about it, said Kiabski.

Reputational Risks

The Assembly would create a civil fine that judges could levy for willful misconduct of up to five times profits for an individual and up to 3% of average annual revenues for a company.

"That would really be something new. It's a kind of punitive damage award, but the government keeps the money," said de Lammerville. Judgments of liability could be enforced provisionally.

The Senate version drops the Assembly's civil fine and stipulates that the new law would only apply to cases for which the events cited occurred after the law takes effect.

Clement Gandibleux, a Paris-based Clifford Chance disputes attorney, said a Senate amendment would limit certain types of health law and employment discrimination cases that could be filed. This amendment is aimed at limiting reputational risks that companies could face, he said.

Some features are in both chambers' versions of the bill. For example, they would both make non-material damages possible. That would allow, for example, damage claims for emotional distress, which the current regime doesn't allow.

Both chambers would allow small groups of companies to file actions. "That potentially opens the way to group actions in B-to-B matters," which are currently not possible, De Lammerville said.

Loser Pays

In France, as in several European jurisdictions, "loser pays" rules act as a significant dissuasion to litigation. The Assembly's bill would allow the government to cover some costs if a judge determines the case was well-motivated, de Lammerville said. That's not in the Senate version.

De Lammerville said another factor cited during Parliamentary debate as a brake on group actions in France is certified associations' limited legal resources. One argument was that third-party funding could help with that. Litigation funding arrangements are technically allowed under current French law but not well known.

De Lammerville said the EU directive allows member states to regulate third-party funding of group actions to promote transparency and prevent conflict of interest, but it doesn't require them to allow it or prohibit it.

The Assembly's version would bar all third-party funding of group actions, while the Senate would allow it, with some conditions to prevent conflict of interest, he said.

A UK Model

The idea that litigation funding might help spur more group actions has some support from the UK's experience.

Neil Mirchandani, a London-based litigation partner at Hogan Lovells, told Law.com International that the UK's loser-pays rules have likely slowed down growth of group actions, but litigation funders have helped ease that.

He said England and Wales have seen momentum building to greater use of group actions and class actions, driven by court decisions, and increased presence of a claimant bar.

"A significant factor is that litigation funders have gotten bigger," Mirchandani said, and "hedge funds, private offices of wealthy families, and specialist litigation insurers are taking more of an interest in mass consumer claims."

Claimant firms with big U.S. litigation practices, such as Hausfeld, have opened London offices, "drawn no doubt by the money," he said, while plaintiff boutiques have also sprouted up.

"Claims attorneys don't open cases unless they see a way to make money," he said, noting that in the UK only about 1% of cases tend to go to trial.

Growing Pains

Yet even in European countries where the law has changed to facilitate group actions, and litigation funders have moved in, few cases have moved forward.

In the [Netherlands](#), international funders and boutique litigation firms rolled into the country after it replaced its 30 year-old collective redress system with an opt-out system in 2020. But since then, only three of the dozens of cases backed by litigation funders have passed the first step toward getting to trial.

Lawyers and funders cite a variety of reasons: many of them boil down to growing pains for a new area of law and practice that are working themselves out.

That may yet be the case for France, lawyers said. De Lammerville noted that, for example, there isn’t really a specialized claimant bar for group actions in France because there are so few cases filed, and so few of them go to trial.

“But with the changes this law would bring, perhaps we will see more group actions in the coming years, and perhaps, little by little, we will see some specialized plaintiffs firms show up here,” he said.

First, however, the Parliament has to pass a law.

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Confidentiality and common carriers – the Boeing fiasco

DJ [dailyjournal.com/articles/377696-confidentiality-and-common-carriers-the-boeing-fiasco](https://www.dailyjournal.com/articles/377696-confidentiality-and-common-carriers-the-boeing-fiasco)

Mar. 19, 2024

The confidentiality rule for lawyers, which allows but does not require disclosure of information to prevent death or substantial bodily harm, may need to be revised for common carriers like Boeing.



Carol M. Langford

Langford is a lawyer who provides legal ethics advice and counsel and handles State Bar defense matters. She is an adjunct professor of ethics and served on the Commission for the Revision of the Rules of Professional Conduct.

A growing number of in-flight issues on its aircraft have made Boeing the target of FFA inspections and questions about where the ethical buck stops for Boeing's lawyers. The list of incidents includes two fatal crashes outside the U.S., one in October 2018 and one in March 2019 killing a total of 346 passengers. In more recent incidents a plane made a "sudden movement" read: a hard drop in mid-flight injuring 50 people; an emergency exit door on another plane blew open on take-off (and some oxygen masks malfunctioned) on another plane and an engine caught fire mid-flight on still another. There have been other malfunctions; a tire blowing off on a United Airline's Boeing plane making a landing in San Francisco risky, a new tire incident a week later, and an external panel falling off a plane mid-flight.

I am sure Boeing, and its parts suppliers will argue over who is responsible. That Boeing had notice of potential manufacturing issues seems clear. John Barnett, a Boeing employee who had worked there for well over a decade warned them about safety standards not being met. He said when he did convey his concerns he was met with "a culture of concealment that valued profits over safety." (NBC News, March 12, 2024, Patrick Smith). He died for his troubles in March in a way that social media is calling "being Epsteined" – inside his truck in

an underground hotel parking lot with a lack of security cameras in what is currently being preliminarily called a suicide. After he had been through deposition questioning the prior day by defense counsel. He was looking forward to the trial, according to his family.

All we can do is speculate as to what happened to Barnett. What we can be certain about is that Boeing's lawyers knew there were safety issues - the FAA had done an audit. Our California confidentiality Rule 1.6 allows a lawyer to reveal confidential information only where disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm. But lawyers are not required to reveal that information. The words "criminal act," "likely to result," "death" or "substantial bodily harm" and "may reveal" all create hurdles to revealing a confidence. Rule 1.13 allows the lawyer to go up the chain, but not out. Very few situations will allow for the revelation of client confidences and secrets. I was on the Commission that drafted this Rule. Perhaps we need to re-think its rigidity, at least regarding a common carrier.

Don't get me wrong. I do understand that air travel is statistically safer than driving a car, but that misses the point. And I get that confidentiality is a basic tenant of the lawyer-client relationship. I see its value in advising a client, particularly one with manufacturing problems. I also know that Business & Professions Code section 6068 has similar wording to our Rule 1.6, and you cannot fight the Legislature. But maybe it is time for The Bar to urge our lawmakers in Sacramento to take a second look at the barriers to reporting under this statute. When should a lawyer's duties give way to public safety if a common carrier manufacturer is involved?

Uber is not a manufacturer, but it is a common carrier. However, if something is wrong with the car the driver can usually pull over to the side of the road safely. The airline passenger, on the other hand, gives complete control to the plane, the pilots, and the carrier, and there is no easy exit from mechanical failure. In addition, unlike Boeing Uber is not a duopoly. There are many traveling options; Lyft, buses, trains and subways. But Boeing and Airbus have little real competition in the manufacture of passenger planes. We are forced to fly on their planes, whether they are safe or not.

John Burnett tried; he really did. Can't we lawyers do better? If so, how? It is all eerily similar to the Ford Pinto cases. Ford knew that a rear impact as low as 21 mph could cause its cars to explode, because the fuel tanks were mounted improperly. There were other options, but all were rejected as costing more money and because they took up a little more trunk space.

Dalkon Shield cases in the 1970s raised similar issues. The Dalkon Shield was an intrauterine device made by A.H. Robins & Co. that caused everything from pelvic inflammatory disease to sterility. Women were not adequately warned of its dangers. Roger Tuttle served as a Robins in-house lawyer. In 1984 he testified in a deposition that he was told by General Counsel William A. Forrest to oversee the burning of documents. Forrest

denies this. Tuttle did so, but secretly saved some of the most damaging of the bunch and turned them over at his deposition. He stated that he “personally lacked the courage to throw down the gauntlet” because “With a wife and two young children, I’ll have to confess to you that I lacked the courage to do then what I know today was the right thing.” A few months later all the Minnesota Shield cases settled.

There are a host of other similar product cases most often involving cars and pharmaceutical products where the lawyers said nothing. When a commercial air manufacturer, a common carrier, and their maintenance staff are involved should our ethics Rules and statutes protect lawyers from scrutiny? In the past, I would have said yes. Today I’m not so sure. The Boeing website states that safety is a foundational value. I have my doubts about that.

Attorneys, the Legislature, and Federal authorities need to re-address confidentiality, even more so where the lawyers may have urged the manufacturer to do safety checks and that advice was ignored. We need to do this so that Barnett did not die in vain.

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March 19, 2024, 9:14AM PDT
Berkshire Hathaway Affiliate Owes \$4.7 Billion, Home Sellers Say
By Katie Arcieri
Documents

- Motion for Entry of Judgement
- Docket

- HomeServices of America is remaining defendant in NAR case
- NAR struck proposed settlement with home sellers

Bloomberg Law News 2024-03-19T13:09:14710524044-04:00
Berkshire Hathaway Affiliate Owes \$4.7 Billion, Home Sellers Say

By Katie Arcieri 2024-03-19T12:14:14000-04:00
HomeServices of America is remaining defendant in NAR case
NAR struck proposed settlement with home sellers

Home seller plaintiffs say a unit of Berkshire Hathawayowes \$4.7 billion as the last defendant in a case accusing real estate players of colluding to keep agent commissions high.

The plaintiffs asked the court to enter a final judgment in the case stating that the HomeServices of America Inc. residential real estate brokerage company is liable for that amount, according to a Monday motion in US District Court for the Western District of Missouri.

The request comes just days after National Association of Realtors and other defendants enteredinto a proposed settlement with plaintiffs over commission rules for US real estate agents, clearing the way for possible changes in how Americans buy and sell homes. A Missouri jury last year found the Realtor group and others liable of collusion in a \$1.8 billion verdict.

Keller Williams Realty Inc., Anywhere Real Estate, Inc., and RE/MAX LLC have already entered into settlements, leaving HomeServices as the remaining defendant in the case.

“The judgment should state there is no reason to delay judgment against the HomeServices” while settlements with NAR, Keller Williams, Anywhere, and RE/MAX are administered, the plaintiffs said in their motion.

Attorneys for HomeServices didn’t immediately respond to requests for comment. The company in February asked the Supreme Court to allow it to compelarbitration in the suit and unwind the case entirely.

Home seller plaintiffs in a separate but related case in March amended their complaint to add Berkshire Hathaway Energy, which controls HomeServices, as a defendant. Other defendants in the suit include Compass Inc., eXp World Holdings, Redfin Corp., and Weichert Realtors.

HomeServices is represented by firms including Gibson Dunn & Crutcher LLP and MacGill PC. The plaintiffs are represented by firms including Ketchmark & McCreight PC.

The case is *Sitzer v. NAR*, W.D. Mo., No. 19-cv-00332, 3/18/24.

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Home sellers say HomeServices owes \$4.7 bln in real estate commissions case

 [reuters.com/legal/litigation/home-sellers-say-homeservices-owes-47-bln-real-estate-commissions-case-2024-03-18](https://www.reuters.com/legal/litigation/home-sellers-say-homeservices-owes-47-bln-real-estate-commissions-case-2024-03-18)

Mike Scarcella

Berkshire Hathaway logo is displayed on a screen on the floor of the New York Stock Exchange (NYSE) in New York City, U.S., May 10, 2023. REUTERS/Brendan McDermid
Purchase Licensing Rights , opens new tab

March 18 (Reuters) - After winning a \$1.7 billion verdict last October over claims that they paid inflated real estate commissions, Missouri-area home sellers on Monday asked for a final judgment of more than \$4.7 billion against HomeServices, a unit of Warren Buffett's Berkshire Hathaway (BRKa.N) , opens new tab that is the sole defendant left in the case. In addition to seeking triple damages as allowed under federal antitrust law, the filing , opens new tab in Kansas City, Missouri, federal court takes into account \$626.5 million in settlements that the plaintiffs have reached with the other defendants in the case.

In the most significant settlement, the Chicago-based National Association of Realtors last week said it would pay \$418 million to resolve the class action and institute sweeping reforms to industry commission practices.

Lawyers for HomeServices have asked U.S. District Judge Stephen Bough to scrap the verdict, calling it "misguided and excessive."

HomeServices on Monday said the plaintiffs' filing was expected and that it will continue to contest the verdict.

Michael Ketchmark, a lead attorney for the Missouri plaintiffs, said HomeServices "was the only defendant left standing, and we hope that they change their ways and quit defending a rule that the rest of the industry has abandoned."

The 2019 lawsuit claimed the real estate association and major brokerages unlawfully coerced home sellers to pay a commission to the buyer's agent in order to list their homes for sale.

The commission, which is shared between the buyer's and seller's agents, can run 5% to 6% of a home's sale price.

Under the terms of the proposed settlement with the National Association of Realtors last week, the decades-old commission requirement would be scrapped, leaving buyers and sellers to negotiate their own agent fees.

Keller Williams, Re/Max and Anywhere have also settled with the Missouri plaintiffs. The defendants did not admit to any wrongdoing.

The case is *Burnett v. The National Association of Realtors*, U.S. District Court for the Western District of Missouri, No. 4:19-cv-00332.

For plaintiffs: Michael Ketchmark of Ketchmark & McCreight; Eric Dirks of Williams Dirks Dameron; and Brandon Boulware of Boulware Law

For HomeServices: Robert MacGill of MacGill Law; Brian Fries of Lathrop GPM; Jay Varnon of Foley & Lardner; Theodore Boutrous Jr, Gregg Costa, Julian Kleinbrodt and Cynthia Richman of Gibson, Dunn & Crutcher

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Home buying costs could fall in big US real estate group settlement

Berkshire unit added to lawsuit over inflated real estate commissions

Brokerages push to undo \$1.8 bln verdict in real estate commissions case

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NEWS

DuPont Water Settlement Class Counsel Moves to Sanction Lawyers: 'False, Slanderous, Meritless and Vexatious Conduct'

A March 15 sanctions motion accused the Metropolitan Water District of Southern California’s lawyers of a "bad-faith course of conduct" that includes libeling class counsel, disseminating the wrong information to class members and filing frivolous objections.

March 19, 2024 at 01:44 PM

Legal Ethics and Attorney Discipline



Amanda Bronstad
staff reporter



What You Need to Know

- The motion seeks sanctions against Metropolitan Water District of Southern California General Counsel Marcia Scully and Deputy General Counsel Jill Teraoka, as well as outside counsel Jeff Kray, managing partner of Seattle’s Marten Law.
- The Metropolitan Water District of Southern California has moved to intervene after opting out of the deal and filed a notice of appeal.
- Metropolitan, in a statement, said the settlement precludes wholesalers that opted out of the deal from filing future claims against 3M and DuPont.

Lawyers in DuPont’s water contamination settlement have moved for sanctions against a Southern California wholesaler’s lawyers for their repeatedly “abusive, unreasonable and vexatious behavior,” which is threatening to hold up the \$1.19 billion agreement’s distribution.

The settlement compensates thousands of retail water providers nationwide over “toxic chemicals,” called perfluoroalkyl and polyfluoroalkyl substances, or PFAS, in public drinking water supplies. A March 15 sanctions motion accused the Metropolitan Water District of Southern California’s lawyers of a “bad-faith course of conduct” that includes libeling class counsel, disseminating the wrong information to class members and filing frivolous objections.

The motion seeks sanctions against MWDSC General Counsel Marcia Scully and Deputy General Counsel Jill Teraoka, as well as outside counsel Jeff Kray, managing partner of Seattle’s Marten Law, who DuPont’s lawyers accused of disseminating “significant misinformation” and taking “frivolous positions” about the settlement.

“Given Met’s continued abuses of the judicial process by filing false, slanderous, meritless and vexatious conduct, the imposition of sanctions is appropriate,” they wrote in the motion.

They request all three lawyers show up personally at a sanctions hearing.

“The parties have reached a historical settlement to remediate an emergent public health crisis,” they wrote. “Class members have nearly unanimously demonstrated their support for it. Yet Mr. Kray and Met have engaged in tactics intended to destroy the settlement and obstruct the administration of justice. Their gamesmanship is outside the bounds of Rules 23 of the Federal Rules of Civil Procedure—both inside and outside the courtroom.”

Class counsel are Elizabeth Fegan, of FeganScott; Paul Napoli, of Napoli Shkolnik; Michael London, of Douglas and London; Joe Rice of Motley Rice; and Scott Summy of Baron & Budd.

“It is unfortunate but some matters have to be brought to the court if counsel cannot resolve them,” Rice wrote in an emailed statement to Law.com on behalf of class counsel. “There are thousands of participating class members counting on and depending on this settlement funding timely.”

Kray said he planned to respond to the sanctions motion in court.

“We’re confident we and our clients are using the proper judicial processes to raise objective concerns about this settlement,” he wrote in an email.

Mitchell Tilner, of Horvitz & Levy in Burbank, California, filed a March 11 motion for MWDSC, which had opted out of the settlement, to intervene “for the limited purpose of filing a notice of appeal” of the [Feb. 8 final approval](#) of the DuPont settlement.

At issue is a settlement provision that releases the claims of a wholesaler that opted out of the deal even if its clients, the retailer water providers, are class members. Its efforts to convince class counsel to change that portion of the settlement, he wrote in the motion, were ignored.

“The DuPont agreement defines releasing persons to purportedly reach public water systems beyond those that are participating in the settlement,” Tilner wrote.

Tilner also filed the MWDSC’s March 11 notice before the U.S. Court of Appeals for the Fourth Circuit.

On Monday, class counsel responded to the intervention motion, stating that the MWDSC lacked standing to appeal, since it opted out of the settlement, and that the move was untimely.

Tilner referred requests for comment to spokesperson Rebecca Kimitch.

“Metropolitan’s only goal through these actions is to clarify that nothing in the settlements or the joint guidance precludes wholesalers such as Metropolitan that opted out of the settlements from filing claims against 3M and DuPont in the future,” Kimitch wrote in a statement.

‘Drumming Up Opposition to the Settlement’

The DuPont deal comes as the U.S. Environmental Protection Agency and other regulators are setting standards on permissible amounts of PFAS and other “toxic chemicals” in the nation’s drinking water.

3M, [in a related settlement](#), agreed to pay between \$10.5 billion and \$12.5 billion.

Kray [represented several objectors](#), including the MWDSC, in the 3M settlement, which held a final approval hearing on

Feb. 2 but has yet to be approved.

In the sanctions motion, class counsel accused the MWDSC's lawyers of lodging "baseless accusations of ethical violations" against them in the 3M settlement.

Specifically, MWDSC's general counsel, Scully, wrote a Feb. 23 letter to U.S. District Judge Richard Gergel, in the District of South Carolina, accusing class counsel of sending "improper and coercive communication" to its interim group manager of water systems operations, rather than its lawyers, in an attempt to coerce the wholesaler to opt back into the 3M settlement.

The email is the latest of class counsel's "pattern and practice of trying to intimidate public water systems not to opt out of the 3M (and the DuPont) settlements," the letter says. The letter cites a Dec. 1 "emergency email" to members of the Texas City Attorneys Association, citing a "concerning amount of opt outs" that could raise the threat of a 3M bankruptcy should the settlement fall apart, and statements by Summy at the final approval hearing insinuating that lawyers with water provider clients that have known PFAS contamination who opt out of the settlement could see their malpractice insurance rates skyrocket.

In a Feb. 26 response to the court, class counsel insisted their communication to class members was a court-appointed supplemental notice regarding deadlines and that any references to malpractice were hypothetical.

But this month, the Association of Metropolitan Water Agencies sent a communication to its members encouraging water systems to file their own complaints to the court, citing the MWDSC's situation in the DuPont settlement.

"Essentially, Met and its counsel have been feverishly occupied with drumming up opposition to the settlement," class counsel wrote in the sanctions motion.

In a March 9 email to class counsel, Teraoka proposed changes to the DuPont settlement, sending a draft intervention motion the following day. But the email, class counsel wrote in their sanctions motion, is a "sham."

"Such last-minute sandbagging is so fundamentally inconsistent with notions of fairness and good faith as to be worthy in and of itself of sanctions, or at the very least admonishment," the sanctions motion says.

"The current filing by Met," the motion continues, "is the proverbial straw that broke the camel's back. But the pattern of misconduct leading to this sanctions motion is extensive and involves months of misconduct."

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NEWS

Plaintiffs Claim Bad Evidentiary Rulings Fueled Monsanto's First Phila. Roundup Trial Win

The plaintiff argued in a post-trial motion that the court’s entry and application of global orders regarding evidence in Philadelphia’s Roundup trials resulted in the jury receiving a skewed picture of scientific research on the Monsanto-produced weedkiller.

March 19, 2024 at 12:34 PM

Mass Torts



Aleeza Furman
Litigation Reporter



The original version of this story was published on [The Legal Intelligencer](#)

What You Need to Know

- The plaintiff who lost a March Roundup trial in Philadelphia claims the defense verdict was caused by a bar on key evidence.
- The trial was the first in Philadelphia's Roundup mass tort program to end in a Monsanto win.
- The plaintiffs argue that errors in the court's evidentiary rulings entitle them to a new trial.

The only plaintiff so far to lose a Philadelphia Roundup trial claims a bar on key evidence fueled the [defense verdict](#).

Plaintiff Carl Kline argued in a [post-trial motion](#) filed March 15 that the court’s entry and application of global orders regarding evidence in Philadelphia’s Roundup trials resulted in the jury receiving a skewed picture of scientific research on the Monsanto-produced weedkiller.

Attorneys for the plaintiff said in a joint statement, “We are pleased that the rulings which materially and negatively affected the outcome of the *Kline* case, and which were at odds with all of the previous Roundup cases which were tried, will now be the subject of reevaluation on post-trial motions by Judges [Joshua] Roberts and [Ann] Butchart and, if necessary, by our appellate courts.”

Kline was represented at trial by Scott Love and Adam Peavy with Houston-based Clark, Love & Hutson and Feldman & Pinto’s Rosemary Pinto of Philadelphia.

Lawyers with Kline & Specter have also gotten involved in the case, including appellate head Charles Becker, mass tort chair Tobi Millrood and founding partner Thomas Kline, who serves alongside Pinto as plaintiffs liaison counsel in the broader Philadelphia Roundup litigation.

The firm now has a hand in the post-trial proceedings in all four Roundup cases that have reached verdicts in the Philadelphia Court of Common Pleas so far—two of which were already Kline & Specter cases and two of which the firm entered appearances in after the trial.

When it comes to Roundup trial wins nationwide, Monsanto currently holds a lead over plaintiffs.

But out of the four cases tried Philadelphia so far, only *Kline v. Nouryon* ended in a defense verdict. The three trials preceding Kline yielded verdicts of \$175 million, \$3.5 million and \$2.25 billion.

And both sides say a key difference between those earlier trials and the Kline trial was the evidence the jury saw about various studies.

“This defense verdict is the first to follow significant rulings in the Philadelphia litigation that kept the case focused on the core scientific issue regarding the safety of glyphosate,” a spokesperson for Monsanto parent company Bayer said in a statement. “Unsurprisingly,” the spokesperson continued, “plaintiffs want to relitigate the evidence admitted at trial as their playbook rests on keeping the most significant science and regulatory approvals out while they inflame the jury with irrelevant information.”

In the weeks leading up to the *Kline* trial, the judge overseeing the Philadelphia Roundup program—Judge Joshua Roberts—entered a series of orders applying several motion in limine rulings from an earlier trial to all pending cases in the mass tort.

One of those orders allowed defendants to present findings from the U.S. Environmental Protection Agency that Roundup’s key ingredient, glyphosate, was safe.

The plaintiffs contended the EPA evidence should have been precluded entirely because it was irrelevant to the plaintiff’s claims of common-law negligence. They further argued that the court improperly barred the plaintiffs from mentioning a U.S. Court of Appeals for the Ninth Circuit ruling finding issues in the EPA study.

“The jury was left with a misleading presentation of the current state of the EPA’s findings on glyphosate and prevented from considering evidence that fairly rebutted Monsanto’s own reliance on EPA’s regulatory decisions concerning Roundup and glyphosate,” the plaintiffs argued.

The plaintiffs also argued the court wrongly barred them from introducing evidence regarding International Agency for Research on Cancer study linking glyphosate to cancer.

An order on the mass tort docket excluding mentions of foreign regulatory approvals originally allowed certain IARC evidence, but Roberts amended the order the day before the *Kline* trial to remove the language about IARC. The plaintiffs challenged both the amendment of the order as well as a subsequent ruling from the trial judge—Judge Ann Butchart—restricting their references to the IARC study.

According to the post-trial motion, the IARC evidence had been permitted in all three of the Philadelphia Roundup trials that had preceded *Kline*.

“Due to the court’s erroneous ruling or rulings, plaintiff was unable to demonstrate that Monsanto was aware of the importance of IARC’s scientific review and classification of glyphosate as a probable human carcinogen, and Monsanto’s efforts to deliberately combat this classification,” the plaintiffs claimed.

The plaintiffs argue that the purported errors in the courts’ evidentiary rulings entitle them to a new trial.

The defendants, meanwhile, contend there is no basis for a new trial, with a Bayer spokesperson saying the March 5 *Kline* verdict “was decided by a well-informed jury that heard both sides of the case over several weeks.”

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March 19, 2024, 9:25 AM PDT

Vale Facing \$3.8 Billion Dutch Lawsuit Over Brazil Dam Collapse

By Mariana Durao

Bloomberg Law News 2024-03-19T13:05:40904190658-04:00

Vale Facing \$3.8 Billion Dutch Lawsuit Over Brazil Dam Collapse

By Mariana Durao2024-03-19T12:25:18747-04:00

Vale SA is set to face a fresh legal front over a catastrophic Brazilian dam collapse in 2015 after thousands of victims sued the company in a Dutch court in a claim that could cost the mining giant £3 billion (\$3.8 billion).

Proceedings were started in the Netherlands against Vale and Samarco, law firm Pogust Goodhead said in a statement. Brazil's worst environmental disaster unleashed a torrent of waste, killing 19 and polluting waterways in at least two Brazilian states.

The lawsuit is being brought on behalf of claimants including seven Brazilian municipalities, 77,000 victims and nearly 1,000 businesses and associations affected by the dam break.

Both companies said in emailed messages that they are committed to supporting full reparations for the damage caused by the collapse of the Fundao dam. Samarco said it has not been notified of the lawsuit.

"For too long the victims of the Mariana dam disaster have seen Vale and BHP continue to boast about their profits and shareholder dividends while the victims have yet to receive redress for their losses as they continue to live with the devastation the companies caused eight long years ago," Tom Goodhead, Pogust Goodhead's managing partner, said.

The move comes weeks before one of the largest London civil trials of the year starts. BHP Group Ltd. may face a £36 billion compensation payout if it loses a London class action lawsuit over its role in the deadly collapse of a Brazilian dam.

In February Vale set aside an additional \$1.2 billion for settlements tied to the Samarco mine disaster, following a similar move by BHP, after a Brazilian judge ruled that the parent companies and Samarco iron ore venture must pay 47.6 billion reais (\$9.7 billion) to cover the collective moral damages. The mining giants are also negotiating a settlement with Brazilian authorities that would cover all the compensation.

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Mariana Durao, Jeremy Hodges

Vale SA

Vale faces £3bn legal action over 2015 Mariana dam disaster

New class action pursues mining group and project partner BHP over one of Brazil's worst environmental disasters



Aftermath of the dam collapse near Mariana, Brazil, in November 2015, which killed 19 people and polluted hundreds of kilometres of waterways © NurPhoto via Getty Images

Harry Dempsey in London and **Michael Pooler** in São Paulo 6 HOURS AGO



Vale faces a £3bn lawsuit in the Netherlands from 77,000 claimants over the 2015 Mariana dam collapse in Brazil, opening a new front in legal action against the mining group and its project partner BHP over one of the country's worst environmental disasters.

A huge class action [representing 700,000 claimants](#) is already being pursued in the UK against BHP after the rupture of the Fundão mining waste dam near Mariana, south-east Brazil, killed 19 people and polluted hundreds of kilometres of waterways.

The Dutch case is being brought by law firms Pogust Goodhead and Lemstra Van der Korst against Vale SA and Samarco Iron Ore Europe, a marketing arm of the Samarco joint venture between [Vale](#) and BHP that operated the dam.

Pogust Goodhead, which is also involved in the UK case, said that preliminary work indicated it would request compensation of more than £3bn in the Dutch case for claimants including 77,000 individuals, almost 1,000 businesses and seven municipalities.

“The class action was launched in 2018 in England. The victims have been trying for justice in Brazil for eight-and-a-half years,” said Tom Goodhead, chief executive of Pogust Goodhead. “We have now brought a case in the Netherlands against Vale for the victims that haven’t had the opportunity to join the case in London.”

As part of the Dutch claim, Pogust Goodhead said that it has secured an “asset attachment” over shares in Amsterdam-based Vale Holdings BV owned by its Brazilian parent, preventing the subsidiary from paying dividends or selling shares until a final ruling.

In February 2023, Vale Holdings BV made a “dividend distribution in kind” to Vale in the form of \$1.5bn of share buybacks. Pogust Goodhead believes this kind of transaction will be blocked by the asset attachment.

Vale said it “remains committed to supporting the full reparation of the damages caused by the [Fundão dam collapse](#)”.

Under an initial deal with Brazilian authorities, BHP and Vale agreed to fund the Renova Foundation, a non-profit organisation set up to provide compensation to affected communities. It has so far distributed about R\$35.5bn (\$7bn).

The UK legal case, the country’s largest-ever class action, is due to start in October. BHP has requested that Vale also be found liable for any resulting damages. A decision about Vale’s liability is expected around the time of the main ruling.

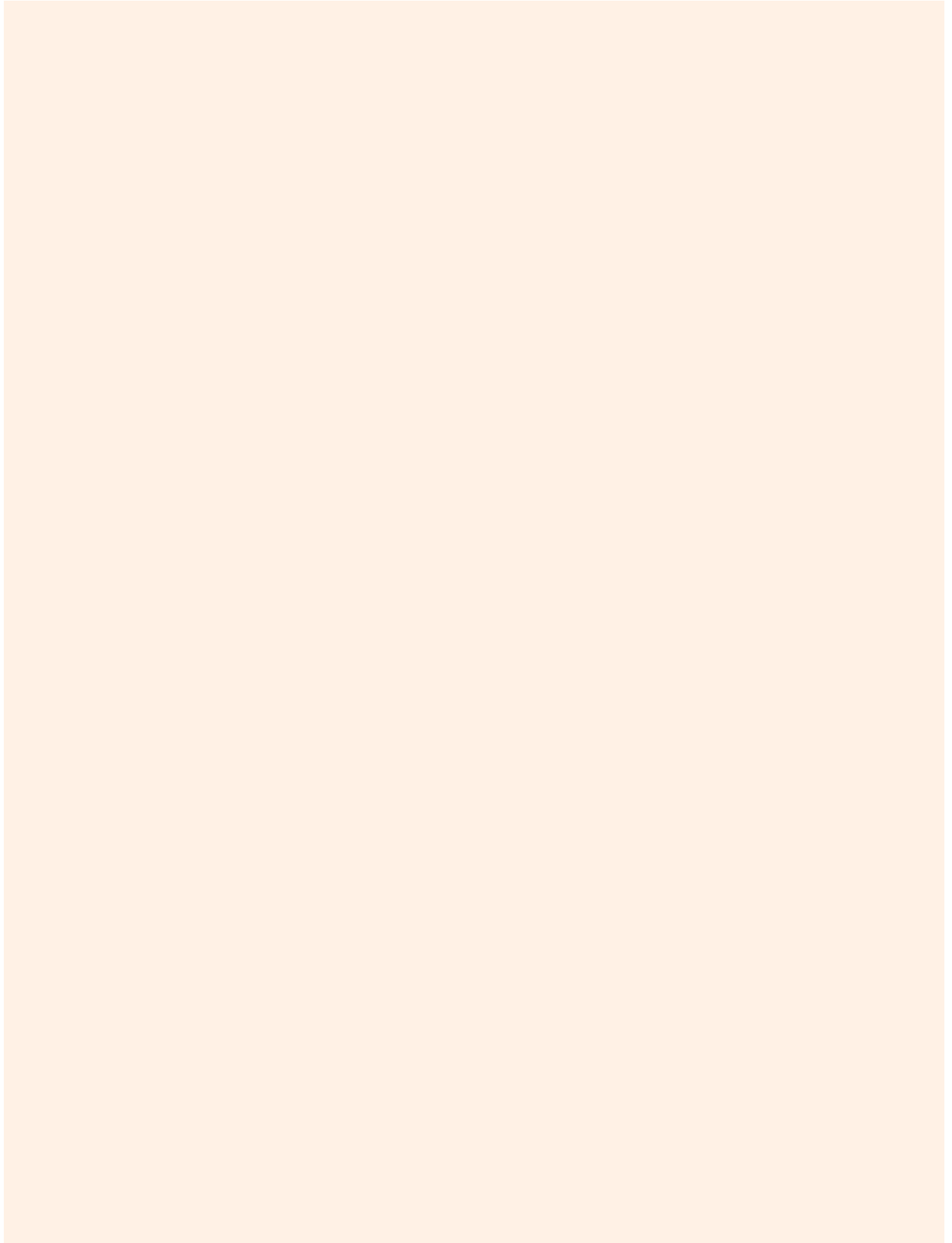
In January, Samarco, Vale and BHP were ordered by a Brazilian court [to pay R\\$47.6bn in compensation](#) for the dam collapse. Vale and BHP have both said they would consider appealing.

Pogust Goodhead, which is funded by US investment manager Gramercy and Brazilian investment firms Prisma Capital, Vinci Partners and Jive Investments, stands to win 30 per cent of individual damages and 20 per cent from municipalities if the Dutch case succeeds.

In the UK case, Pogust Goodhead and the Brazilian law firms that have brought the case stand to earn as much as 30 per cent of the settlement if their case is successful.

This article has been corrected to say that Pogust Goodhead stands to win 30 per cent of individual damages, not 6 per cent, if the Dutch case succeeds and that the case is being brought against Vale SA, rather than Vale Holdings BV.

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Wozniak claim against YouTube over Bitcoin scam revived

DJ [dailyjournal.com/articles/377684](https://www.dailyjournal.com/articles/377684)

Technology

Mar. 19, 2024

The ruling reversed a dismissal of the case on the grounds of Section 230 of the Communications Decency Act, a partial win for apple co-founder Steve Wozniak's case.

Steve Wozniak, right, co-founder of Apple, speaks with Al Alcorn, inventor of Pong, before an exhibition tour at the Computer History Museum in Mountain View, January 2011. (The New York Times)

A 6th District Court of Appeal panel allowed Apple Inc. co-founder Steve Wozniak and 17 other plaintiffs to revive their lawsuit against YouTube LLC over a "bitcoin giveaway" scam.

The Friday ruling reversed a Santa Clara County judge's dismissal of the case on the grounds of Section 230 of the Communications Decency Act, a partial win in Wozniak's case. But it also included language that YouTube's parent company, Alphabet Inc., cited Monday in another major lawsuit against technology companies accusing them of harming young users.

Both sides appeared pleased by the outcome.

"This could be the first nail in the coffin of Section 230," said Joseph W. Cotchett of Cotchett, Pitre & McCarthy LLP.

The Wozniak case concerns allegations that his name and likeness were used on allegedly hijacked YouTube channels for a two-for one "bitcoin giveaway" in live events during 2020 and 2021, according to Cotchett partner Brian Danitz. *Wozniak et al. v. YouTube LLC et al.*, H050042 (6th CA, filed May 6, 2022).

David H. Kramer, a partner with Wilson Sonsini Goodrich & Rosati PC who represents YouTube, declined to comment.

But Wilson Sonsini attorneys were quick to cite the 6th District decision in a lawsuit accusing YouTube, Google, Meta Platforms Inc. and other social media companies of targeting and damaging young people.

“The Court of Appeal made clear that plaintiffs cannot avoid Section 230 in cases involving injuries caused by the publication of third-party content by asserting that the claims are based on a service provider’s ‘distinct capacity as product designers,’” wrote Wilson Sonsini partner Christopher C. Chiou. Social Media Cases, JCCP 5255 (Los Angeles Co. Sup. Ct., filed Dec. 30, 2022).

Justice Charles E. Wilson of the 6th District, an appointee of Gov. Gavin Newsom, affirmed the bulk of a ruling by Superior Court Judge Sunil R. Kulkarni dismissing most of the Wozniak complaint. But the sticking point is the “verification badges” created by YouTube. “It can reasonably be inferred from these allegations that YouTube is wholly responsible for creating the information concerning the authenticity of the channel owners in the verification badges,” he wrote.

“Unlike the scam videos themselves, the third-party scammers did not create or develop the verification badges — defendants allegedly did,” Wilson added. “We therefore conclude the [second amended complaint] adequately alleges that under Section 230, YouTube is responsible for creating the information in the verification badges.”

The justice wrote that the complaint “fails to provide a basis for concluding that defendants materially contributed to the illegal content and should be treated as the creators or developers of that content.” But the “allegations regarding verification badges are sufficient to justify granting plaintiffs leave to amend, because there is a reasonable possibility that the infirmities we have discussed can be cured by amendment.”

The panel remanded the case to Kulkarni to consider an amended complaint and a possible YouTube motion to dismiss.

“Verification badges are different because it is YouTube’s own speech and could be outside of Section 230 immunity,” Danitz said in a phone interview Monday. He added that the discovery stay should be lifted, citing Wilson’s conclusion that “those grounds [for staying discovery] have now shifted.”

Justice Allison M. Danner, an appointee of Gov. Jerry Brown, and Justice Daniel H. Bromberg, a Newsom appointee, concurred in the opinion.

#377684

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<https://www.law.com/litigationdaily/2024/03/19/another-look-at-how-ai-is-shaping-litigation-finance/>NOT FOR REPRINT
ANALYSIS

Another Look at How AI Is Shaping Litigation Finance

Eva Shang, the CEO and co-founder of litigation funder Legalist, describes how generative AI helps shape its outreach to lawyers.

March 19, 2024 at 07:30 AM



Ross Todd
Editor/columnist



Earlier this year, we sat down with **David Perla**, the co-chief operating officer of **Burford Capital** to walk through the ways that the world's largest publicly-traded litigation finance company is using artificial intelligence to find potential investments, improve its internal economic modeling, and—potentially—make underwriting decisions.

This past week we dug into similar topics with **Eva Shang**, the co-founder and CEO of **Legalist**, which operates in a segment of the litigation funding world distinct from Burford and other large funders. Burford makes the sorts of big bets that ideally lead to outcomes such as last year's blockbuster \$16 billion verdict for plaintiffs targeting Argentina with claims related to the 2012 nationalization of energy company YPF—a case that involved about \$50 million in attorney fees as of last September. Legalist, meanwhile, focuses on cases that require less than \$1 million in funding.

Legalist currently has nearly \$1 billion under management and Shang told me about half of that is in litigation finance. The company, which Shang co-founded after dropping out of Harvard at age 20 in 2016, has expanded in recent years to also provide debtor-in-possession financing to companies in bankruptcy and credit facilities to government contractors backed by receivables owed by federal and state governments. Those two investment areas, like litigation, involve a churn of public documents. Shang said they were expansion targets for the company, which since its founding has harnessed AI to analyze public data to help it choose investments.

On the litigation side, Shang said the company's average investment for a single case sits at about \$250,000. About two-thirds of the company's litigation finance portfolio involves breach of contract and business torts claims, but Legalist also funds class actions, and employment and personal injury cases. "Basically, anything that's within our size realm and is going well, we're interested in funding," Shang said.

How does Legalist spot cases that are going well? Shang said Legalist looks out for cases that survive certain "motion hurdles" that put them on the track to a successful verdict or settlement. She said the company has a 75% success rate on the more than 120 investments that have yielded a realization to date. A success, she told me, is any case where Legalist's return is greater than what the firm put in. But when you alternatively look at the portfolio as a whole, she said Legalist's internal rate of return is more than 30% on realizations concluded to date.

Shang said that investors often ask her about that 75% success rate. “If we invest in four cases, three of them win and one of them loses. Investors often ask us whether we can prevent having the one that loses,” she said.

Her natural response: “You don’t understand how litigation works.”

Think about the O.J. Simpson trial, she tells them.

“Everybody thinks it’s one way and then it goes another way. So you can never perfectly predict it,” she said. “But over hundreds of realizations, I think what we can offer investors is this idea that—on the whole—the portfolio is going to behave predictably.”

Shang said recent developments in generative AI have improved the company’s automated communication with attorneys. She shared her computer screen with me to give me a look at an internal tool the company refers to as its “truffle sniffer.” The example she pulled up was from a government contract. Not only was the AI tool pulling out the appropriate values from the contract, but it was also digesting the subject of the work and preparing a pitch to the potential target.

Shang said the technology digests court decisions on significant motions in much the same way. “What we’ve been doing on the generative AI side really helps us to personalize the outreach and give more specificity as to why we’re reaching out,” she said. “[It’s] not just that you’ve survived a motion for summary judgment, but that you’ve survived a motion for summary judgment on X claims and then Y claims might need X going forward.”

Shang estimated that Legalist makes between 20,000 and 40,000 outreaches a year that yield about 5,000 phone calls with potential targets. She called that a “pretty high hit ratio.” She estimated that there are about 40,000 attorneys who do the type of litigation that the company is interested in, and at this point, Legalist has spoken to many of them.

“Instead of it being a cold outreach it’s like, ‘Congrats on your contract’ or ‘Congrats on your motion. It was great to see you last quarter. I saw you had a new case. Congrats on that motion. Do you want to talk about that too?’” she said.

Shang said the company gets about 1,000 funding applications each year and ultimately funds about 100.

On the underwriting side, she said the firm has developed expertise in its slice of the market. She said the underlying technology tracks between 30 and 50 variables for each case. Some are static variables such as the judge, the court, and the case type. She said a lot of filtering happens at that level. “For instance, we don’t really do patent cases,” she said. “That just gets filtered out.”

Then there are additional event-driven variables. “That’s where things get really interesting,” Shang said. She said while some cases are difficult for Legalist to invest in, there are others where as long as the case survives a motion to dismiss “we know with pretty high certainty that it’s going to either settle or win.”

Shang said that the firm’s model values “high-probability cases consistently over a few high-value cases.” But high-probability does not necessarily mean high speed. Shang said Legalist’s average duration of cases is still two-and-a-half years. That’s part of the selling point to plaintiffs. “They often just have better uses for their money for two- to two-and-a-half years [than] to have it locked up in a litigation,” she said.

How bullish is Shang on the litigation finance piece of the business?

She and her co-founder, **Christian Haigh**, recently sat for the California Bar after four years of self-study.

“We plan to double down on litigation finance and double down on the legal space,” she said. “There’s just so much opportunity here and that’s why we decided to become attorneys.”

Clarification: This story was updated at 10:47 a.m. ET to note that Legalist’s internal rate of return is for concluded realizations to date.

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March 18, 2024, 1:32 PM PDT

Quinn Emanuel's \$185 Million Fee Mostly Insured as Fight Goes On

By Roy Strom

Documents

Quinn Emanuel Excess JPI Policy

- Fee stems from \$12 billion Obamacare suit against U.S.
- Firm insured \$166.85 million of the fee, documents show

Bloomberg Law News 2024-03-19T13:07:2497497019-04:00

Quinn Emanuel's \$185 Million Fee Mostly Insured as Fight Goes On

By Roy Strom 2024-03-18T16:32:02000-04:00

Fee stems from \$12 billion Obamacare suit against U.S.

Firm insured \$166.85 million of the fee, documents show

Quinn Emanuel Urquhart & Sullivan insured about 90% of a \$185 million legal fee that the law firm is still fighting over with some of its clients, according to court documents filed Monday.

The firm's insurance policy covers nearly \$167 million of the fee, awarded in lawsuits by major health insurers against the U.S. government. The fee, which followed a nearly \$4 billion win for the health insurers, has been challenged by some of the companies in an appeal.

The policies shed more light on what's at stake for the law firm in an intense fight over the fee and quantify the potential losses for a relatively young judgment preservation insurance market that's usually entirely private. Experts have said big, early losses on these types of policies could cause their prices to increase.

The existence of Quinn's insurance policy became public during the fee fight. Some of Quinn Emanuel's clients argue that the firm should be forced to take a drastic haircut on the nine-figure award and return the rest of the money to the companies.

The firm has been pursuing the nine-figure legal fee since 2020, after the Supreme Court ruled that the federal government must pay health insurers roughly \$12 billion under the ACA's "risk corridor" provisions. Quinn Emanuel's clients collected roughly a quarter of that award.

Documents previously made public showed Quinn Emanuel had obtained a \$25 million primary insurance policy after winning the fee. The documents also referenced other “excess” policies, which led to speculation the firm had insured only a small portion of the award.

The Monday court filing shows the primary and excess policies amount to \$166.85 million in total. Other details of the policy, such as how much the firm paid for the policy or who insured it, remain confidential.

In effect, the policies mean Quinn Emanuel will keep the vast majority of the fee regardless of the court's ultimate ruling. The health insurers opposing the fee have said the policies preclude the firm from seeking "a reasonable fee" from the court or else risk violating the policies.

The policies require Quinn Emanuel to litigate the case as if no insurance was in place. The objecting insurers have argued Quinn Emanuel didn't seek a "reasonable fee" after the appeal at least in part because the policies could be voided if the firm was found to not be "vigorously prosecuting" the award.

A federal appeals court last year ruled that the \$185 million fee must be reconsidered, subject to what's known as a "lodestar" analysis, which compares the fee to the amount of work done by the lawyers in the case.

Lawyers for the health insurers objecting to the fee said this month Quinn Emanuel should be paid between \$12 and \$23 million in the case. Despite the insurance policy, Quinn Emanuel has argued it should receive the full \$185 million, which represents 5% of the total damages its clients received.

The case is *Health Republic Insurance Co. v. The United States*, Ct. Cl., 16 259, 3/18/24 .

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California Public Employees' Retirement System**Calpers to invest more than \$30bn in private markets**

Decision to raise allocation to private equity and other assets comes after fund missed out on up to \$18bn of returns



Calpers will increase its bet on private equity from 13% to 17% of its portfolio, although this could potentially rise as high as 22%
© Getty Images

Josephine Cumbo in London 5 HOURS AGO



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Calpers, the US's biggest public pension plan, is to increase its holdings in private markets by more than \$30bn and reduce its allocation to stock markets and bonds in an effort to improve returns.

A proposal to increase the \$483bn fund's positions in assets such as private equity and private credit from 33 per cent of the plan to 40 per cent was approved on Monday, according to an announcement by the fund and notes from its board meeting.

The formal approval comes two years after Calpers admitted that a decision to put its private equity programme on hold for 10 years had [cost it up to \\$18bn in returns](#).

However, a review of its investment policy found that, despite the gains it had already missed, [private equity](#) was still the asset class with the highest expected long-term total return.

“Strong and ongoing growth in private equity returns is behind this measured and appropriate increase,” said Calpers trustee David Miller, chair of the investment committee.

“Market conditions are evolving and the investment team needs latitude to deploy capital intelligently to keep the fund on track for sustainable returns.”

According to analysis published by [Calpers](#) alongside its board notes, private equity was the top-performing asset class in the decade to June 30 2023, with annualised returns of 11.8 per cent. That compares with 8.9 per cent from public equities and 2.4 per cent from fixed income. The documents did not disclose if the figures took account of fees.

The portfolio shake-up, which was confirmed after a scheduled asset allocation review, will bring the California-based plan into line with other big retirement systems in the US, including Calstrs, which has just over 40 per cent of its portfolio in private markets.

As part of the move, Calpers will increase its bet on private equity from 13 per cent to 17 per cent of its portfolio, although this could potentially rise as high as 22 per cent.

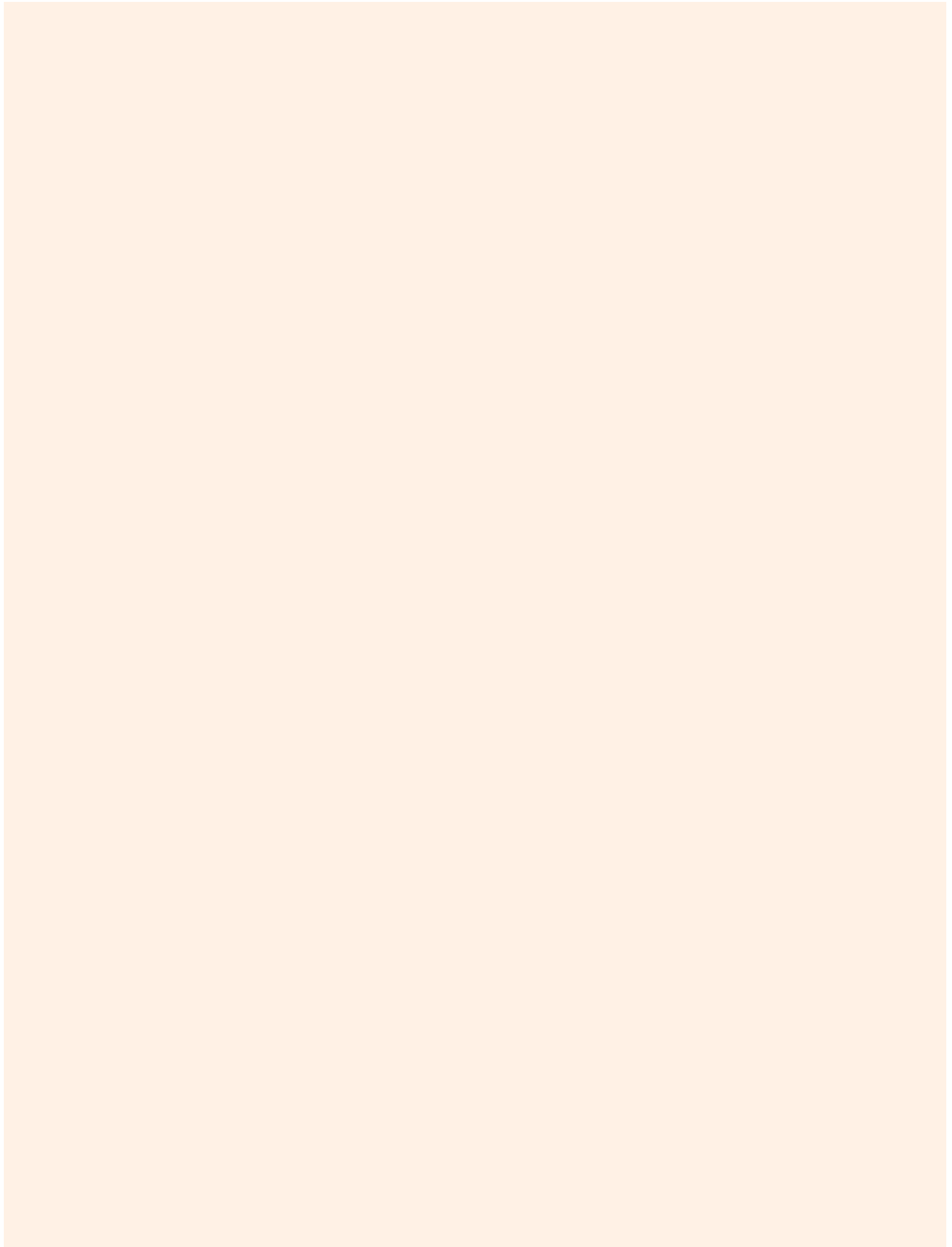
At the same time, it is pulling back from investing in stock markets, with its allocation to equities set to fall from 42 per cent to 37 per cent of its portfolio. It will also trim its allocation to fixed income from 30 per cent to 28 per cent.

In 2021, Calpers’ board approved an expansion into private assets including private equity, real assets and private debt, from 21 per cent to 33 per cent of the portfolio, and gave itself the ability to borrow money to invest in assets that would help diversify its holdings.

Last year the Financial Times reported that Calpers was planning a [multibillion-dollar move into international venture capital](#), as the fund moved towards investing in riskier assets to drive returns.

The fund also reported a return of 10.3 per cent last year. It is yet to announce a replacement for chief investment officer Nicole Musicco, who resigned last year after 18 months in the role.

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March 19, 2024, 6:39 AM PDT

Ex-Regulator's Assets Remain Frozen in FirstEnergy Bribe Row (Correct)

- Justices said appeals court improperly analyzed freezing order
- Case stems from massive FirstEnergy corruption investigation

By Eric Heisig

(Bloomberg Law) --

The Ohio Supreme Court on Tuesday reinstated a trial court judge's order that froze millions of dollars worth of a now-indicted former state utility regulator's assets after he was implicated in a massive bribery probe involving FirstEnergy Corp.

The state's high court said the Tenth District Court of Appeals erred when it reversed a "prejudgment attachment" order issued against former Public Utilities Commission of Ohio Chairman Samuel C. Randazzo's assets without his knowledge.

The opinion doesn't mark a change in the status of Randazzo's assets, though, as the justices re-froze them pending their own ruling. The case is also about litigation that was filed before he was indicted on federal charges.

The Columbus-based appeals court focused on the issuance of the ex parte order said the state hadn't properly shown that it would "suffer irreparable injury if the order is delayed until the defendant against whom the motion has been filed has been given the opportunity for a hearing."

The problem is that an appeal must flow from denial of a motion to vacate, Justice R. Patrick DeWine wrote. He added that an asset's owner may file such a motion and request a hearing, which Randazzo did.

"Once the other side has had an opportunity to be heard," DeWine wrote, "there is no longer any effective relief that can cure a trial court's erroneous decision to grant an attachment ex parte."

The justices also shot down the Tenth District's assertion that the state used the wrong forms to freeze Randazzo's assets and said that the former regulator wasn't harmed by their use.

The justices were mostly unanimous in their decision, though Justice Patrick F. Fischer wrote separately to address the use of the incorrect forms. While the state said the Franklin County Clerk of Courts' office didn't have the right forms available, Fischer said that isn't an excuse.

"While I concur in the majority opinion, I respectfully wish to also caution future litigants that their failure to follow statutory procedures could result in this court finding reversible error under different circumstances," Fischer wrote.

The opinion stems from a massive federal corruption probe, which included an investigation into the passage of a legislative package in 2019 that bailed out two nuclear power plants owned at the time by the Akron-based utility FirstEnergy. The probe ultimately led to a \$60 million racketeering case against former Ohio House Speaker Larry Householder (R), who is serving a 20-year prison sentence, and four others.

FirstEnergy struck a deal with federal prosecutors in 2021 in which it agreed to pay \$230 million and cooperate. In a deferred prosecution agreement, it admitted to bribing Randazzo with \$4.3 million in exchange for favorable treatment when he later became chair of the Public Utilities Commission of Ohio. Randazzo's lawyer Roger P. Sugarman, during oral arguments in the frozen assets case last June, described FirstEnergy's admission as no more than an "allegation."

The FBI raided Randazzo's house in November 2020, and federal prosecutors charged him in November 2023 with a bevy of bribery, fraud, and other charges.

Ohio Attorney General Dave Yost (R) sued Randazzo and his company Sustainability Funding Alliance of Ohio Inc. in 2021. He sought to freeze his assets after the ex-regulator allegedly gave his son a house worth \$500,000 and sold four other real estate properties for more than \$4.8 million. All these transactions happened after the FBI raid, the attorney general said.

Franklin County Common Pleas Judge Christopher Brown ordered the prejudgment attachment for up to \$8 million of Randazzo's assets. However, the Tenth District said the judge didn't sufficiently justify freezing Randazzo's accounts.

Charles M. Miller, special counsel for the Ohio Attorney General's Office, said during his oral argument that about \$900,000 of Randazzo's money held in banks and with a brokerage firm is frozen. An additional \$3 million is in attorney-trust accounts, and Randazzo's lawyers agreed to hold it pending the outcome of the Ohio Supreme Court case, Miller said.

Randazzo is also represented by Allen Stovall Neuman & Ashton LLP.

The case is *Ohio ex rel. Yost v. FirstEnergy Corp.*, Ohio, No. 2022-1286, 1/16/24.

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(Corrects a story originally published on Jan. 16 to reflect the month Randazzo was indicted.)

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NEWS

As Fraud Trial Opens, Tech Titan Who Wooed HP Cast as Accounting Alchemist, 'Startup Guy' Who Delegated Details

“HP needed someone to blame. They had an \$11 billion debacle on their hands. They were actually better at finding a scapegoat than at integrating a company,” Reid Weingarten, lead attorney for Autonomy CEO Mike Lynch, told a jury Monday.

March 19, 2024 at 12:06 PM

White Collar Crime



Maria Dinzeo



The original version of this story was published on [Corporate Counsel](#)

Over the next 10 weeks, a federal jury will get to know the many sides of Mike Lynch, the hard-charging entrepreneur behind what once was one of Britain’s biggest and most successful tech companies.

To federal prosecutors, Lynch, 58, is the perpetrator of an epic fraud—a spinner of tales and cooker of books who falsely inflated the revenue of his software firm, Autonomy, ahead of its ill-fated \$11 billion sale to HP more than a decade ago.

“For many years, he ran Autonomy with an iron fist. He beguiled the stock market and tech sector into cheering his every move. And he was the driving force behind this massive fraud,” Assistant U.S. Attorney Adam Reeves said during opening statements Monday in federal court in San Francisco.

But Lynch’s lawyers just want him to be known as Mike, “a startup guy” more comfortable working late into the night “inventing something” than in the boardroom.

In his opening statement, defense attorney Reid Weingarten said Lynch was an innovator who had little interest in sales, accounting, legal or any of the other tedious facets of running a business. “He knew the basics. He relied on others to do the day-to-day stuff,” said Weingarten, a partner at Steptoe.

Weingarten said Lynch was intensely focused on using machine learning to solve some of the largest knowledge-management problems in government and business. He “despised living quarter to quarter” when he would have preferred to strategize and long-plan. “His greatest joy is to go where no one else has gone. To make a contribution,” Weingarten said.

Though prosecutors will endeavor to paint Lynch as “omniscient, omnipotent and omnipresent,” the defense says this portrayal is far from the truth. “At the end of the day, Mike Lynch is not Superman. He’s not perfect. He’s not a saint. But he sure as hell ain’t no criminal,” Weingarten said.

Lynch and his co-defendant, former Autonomy Vice President of Finance Stephen Chamberlain, are each charged with 14 counts of wire fraud and one count of conspiracy to defraud HP.

Lynch is separately charged with an additional count of securities fraud for signing off on a news release on the merger that the feds say contained representations about Autonomy's financial performance that Lynch knew were false.

These representations defrauded HP's shareholders, Reeves said.

After closing on the Autonomy purchase in October 2011, HP quickly realized it was a financial disaster. Within a year, HP had written down the company's value by \$8.8 billion, blaming \$5 billion of the reduction on "serious accounting improprieties" and "outright misrepresentations" by Autonomy.

HP soon found itself deluged with shareholder lawsuits, which the company settled in 2015 for \$100 million.

Lynch and Chamberlain were indicted in 2018, but their trial has been delayed because of difficulties extraditing Lynch from the United Kingdom, where he was defending himself against HP in a civil lawsuit.

Chamberlain's attorney, Gary Lincenberg, a partner at Bird, Marella, Rhow, Lincenberg, Drooks, & Nessim, said his client may have managed Autonomy's accounting department, but he was not a member of its core management team and did not speak with analysts, lie to auditors or make misrepresentations to HP.

In his opening statement, Lincenberg said Chamberlain is an innocent man who never intended to defraud anyone. Rather, he was "caught up as a pawn in a battle between titans—HP and Dr. Lynch," and "hopes to be able to clear his good name" at trial.

The Department of Justice already has one Autonomy conviction under its belt, that of ex-Chief Financial Officer Sushovan Hussain. A jury found Hussain guilty of wire fraud in 2018, and the next year a judge sentenced him to five years in prison.

The government plans to call some 44 witnesses, intending to show that Lynch sought to make Autonomy appear more attractive ahead of its sale to HP by issuing false and misleading annual reports, lying to auditors and market analysts, and backdating invoices and contracts.

For HP, one reason Autonomy was alluring was that it was in software, a field the Silicon Valley giant wanted to branch into. Autonomy's premier software product, IDOL, had the ability to extract meaning from vast amounts of unstructured data, an innovation that HP leaders viewed as having great potential.

Reeves said that Lynch revved up HP's interest in IDOL by falsely suggesting that much of Autonomy's revenue came from sales of that product, "when in fact millions of dollars in revenue was from the resale, at a loss, of hardware devoid of Autonomy software."

According to the feds, when on earnings calls analysts questioned whether Autonomy was really growing organically, as opposed to relying entirely on a blitz of acquisitions for growth, Lynch obfuscated and sought to silence critics.

"Demand for IDOL was bottoming out and Autonomy was a public company whose stock was going nowhere. Its vaunted growth story was all an artifice," Reeves said.

The government plans to call as witnesses a bevy of accountants, auditors, analysts and former Autonomy employees, including a whistleblower named Brent Hogenson, who'd been the company's U.S.-based CFO. Prosecutors allege Lynch eventually fired Hogenson for sounding the alarm about accounting fraud.

Weingarten said he was looking forward to cross-examining Hogenson.

“We’re going to settle this one in court,” Weingarten told the jury. “We’re saying he was fired because of his own conduct, which over and over again made him completely unqualified to be the CFO of a public company.”

Far from being defrauded, HP simply failed to do proper due diligence on the deal, Weingarten said. He said HP internally valued Autonomy at \$46 billion. The tech giant wanted to move fast and only cried foul after it mismanaged the acquisition.

“HP needed someone to blame. They had an \$11 billion debacle on their hands. They were actually better at finding a scapegoat than at integrating a company,” Weingarten said.

Perhaps the most surprising witness of all may be Lynch himself. Weingarten said during his opening statement that he thinks the defendant’s testimony, a rarity for white-collar trials, may help the defense. “We’re going to put Mike on the stand. In most trials you don’t usually do it, but we want you to know we think that helps us. We’re ready for it,” he said.

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Adani Group**Adani Green says 'aware' of US anti-graft probe into third party**

Investigation has threatened to reignite public relations crisis for Indian conglomerate owned by Gautam Adani



A person close to the US probe told the FT that federal prosecutors had widened their investigation to include bribery and Gautam Adani, without elaborating © REUTERS

Chris Kay in London and **Joe Miller** in New York 2 HOURS AGO



Adani Green, the renewable energy business owned by Indian billionaire Gautam Adani, said it was aware of a US government investigation into a “third party” following a report that alleged his conglomerate was subject to a bribery probe.

The company, part of the tycoon’s sprawling infrastructure empire, said on Tuesday that it had “no relationship with the said third party” that was being looked into by the US Department of Justice for “potential violations” of anti-corruption laws. Adani Green added that it had not received any notice from the DoJ about an investigation.

The comments are the first to acknowledge the existence of a probe after Bloomberg News last week reported that US prosecutors were expanding an investigation into potential payments by an [Adani](#) company and individuals linked to the group, including its founder, to Indian officials over an energy project.

A person close to the US investigation told the Financial Times that federal prosecutors had widened their probe to include bribery and Gautam Adani, without elaborating. The DoJ declined to comment.

The allegations have threatened to reignite a public relations crisis for Adani. The group spent much of last year trying to move past the damaging claims of accounting fraud and stock market manipulation made by US short seller Hindenburg Research, which erased billions of dollars from its market value.

Other Adani companies, including its flagship ports business, on Monday said the report was “false” following a share and bond sell-off across the firms. Following the Bloomberg report last week, Adani Group said the company was “not aware of any investigation against our chairman”.

Adani Group did not immediately respond to requests for further details on Tuesday. The conglomerate has repeatedly denied any wrongdoing when asked about the claims made by Hindenburg.

Since the short seller’s report was released last year, Adani stocks have [largely recovered](#). In January, India’s Supreme Court [declined](#) to escalate a probe into Gautam Adani’s conglomerate that would have transferred it to a special investigative unit.

India’s opposition parties have [attacked](#) Prime Minister Narendra Modi’s perceived close relationship with Gautam Adani ahead of national elections commencing next month.

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US DOJ to target pre-IPO artificial intelligence frauds, top attorney says

 [reuters.com/legal/us-doj-target-pre-ipo-artificial-intelligence-frauds-top-attorney-says-2024-03-19](https://www.reuters.com/legal/us-doj-target-pre-ipo-artificial-intelligence-frauds-top-attorney-says-2024-03-19)

Chris Prentice

Item 1 of 2 Ismail Ramsey, who was sworn in as U.S. Attorney for the Northern District of California in March 2023, poses in this undated handout photograph. U.S. Attorney's Office for Northern District of California/Handout via REUTERS

[1/2] Ismail Ramsey, who was sworn in as U.S. Attorney for the Northern District of California in March 2023, poses in this undated handout photograph. U.S. Attorney's Office for Northern District of California/Handout via REUTERS 

NEW YORK, March 19 (Reuters) - The U.S. Justice Department's top prosecutor in San Francisco is targeting artificial intelligence (AI) and other tech start-ups that defraud investors before they go public, he told Reuters.

Ismail Ramsey, who became U.S. attorney for the Northern District of California a year ago, said his office is uniquely positioned to crack down on tech start-ups that mislead investors on the path to initial public offerings (IPOs) given his proximity to Silicon Valley venture and angel investors.

"These 'fake it til you make it' pre-IPO frauds erode the integrity of public and private financial markets," he told Reuters in an interview.

To generate interest in a prospective offering, entrepreneurs may be tempted to mislead investors about key information, including customer reach, revenue base and product readiness, he said.

High-profile examples of such frauds by start-ups include Theranos, whose founder Elizabeth Holmes and president Ramesh "Sunny" Balwani were convicted of deceiving Silicon Valley investors about the start-up's blood-testing technology, or uBiome Inc, a San Francisco start-up whose co-founders were charged with defrauding investors about its ability to expand clinical tests to monitor gut health.

Private companies typically receive less public and regulatory scrutiny, and the onus is on investors to do their due diligence. The evidence needed for prosecutors to pursue these cases can be harder to unearth, as such companies are not required to publish disclosures.

AI will be a key focus, said Ramsey. Investor excitement around AI stocks such as Nvidia (NVDA.O) , opens new tab has helped push U.S. markets to new highs in recent months.

"As with any such emerging technologies, AI is fertile ground for fraudsters to make false and exaggerated claims," said Ramsey, who was previously a partner at Ramsey & Ehrlich LLP in Berkeley and before that an assistant attorney in the office he now runs.

The U.S. government has been ratcheting up scrutiny of AI. The Securities and Exchange Commission (SEC) on Monday fined two investment advisers over their statements related to AI.

Ramsey tapped Jina Choi in late 2023 to lead a team focused on corporate crime such as securities and accounting fraud.

Choi was most recently a partner at law firm Morrison & Foerster and before that led the SEC's regional office in San Francisco. Under her watch, the SEC brought civil charges against Theranos, Tesla Inc (TSLA.O) [opens new tab](#) and its CEO Elon Musk, and the company formerly known as Yahoo!.

The team is currently prosecuting a high-profile case against a UK tech entrepreneur once hailed as Britain's answer to Bill Gates whose trial kicked off on Monday.

Ramsey has also created a team dedicated to cybersecurity and intellectual property theft. That unit was behind an indictment unsealed earlier this month against a former Google software engineer charged with stealing trade secrets.

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Reporting by Chris Prentice; Editing by Michelle Price and Stephen Coates

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Chris Prentice

Thomson Reuters

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

Read Next / Editor's Picks

4th Circ. Sends Opioid 'Nuisance' Question To W.Va. Top Court

By **Dan McKay**

Law360 (March 18, 2024, 8:16 PM EDT) -- The Fourth Circuit asked West Virginia's high court Monday to determine whether the state's public nuisance law can be used to target companies that shipped drugs to pharmacies in a community ravaged by addiction, a crucial question in litigation spawned by the opioid crisis.



West Virginia's high court must determine whether state public nuisance laws can be brought to bear against companies that shipped opioids to pharmacies in the communities hit hardest by the drug crisis, a Fourth Circuit panel said Monday. Pictured is West Virginia's state complex in Charleston, with the Supreme Court visible at far right just behind the Capitol building. (iStock.com/UA-Visions)

In a 20-page order, the three-judge panel said no court decision in West Virginia has sufficiently answered the question, despite a 2022 ruling by a federal district judge who **sided** with the drug distribution companies.

The state "Supreme Court of Appeals has not determined whether the common law of public nuisance may apply to conditions caused by distribution of a potentially dangerous product," Senior U.S. Circuit Judge Barbara Milano Keenan said in Monday's order.

The **decision** sends two related questions to the West Virginia high court: whether conditions caused by the distribution of a controlled substance can constitute a public nuisance under West Virginia common

law and, if so, what the elements are of such a claim.

The request for help comes in a bellwether case in multidistrict litigation over the opioid epidemic.

The city of Huntington and the Cabell County Commission are pushing to hold the nation's three largest drug distributors liable for the opioid epidemic, contending they created a public nuisance by supplying pharmacies with far more opioids than medically justified. In 2017, about 10% of the community's population was or had been addicted to opioids, according to court documents.

But the city and county lost the first bench trial in the opioid MDL when a West Virginia federal judge ruled in favor of the distribution companies, finding the plaintiffs not only failed to prove the companies caused the crisis but also that anti-nuisance laws couldn't be used to target them.

In the 184-page decision, Senior U.S. District Judge David Faber acknowledged West Virginia's high court hadn't ruled directly on the nuisance question. But he said the sale and marketing of a product isn't consistent with the historical notion of what constitutes a public nuisance.

The Fourth Circuit panel, nevertheless, wasn't convinced. The circuit judges said it simply isn't clear how the West Virginia Supreme Court of Appeals would rule on the question.

In oral arguments two months ago, the circuit judges **repeatedly asked** why no one had asked the state's top court to explain whether the public nuisance law could be used to hold drug distribution companies liable.

The panel pointed out in Monday's order that two West Virginia trial court decisions had found anti-nuisance laws can apply to the sale and distribution of opioids.

On the one hand, the circuit judges said, nuisance claims in the state have traditionally centered on harm to property or resources, such as hazardous waste from a lumber-treatment operation.

But "we do not view as dispositive the fact that the Supreme Court of Appeals has not yet applied principles of public nuisance to the distribution of a product," Judge Keenan said.

In oral arguments in January, neither the plaintiffs nor the defendants suggested it was necessary to ask the West Virginia high court to weigh in.

The local governments said the applicability of the nuisance law was already clear. The distribution companies, by contrast, said answering the question wasn't necessary because Judge Faber had already ruled the city and county failed to prove the distributors caused the opioid crisis.

The distributors — AmerisourceBergen Corp., Cardinal Health Inc. and McKesson Corp. — contend they simply filled legitimate orders from doctors prescribing opioids, an argument they say is supported by Judge Faber's decision.

Asking state justices to weigh in on the opioid litigation isn't unique. The Sixth Circuit, for example, **has asked** the Ohio Supreme Court to decide whether the opioid epidemic can be considered a public nuisance under the state's product liability law.

Monday's order in the Fourth Circuit was praised by the plaintiffs' executive committee in the national prescription opiate MDL.

"We are pleased with this ruling, which is an important step in the right direction for this case and these communities," said committee co-leaders Jayne Conroy of Simmons Hanly Conroy, Paul Farrell Jr. of Farrell & Fuller Law LLC and Joe Rice of Motley Rice LLC. "We look forward to the Supreme Court of Appeals of West Virginia's review and consideration of this matter as the case moves ahead."

Counsel for the distributors didn't immediately respond Monday to a request for comment on the circuit panel's order.

U.S. Circuit Judges Robert B. King, DeAndrea Gist Benjamin and Barbara Milano Keenan sat on the panel for the Fourth Circuit.

The city of Huntington and Cabell County Commission are represented by David Frederick, Ariela Migdal,

Lillian V. Smith and Kathleen Hickey of Kellogg Hansen Todd Figel & Frederick PLLC.

The city of Huntington is also represented by Louis Bograd and Michael Quirk of Motley Rice LLC.

The Cabell County Commission is also represented by Anthony Majestro and Christina L. Smith of Powell & Majestro PLLC.

AmerisourceBergen Drug Corp. is represented by Kim Watterson, Robert Nicholas and Joseph Mahady of Reed Smith LLP.

Cardinal Health Inc. is represented by Enu Mainigi, F. Lane Heard III, George Borden and Ashley Hardin of Williams & Connolly LLP.

McKesson Corp. is represented by Paul W. Schmidt, Timothy Hester, Christian Pistilli, Stephen Petkis and Nicole Antoine of Covington & Burling LLP.

The case is City of Huntington, West Virginia et al. v. AmerisourceBergen Drug Corp. et al., case numbers 22-1819 & 22-1822, in the U.S. Court of Appeals for the Fourth Circuit. The MDL is In Re National Prescription Opiate Litigation, case number 1:17-md-2804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Emily Field, Alyssa Aquino and Jeff Overley. Editing by Emily Kokoll.

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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (March 18, 2024, 2:55 PM EDT) -- Multimillion-dollar e-cigarette settlements, \$4 billion in stock buybacks and a \$6.1 million appraisal tweak were among the big-dollar items logged in the Delaware Court of Chancery's ledger last week. Also on the docket: a Panama port project, a news outlet's defamation case, drone disputes and a flood of mail from Tesla shareholders. In case you missed it, here's all the latest from the Chancery Court.

In the Courtroom

A director of Juul Labs Inc. denied he kept the company out of bankruptcy in 2022 to profit from his own investments, **telling the court** he helped Juul refinance and backstopped millions' worth of litigation settlements because he wanted the e-cigarette company to succeed.

Meanwhile, Hertz Global Holdings **urged dismissal** of a shareholder's lawsuit over \$4 billion in stock buybacks, arguing directors didn't know for sure it would shift control of the auto rental company to an entity backed by private equity firms Knighthead Capital Management LLC and Certares Opportunities LLC.

Decisions

Chancellor Kathaleen St. J. McCormick **issued a rare correction** of a post-merger appraisal ruling, adding \$6.1 million to an earlier valuation of Pivotal Software Inc. shares that two HBK Capital Management affiliates held when VMware Inc. bought Pivotal for \$2.7 billion in 2019, increasing the per-share valuation from \$14.83 to \$15.44.

And Vice Chancellor Nathan A. Cook **sent remaining claims** in a contract dispute between drone-maker Teal Drone Inc. and drone software provider Autodyne LLC to Delaware's Superior Court, finding they fell outside Chancery's limitation to matter of equity.

New Cases

An Apollo Global Management Inc. investor **launched a proposed class challenge** to board voting agreements, arguing they breach the "board-centric" nature of Delaware-chartered corporations and improperly tilt power toward founders and 21.2% owners Leon D. Black, Josh J. Harris and Marc J. Rowan.

The former co-CEO and co-founder of Lithos Industries Inc. **sought to compel** the lithium-fracking company to return 3.25 million shares of stock he alleges were unfairly repurchased from him when the company fired him in "bad faith."

A shareholder of California-based computer software company Alteryx Inc. **sued for books and records** in relation to its \$4.4 billion sale to private equity firms Insight Partners and Clearlake Capital, arguing a special committee that evaluated the deal was "inherently conflicted from the beginning" and gave an unfair advantage to the two buyers.

The co-founder of Caraway Therapeutics Inc. **sought an appraisal of his shares** following the company's November merger with a subsidiary of pharmaceutical giant Merck, alleging it "was an unfair cash-out transaction" and that he is owed at least a million more shares.

A private equity firm that bought Onix Networking Corp. in 2022 **sought to rescind** part of the deal,

alleging seller fraud and misrepresentation of annual revenues by "tens of millions of dollars."

A GigNet Inc. stockholder **sued for access to corporate records** to probe company losses, suspected mismanagement and allegations that the high-speed broadband network provider had entered into "numerous" interested party transactions over the years.

And a stockholder of Tingo Group Inc., a company controlled by a Nigerian man recently charged in connection with an allegedly "staggering" multinational fraud, **sued** the business for books and records.

Ongoing Disputes

Tesla Inc. stockholders flooded Chancellor McCormick's inbox with letters after class attorneys sought a stock-based fee potentially worth more than \$5 billion at current share prices following her reversal of Elon Musk's \$55.8 billion stock-based pay plan, according to a **letter she sent to counsel** last week.

A Hong Kong company alleging its interest in a lucrative port project near the Atlantic entrance to the Panama Canal is being stolen **urged** a Delaware federal court to remand its lawsuit back to Chancery, saying the suit's removal last month was a delay tactic.

Fox Corp. media mogul Rupert Murdoch and other Fox empire figures **urged the court to toss** a stockholder suit seeking to make them liable for billions in potential damages for defamatory statements alleging 2020 election conspiracies on network and affiliated broadcasts.

Stockholders of Bolt Financial Inc. **updated their derivative complaint** against the company's board of directors, alleging chairman, controlling shareholder and former CEO Ryan Breslow purposely defaulted on a \$30 million loan secured by Bolt and repeatedly appointed and removed directors for his personal interests.

And a longtime attorney disbarred last year by Delaware's Supreme Court for professional misconduct **asked** the Chancery Court to dismiss the receiver that was appointed to supervise the wind-down of his legal practice, accusing her of making "multitudinous falsehoods" in reports she filed about the process.

Quotable

"So the board was sitting there, and any number of things could have happened, and one of those things could be a change of control. And so [the board decided], 'We're just going to roll the dice'? It's really hard to believe that that's what happened." – Chancellor Kathaleen St. J. McCormick, **during a motion to dismiss** and in response to arguments that Hertz directors "didn't know for certain" that \$4 billion worth of stock buybacks might result in a change of company control.

--Additional reporting by Caroline Simson, Sydney Price, Jade Martinez-Pogue, Jeff Montgomery, Katryna Perera and Rose Krebs. Editing by Philip Shea.



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Biotech Ardelyx Beats Shareholder Suit Over Kidney Drug

By **Katryna Perera**

Law360 (March 18, 2024, 7:23 PM EDT) -- Biotechnology company Ardelyx Inc. has for now beaten a shareholder class action alleging the company and its top brass made false and misleading statements about regulatory approval of Ardelyx's drug for patients with chronic kidney disease.

U.S. District Judge Haywood S. Gilliam Jr. issued an **order** on Monday tossing lead plaintiff Steven Strezsak's suit, finding that he has failed to plead any actionable misleading or false statements made by Ardelyx or its executives.

Strezsak's complaint is on behalf of a proposed class of individuals and entities that purchased or acquired Ardelyx securities between March 6, 2020, and July 19, 2021. The suit alleges that Ardelyx failed to tell investors about "significant concerns" the U.S. Food and Drug Administration raised about the effect of its drug tenapanor for treating chronic kidney disease.

According to Monday's order, when Ardelyx finally disclosed in July 2021 that the FDA had "identified deficiencies" in Ardelyx's new drug application for tenapanor that prevented the application from moving forward, the company's share price plummeted 74% the following day.

Strezsak alleged that there were several false and misleading statements made by the defendants, including their description of tenapanor's clinical trials as "successful," statements expressing confidence in tenapanor's "potential to transform the treatment landscape for patients," and statements expressing an "expectation" of FDA approval.

However, Judge Gilliam said Monday that all of the challenged statements in the complaint qualify as opinions because "they inherently reflect the speaker's assessment of and judgment about the underlying circumstances," and are, therefore, non-actionable.

Ardelyx also did not have an obligation to loop investors into "each detail of every communication with the FDA," as Strezsak claims, and during the class period, the FDA never expressed any doubts about approval or suggested to the defendants that they would need to overcome "special" hurdles to obtain approval. None of the FDA's statements at the time contradicted what the defendants were telling investors, the judge said.

"Even if the court credits the inference that the FDA's statements cast doubt on the trial data, the FDA's statements at most constitute 'contrary views' to defendants' statements concerning the sufficiency of the data — communications that courts have not required similarly situated defendants to disclose," the order states.

Judge Gilliam also noted that Ardelyx publicly disclosed many of the suit's alleged omitted facts and warned investors that because tenapanor was a first-in-class drug, approval would be more difficult to obtain.

"Ultimately, defendants had a years-long iterative dialogue with the FDA, during which the agency unsurprisingly expressed its outlook on the general guidelines for tenapanor's approval and explained its expectation that defendants would need to provide a justification if their application fell short of those guidelines. Defendants were free to express optimism in their application and the prospects for approval, and the feedback from the FDA did not render those expressions of optimism false," Judge Gilliam said.

Due to the complaint's lack of actionable false and misleading statements, the judge said he does not need to address the question of scienter, or knowledge of wrongdoing. Regardless, the suit's scienter allegations are insufficient, he said.

"Plaintiff simply alleges that because tenapanor was 'important' to Ardelyx the court should assume that all defendants knew every possible adverse fact about it. This is not sufficient," the order states. "Ultimately, the inferences the court could draw from the limited allegations relating to scienter are not as compelling as competing innocent inferences. The more convincing theory is that plaintiff believed that its trials were successful, that its interactions with the FDA were straightforward, and that the drug likely would be approved, and expressed that optimism to investors."

Judge Gilliam also tossed all claims of loss causation, saying that because he found no false or misleading statements were made, any alleged corrective disclosures "did not correct any actionable misstatements, and plaintiff fails to establish that any misleading statement was the proximate cause of the July 20, 2019 stock drop."

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

Ardelyx is also battling a derivative shareholder suit in California federal court **over similar claims**, including allegations of insider trading.

Strezsak and the proposed class are represented by Jacob B. Lieberman, Thomas L. Laughlin IV, John T. Jasnoch, Deborah Clark-Weintraub and Marc J. Greco of Scott+Scott Attorneys at Law LLP.

Ardelyx and the other defendants are represented by Matthew Rawlinson, Melanie Blunschi and Daniel Gherardi of Latham & Watkins LLP.

The case is Strezsak v. Ardelyx Inc. et al., case number 4:21-cv-05868, in the U.S. District Court for the Northern District of California.

--Editing by Patrick Reagan.



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Voyager Investors Suing Mark Cuban Seek Class Cert.

By **Carolina Bolado**

Law360 (March 18, 2024, 8:05 PM EDT) -- Investors suing billionaire Mark Cuban over his role in promoting now-bankrupt Voyager Digital Ltd. have pushed for class certification and urged the court to rule that Voyager was selling unregistered securities.

The investors moved on Friday to certify nationwide classes on what they said are the two central, dispositive questions in the case: whether Voyager tokens are securities under the New Jersey Uniform Securities Law, which governs the case, and whether Cuban and his former NBA team the Dallas Mavericks could be considered statutory sellers under the New Jersey law.

"As it is clear that this action should proceed beyond the motion to dismiss phase, the next logical steps are to certify these nationwide issue classes, consider the security issue on summary judgment and set the solicitation issue for an expedited trial," the investors said.

A ruling on the security issue would also have "substantial precedential value in other litigations currently pending in this district," namely multidistrict litigation over the collapse of cryptocurrency exchange FTX, according to the motion.

Cuban and the Mavericks are the only defendants left in the **August 2022 suit** that originally also targeted former NFL star Rob Gronkowski, NBA player Victor Oladipo and NASCAR driver Landon Cassill. All three athletes have settled with the plaintiffs.

At a **status conference** last month, attorneys for the parties said settlement talks with Cuban and the Mavericks were unproductive and broke down months ago.

In the suit, the Voyager investors claim Cuban and the others tricked them into buying unregistered securities and furthering the company's "false and misleading promises" of large profits.

Other suits since filed by Voyager investors against the NBA, the law firm McCarter & English and public relations company Ketchum Inc. have been consolidated into the original lawsuit and set on a separate track.

Voyager **filed** for Chapter 11 protection in August 2021 following a run on the lender and the default of a \$650 million loan to defunct crypto hedge fund Three Arrows Capital. The company received purchase offers from FTX and Binance.US before their own massive problems scuttled hopes for a sale.

Cuban has asked U.S. District Judge Roy Altman to **sanction attorneys** for the Voyager investors over allegedly false claims made against him. The attorneys said Cuban was initiating a "sideshow" in an attempt to oppose the investors' request to file a revised version of their suit.

Stephen Best, who represents Cuban and the Mavericks, said that in the motion, the plaintiffs "have all but acknowledged that it will be difficult, if not impossible, to adequately define an appropriate class in this case."

"We look forward to litigating this issue and having the court rule against the plaintiffs," Best said. "It starts with depositions of the two named plaintiffs for class certification this week. The plaintiffs have had years to put forth adequate class representatives, and now we are down to two, one of which seems to be a serial plaintiff as he is the lead plaintiff in the FTX class action case as well."

Adam Moskowitz, who represents the investors, said they "look forward to moving the case forward."

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

Cuban and the Mavericks are represented by Christopher E. Knight, Esther E. Galicia and Alexandra L. Tifford of Fowler White Burnett PA, Paul C. Huck Jr. of The Huck Law Firm PA, and Stephen A. Best, Rachel O. Wolkinson, Sigmund S. Wissner-Gross and Jessica N. Meyers of Brown Rudnick LLP.

The case is Karnas et al. v. Cuban et al., case number 1:22-cv-22538, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Alex Wittenberg. Editing by Philip Shea.

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Doc Production Is 'Not That Hard,' MDL Judge Tells Snap's Atty

By **Dorothy Atkins**

Law360 (March 18, 2024, 10:26 PM EDT) -- A California magistrate judge laid out incentives Monday to spur depositions and document production in multidistrict litigation over social media's allegedly addictive design, rejecting defense counsel's arguments the incentives are "lopsided," and telling Snap's counsel document production is "not as hard as you're saying it is."

U.S. Magistrate Judge Peter H. Kang's comments came during an hour-long hearing in San Francisco over the latest discovery disputes in the sprawling **consolidated personal injury litigation** initially launched in 2022 against social media tech giants, including Snap Inc., Meta Platforms Inc. and TikTok Inc.

The litigation involves claims by parents of minors, school districts and state attorneys general who generally allege the tech companies, whose platforms draw in billions of dollars annually in ad revenues, are designed to be addictive to the detriment of minors' mental health, allegedly causing numerous psychiatric injuries, including suicidal ideation, self-harm, eating disorders, body dysmorphism, insomnia, anxiety and depression.

During the hearing Monday, Judge Kang established a new deposition protocol with incentives to encourage the parties to identify the witnesses they want to depose soon. Although fact discovery doesn't close until Dec. 20, Judge Kang required the parties to start submitting a monthly chart identifying witnesses for deposition, and he explained that he's establishing the protocol to prevent the parties from filing hundreds of deposition notices right before the discovery deadline.

"It seems like people are going to wait far too long to start talking about taking depositions," he said, adding later that, "What I don't want to happen is suddenly both parties exchange 200 deposition notices in July. The point is, I don't want you holding back names now."

Under the protocol, the parties would receive an extra hour of deposition time for witnesses identified for deposition by the end of April, an extra 45 minutes for witnesses identified by the end of May and an extra 30 minutes for witnesses identified by the end of June.

The judge said that once the witnesses are identified, the parties have 60 days to produce any relevant custodial files related to their depositions, and if they need to extend the 60-day deadline, they have to meet and confer and request an extension from the court.

But defense counsel raised various objections to the protocol. Snap's counsel, Ariel Tal Teshuva of Munger Tolles & Olson LLP, argued that incentive structure is lopsided and unfairly favors the plaintiffs, because the defense can't identify their witnesses until the first bellwether trials are selected, which is expected to occur in April.

"It seems unfair to me that [we're] starting now," she said. "We're not in the position to identify witnesses until next month."

Teshuva also argued that 60 days isn't enough time for the defense teams to find, review and produce the relevant custodial files.

But Judge Kang rejected both arguments, questioning why the defendants wouldn't be able to identify other witnesses aside from the bellwether plaintiffs in the coming weeks.

"There are no other people in the world you would want to depose?" he rhetorically asked the attorney.

The judge also observed that the deposition structure and timing of fact discovery works the way it does, because discovery is generally unbalanced in favor of the defendant companies, which "have a lot more people working for you" than the plaintiffs' legal teams.

Judge Kang additionally rejected Teshuva's claim that the defendants can't produce the relevant documents within 60 days, particularly since he is allowing the parties to come back to court and request an extension if necessary.

He told the attorney that before he became a judge, he was an attorney in private practice, and as an associate, he worked on document production.

"It's not that hard, I've done document production," he said. "It's not as hard as you're saying it is. Sixty days is enough."

Judge Kang also pointed out that the parties only have to produce the relevant custodial file within 60 days, but they can set a deposition later.

"But you need to get the custodial files out in an early fashion," he said. "Part of my goal is not only to get this train running on time, but efficiently and quickly. I know your vendors can do that."

TikTok's counsel, Patrick H. Reilly of Faegre Drinker Biddle & Reath LLP, asked the judge to set a cap on the number of witnesses that the plaintiffs are allowed to identify early so that they don't unfairly receive an additional 100 hours of deposition time if they identify 100 witnesses in the next month.

Reilly suggested the judge set the cap now, and then "see how it goes," but Judge Kang disagreed.

"We can see how it goes and then see if a cap [is warranted]," he said, adding, "I'm a reasonable man."

However, Judge Kang warned plaintiffs' counsel that they shouldn't overload the deposition notices with witnesses they have no intention of deposing just to get the extra deposition time, and he said there will be consequences if they add witnesses and then withdraw a large percentage of them from the deposition chart later.

"Don't abuse the charting process," he said.

Judge Kang also encouraged the parties to work out a deposition time "swap deal," so that any additional deposition time given to the parties isn't spent on subjecting minors to lengthier depositions, which is an issue that the presiding judge, U.S. District Judge Yvonne Gonzalez Rogers, has also **expressed concerns about**.

"You're certainly free to work a swap deal, and work things out, especially if it's a minor," Judge Kang said.

Judge Kang was selected to take the bench as a magistrate judge in March 2023 after practicing as a partner at Baker Botts LLP's intellectual property litigation practice group, according to his profile on the court's website. Prior to joining Baker Botts, he was a partner at Sidley Austin LLP, his profile says.

The next discovery case management conference is scheduled before Judge Kang on Thursday. The first bellwether trial before Judge Gonzalez Rogers is **set to begin** on Oct. 14, 2025, with jury selection.

The plaintiffs were represented in the hearing by Annie E. Kouba of Motley Rice LLC.

TikTok was represented in the hearing by Patrick H. Reilly of Faegre Drinker Biddle & Reath LLP.

Meta was represented in the hearing by Ashley M. Simonsen of Covington & Burling LLP.

Snap was represented in the hearing by Ariel Tal Teshuva of Munger Tolles & Olson LLP.

The case is In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, case number 4:22-md-03047, in the U.S. District Court for the Northern District of California.

--Editing by Dave Trumbore.

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Apple Beats Most Claims In AirTag Stalking Suit, For Now

By **Lauren Berg**

Law360 (March 18, 2024, 7:10 PM EDT) -- A California federal judge has dismissed the majority of a proposed class action accusing Apple of not doing enough to safeguard its AirTag tracking device from being abused by stalkers, saying that apart from a few negligence and product liability claims under Golden State law, the rest need to be reworked.

U.S. District Judge Vince Chhabria, in two concurrent rulings Friday, largely dismissed without prejudice the bulk of the suit, but kept alive negligence and risk-benefit product liability claims asserted by three California residents, finding that Apple could be correct that Golden State law doesn't require that it do more to squash the ability of stalkers to use AirTags, but it's too early to make that determination.

The suit was **initially filed** in December 2022 by Lauren Hughes of Texas and a New York woman identified as Jane Doe, alleging that even though the AirTag has become the "weapon of choice" of stalkers to track their victims, Apple continues to tout the product as "stalker proof" and ignores the concerns of people at risk of abuse.

The lost-item gadget has "revolutionized" stalkers' abilities to find individuals' exact locations, making it nearly impossible for victims to evade or hide from their abusers, but Apple has failed to heed warnings from those at risk, according to the suit.

The AirTag, which is small enough to be slipped in a purse or hidden in a car, emits signals that can be picked up by Bluetooth and sent to the AirTag's owner, according to the suit. Before the product was even released, advocates urged Apple to rethink the product and the ways it might be used in stalking, the complaint said. But the company forged head, claiming the product had features that rendered them "stalker proof," according to the suit.

As soon as the AirTag came out, people found the product placed in their purses, in or on their cars and even sewn into the lining of their clothes by their stalkers and abusers, the plaintiffs said.

The plaintiffs then filed an amended complaint in October, adding 36 additional plaintiffs from around the U.S., as well as Ireland and Canada, according to court records.

Apple shortly after filed its motion to dismiss the operative complaint, arguing that the lawsuit "is a misplaced effort to hold [the company] legally responsible for third parties' intentional misuse" of the AirTag to track people without their consent. The company said it "condemns in the strongest possible way any misuse of its products," adding that it willingly helps law enforcement in investigating complaints of unwanted tracking.

The product's anti-stalking safeguards include a sound emanating from the AirTag to alert users and non-users of potential unwanted tracking, as well as an app to allow Android users to determine if an unknown AirTag was near them, the motion states.

"The law does not recognize any of plaintiffs' theories to hold Apple legally responsible for the stalking they state they experienced," Apple said, noting that it's not the proximate cause of their alleged tort injuries, and it has no duty "to protect against the misconduct of third parties [it] cannot control."

In his **order** partially denying Apple's motion Friday, Judge Chhabria found that three plaintiffs — John Kirkman, Aine O'Neill and Hollye Humphreys — have adequately tied their stories of stalking to the AirTag's alleged defects.

In Kirkman's case, he alleges that his estranged wife was able to find his new home "to terrorize him and his daughter" by using an AirTag. But he said he didn't receive a device notification until after the incident and that it took him several days to find the AirTag because the sounds it made were not loud enough or sufficiently distinctive.

O'Neill also alleges that she didn't receive a notification about the AirTag until after her stalker had already learned where she worked, where she lived, where she parked her car and other intimate details of her life, the order states. She said the AirTag's alert wasn't loud enough and that she couldn't disable it remotely to prevent her stalker from continuing to track her.

In Humphreys' case, her ex-husband allegedly hid an AirTag in the backseat of her car and although she received notifications about it for three days, she ignored them because she didn't know what the alert meant, according to the order.

"A number of the asserted defects are implicated in Humphreys's story: the sound alerts did not begin on their own and the sporadic and unclear notifications prolonged the stalking," the order states.

However, it's not clear from the complaint that Apple's alleged breach was the cause of Roger Derick Hembd's difficulties, according to the order. Hembd alleges that his wife repeatedly hid AirTags in his son's belongings during visitations, which he found after hearing a "faint beeping noise" in his son's Batman toy, but the complaint doesn't connect the asserted safety defects to his injury, the order states.

"The plaintiffs do not appear to be arguing that selling a tracking device is always a violation of the duty of care," Judge Chhabria said. "And based on the allegations, the safety mechanisms seem (roughly) to have worked in Hembd's case."

"The plaintiffs have not done enough to draw the connection in the complaint, and thus, they have not adequately alleged that Apple was the proximate cause of Hembd's injuries," he added.

And in Pamyla Luan's case, the allegations about the role the AirTag played in her stalking are too vague, according to the order. She claims she was stalked for a year by a friend's ex-girlfriend and while she alleges serious injuries as a result, it's "not clear how the AirTags — or the asserted safety defects — fit into that narrative," the judge said.

Finally, in a brief **order** partially granting Apple's motion, Judge Chhabria found that the complaint fails to identify what state's laws govern their common law claims and that more than 20 states' laws are potentially implicated.

He also dismissed the California Invasion of Privacy Act claims, saying the plaintiffs haven't adequately alleged that Apple uses the AirTags to "determine the location or movement of a person," according to the order. He added that the complaint only alleges that the AirTag uses Bluetooth signals of nearby Apple devices to report its location back to its owner, the order states.

"This is a large and complicated action," Judge Chhabria said. "Some amount of complexity is appropriate and necessary. But the pleading errors and inadequacies in the first amended complaint raise the question of whether the plaintiffs are prioritizing the claims that best fit the allegations."

"Nonetheless, all dismissals are with leave to amend," he added.

Judge Chhabria gave the plaintiffs 21 days to file a second amended complaint, according to the order.

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

The plaintiffs are represented by Gillian L. Wade, Sara D. Avila and Marc A. Castaneda of Milstein

Jackson Fairchild & Wade LLP.

Apple is represented by Tiffany Cheung, Galia Z. Amram, Melody E. Wong and Jocelyn E. Greer of Morrison Foerster LLP.

The case is Lauren Hughes et al. v. Apple Inc., case number 3:22-cv-07668, in the U.S. District Court for the Northern District of California.

--Editing by Emily Kokoll.

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Ex-Autonomy CEO's Fraud Trial Over \$11.7B HP Deal Kicks Off

By **Bonnie Eslinger**

Law360 (March 18, 2024, 11:05 PM EDT) -- Autonomy's former CEO Michael Lynch duped HP into buying his company at the inflated price of \$11.7 billion, a federal prosecutor said Monday during opening statements in the British entrepreneur's criminal trial, while Lynch's lawyer countered his client had "all the money in the world" and no motive to commit fraud.

Lynch, who has been called the Bill Gates of the U.K. according to his counsel, reaped about \$804 million from the sale of his software company to the Silicon Valley giant. He is on trial on 16 felony counts of conspiracy and fraud alongside Autonomy's former vice president of finance, Stephen Chamberlain, as well as an additional count of securities fraud.

The trial kicked off on Monday with prosecutor Adam Reeves telling the 12 jurors that before the acquisition, Lynch met with HP executives at their Palo Alto headquarters in 2010 and "spun a fabulous tale" about Autonomy's success that wasn't true.

"The evidence in this case will prove that this was the scene of an \$11 billion fraud," Reeves said.

Key to the case is that Lynch emphasized that Autonomy's success was attributable to growth in its core business product, Intelligent Data Operating Layer, or IDOL. The software helps companies search for and gather data from emails, documents and videos, Reeves said. Lynch told the HP executives that Autonomy was growing because of market demand for IDOL, making the company's market value "enormous, potentially worth billions and billions," Reeves said.

HP was attracted to the company because it was trying to transition from a hardware seller into the lucrative world of software sales, which have a higher profit margin, the prosecutor said. There was just one problem, he said: The financial statements that Lynch presented to HP were full of false and misleading information.

"Autonomy's story of success was in fact an elaborate multilayered multiyear fraud," Reeves told jurors.

Lynch and Chamberlain used a variety of accounting tricks to make autonomy's revenue growth look better than it really was, including backdated contracts and pretending to ship goods that had not really shipped, Reeves said.

And while Lynch told HP that Autonomy was a "pure software" company, it was also reselling millions and millions of dollars' worth of computer hardware, such as laptops and monitors, Reeves said. In 2010, the hardware made up about \$100 million, or over 10% of autonomy's total revenue. That hidden revenue made the company look like it was growing faster than it really was, the prosecutor told jurors.

The evidence will show that Lynch "was the driving force behind this massive fraud," Reeves said.

Autonomy was based in England and traded on the London Stock Market, but about 68% of the company's sales came from the Americas, and the company also had headquarters in San Francisco.

Lynch principally worked in the company's London office near Buckingham Palace. He was a "dominating, controlling intimidating boss," running Autonomy "with an iron fist," Reeves said. "He

beguiled the London Stock Market and the aspiring British tech sector into cheering his every move."

Lynch and Chamberlain lied to Autonomy's auditors in order to carry out the fraud, the prosecutor said.

"You will learn that the job of misleading the auditors fell principally to Steve Chamberlain and his boss, Sushovan Hussain," Autonomy's chief financial officer, Reeves said. He did not tell jurors that in 2018 Hussain was **convicted on related charges** and is serving five years in federal prison.

Reeves also told the jury that they'd hear from Brent Hogenson, the former chief financial officer of Autonomy Americas, who was fired after approaching Lynch and Autonomy's auditors at Deloitte about concerns with the company's accounting. This took place in mid-2010, about a year before the sale to HP.

A lawyer for Lynch told jurors during his opening statement that while the government had painted the matter as an open-and-shut case, it was not so simple.

The government's opening "was black and white, and you know what? You're going to see in this trial that ain't the way the world works," said Reid Weingarten of Steptoe LLP. "The world works in gray; the world is complicated."

The real story will surface through the defense, Weingarten said.

"We will cross-examine, we will impeach, we will cause you to have doubts," he said. "Where he claims there's fire you will only see smoke."

For example, backdating can be benign, he said.

When HP bought Autonomy it was in "desperate shape" and needed the IDOL software, Weingarten said. The company was seeing the success of the iPhone, and its acquisition of Palm had been a disaster. But Weingarten said HP's then-CEO Leo Apotheker was so terrified that Oracle would get Autonomy first that the company didn't take the time to fully research the business.

"If HP had spent the time to do a normal due diligence they would have found anything and everything they're complaining about today, including hardware," he said.

Weingarten also rebutted the prosecution's portrayal of Hogenson as a whistleblower. The company investigated the accounting concerns, and "allegations surfaced about Hogenson himself," Weingarten said, later adding, "The bottom line is Hogenson was utterly unqualified to be the CFO, and he was properly fired."

Hogenson's boss, Hussain, made virtually all the accounting decisions that the government is now challenging, Weingarten said.

Weingarten told the jurors that Lynch would take the stand at trial. He also asked them to consider what motivation, if any, his client would have had to risk everything and commit fraud.

"He had all the money in the world, he had all the prestige in the world, he had all the fame in the world," Weingarten said. "He had a multifaceted, fabulous life, so he's going to sell some hardware and lie about it and risk his life, his liberty and his reputation? Please."

Afterward, Chamberlain's lawyer, Gary Lincenberg of Bird Marella Rhow Lincenberg Dooks & Nessim LLP, told jurors that his client was innocent.

Chamberlain did not decide what sales Autonomy made, and did not make final accounting decisions, Lincenberg said, and he also did not make any misrepresentations to HP.

Nonetheless, Chamberlain is "caught up as a pawn" in a fight between Autonomy and HP, Lincenberg said.

Prosecutors claim that Lynch, Chamberlain and other co-conspirators artificially inflated Autonomy's

revenue figures when it was sold to HP, 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.

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 that 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 company.

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 Brian Baresch.

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Feds Try To Shake Off Youths' Constitutional Climate Suit

By **Juan-Carlos Rodriguez**

Law360 (March 18, 2024, 9:37 PM EDT) -- The government has asked a California federal judge to dismiss a group of children's lawsuit alleging the Constitution guarantees "a life-sustaining climate system" and the U.S. Environmental Protection Agency allows unsafe levels of climate pollution.

In a **motion** filed Friday, the feds acknowledged that "the climate crisis is an urgent problem," but noted that the Biden administration is taking steps to address it, and said the court isn't the right place for the youths to pursue their goal of changing the government's response to climate change in its entirety.

"Their demand for changes to the government's response to climate change in its entirety 'must be made to the political branches or to the electorate at large,'" the filing read.

The **youths' complaint**, which named the government, the EPA and the agency's administrator as defendants, is the latest legal action from legal advocacy group Our Children's Trust, which represents children in climate change litigation in federal and state courts across the country. The suit seeks to establish children — whom it says are "politically and economically powerless" — as a protected class under the Constitution's Equal Protection Clause.

According to the complaint, the EPA knows children are disproportionately harmed by pollution and climate change, but has actively discriminated against children by "systematically allowing climate pollution for decades at levels that harms plaintiffs' health and welfare." The agency also discriminated against kids by disregarding the best available science on climate pollution and "discounting the lives of children" in its regulatory analyses, the suit added.

The California youths are seeking a declaratory judgment that they are entitled to a heightened level of judicial review over government conduct that burdens them with "lifetimes of hardship." They also urged the court to find that the children are members of a constitutionally protected class, and that the government has violated their constitutional rights under the Equal Protection Clause by discriminating against them.

The feds argued Friday that the youths' suit is barred by sovereign immunity.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction," the government wrote. "Plaintiffs must identify a valid waiver that encompasses their claims. Plaintiffs do not, and cannot, carry that burden."

The dismissal motion contended that the Clean Air Act does allow judicial review of the EPA's actions in carrying out Congress' directives, but only subject to certain limitations, and that the youths exceeded their grasp by reaching for constitutional claims, as well as attacking the agency's regulatory actions.

Additionally, the government said the youths don't have standing to pursue their case, pointing to the Ninth Circuit's 2020 decision in *Juliana v. U.S.*, **which established** that courts cannot grant the sweeping type of relief for climate change problems that the youths seek.

And the government said that besides the sovereign immunity and standing problems, the suit can't survive because it "simply is not one that a federal court may entertain consistent with the

Constitution."

"Federal courts cannot use the 'judicial power' to perform such a sweeping policy review — and for good reason: the Constitution entrusts to Congress and the executive branch the power to enact and implement comprehensive government-wide measures of the sort sought by plaintiffs," the government told the court. "These functions are not the province of Article III courts."

Their Due Process Clause claims also fail, according to the government's filing.

"The U.S. Constitution ... does not explicitly recognize a right to a life-sustaining climate," the motion said.

The Equal Protection Clause claims don't fare any better, the feds asserted.

"Plaintiffs' equal protection claims fail at the threshold because none of the EPA actions or inactions contain any age-based classifications," the government said. "Plaintiffs urge that the use of discounting in the context of regulatory impacts analyses — to weigh the costs and benefits of a policy over time — is 'a weapon of intergenerational oppression,' but they do not allege with particularity that defendants have applied discounting in a discriminatory fashion."

Philip L. Gregory of Gregory Law Group, an attorney representing the youths, on Monday defended their lawsuit.

"It is time for the EPA to be held accountable by our courts for violating the U.S. Constitution and misappropriating its congressionally-delegated authority," Gregory told Law360 Monday. "While in its motion in the Genesis case, the DOJ admits that the 'climate crisis is an urgent problem,' the DOJ asks the court to ignore the allegations in the complaint identifying actions the EPA has taken and continues to take that have resulted in the destruction of our nation's air quality and the climate system."

The government is represented by Todd Kim, Sean C. Duffy and Andrew S. Coghlan of the U.S. Department of Justice's Environment and Natural Resources Division and Daniel Conrad of the EPA Office of General Counsel.

The plaintiffs are represented by Julia A. Olson, Andrea K. Rodgers and Catherine Smith of Our Children's Trust; Philip L. Gregory of Gregory Law Group; Paul L. Hoffman of the Civil Rights Litigation Clinic at the University of California, Irvine School of Law; and John Washington of Schonbrun Seplow Harris Hoffman & Zeldes LLP.

The case is Genesis B. et al. v. U.S. Environmental Protection Agency et al., number 2:23-cv-10345, in the U.S. District Court for the Central District of California.

--Editing by Covey Son.

Update: This article was updated to include comment from the plaintiffs.



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Ex-CEO Sues Trump-Tied SPAC For Litigation, Probe Fees

By **Jeff Montgomery**

Law360 (March 18, 2024, 2:29 PM EDT) -- A director and former CEO of Donald Trump-tied Digital World Acquisition Corp. has sued the venture in Delaware's Court of Chancery, seeking legal fee advancements from DWAC for costs arising from federal probes, lawsuits in multiple states and potential fiduciary breach claims.

Patrick Orlando, who was fired from DWAC's CEO post in March 2023 after the special purpose acquisition company reported concerns about "unprecedented headwinds" facing the venture, on Friday cited a right to litigation cost coverage in three broad areas, including for expenses incurred in responding to U.S. Securities and Exchange Commission and U.S. Department of Justice probes of the blank check company and activities surrounding it.

Other sources of fee claims, not quantified, include litigation over Orlando's activities before his departure in the workup to a proposed take-public merger, now in its final stages, with Trump Media & Technology Group, which operates the Trump-focused Truth Social platform.

Multiple suits are pending, meanwhile, involving Orlando-controlled ARC Global Investments II LLC and allegations of fiduciary duty breaches targeting Orlando, among other issues.

"Mr. Orlando has incurred and will continue to incur expenses in connection with DWAC's continued false accusations and threats," the Chancery Court suit filed on Friday said. "By DWAC's own admissions, Mr. Orlando incurred these expenses by reason of the fact that he is a director of DWAC."

Trump founded TMTG in 2021. Digital World went public in September 2021 after completing a \$250 million initial public offering, and announced in October of that year that it would take the social media platform public in a deal that was then valued at \$1.7 billion.

The SPAC raised \$1 billion for the effort in May 2022 in a PIPE deal — a private investment in public equity — but the financing package to support the deal has dwindled as investors pulled their financial commitments.

DWAC acknowledged in mid-2022 that it was under SEC scrutiny for its diligence in pursuing potential acquisition targets other than Trump's entity. The SEC is also inquiring about certain elements of the agreement's transaction history and "certain forward-looking information" about Trump's social media business.

"Both the SEC and DOJ investigations into DWAC remain ongoing and Mr. Orlando continues to incur expenses including legal fees and document hosting fees in connection with these various investigations," the Chancery complaint said.

One of the Florida cases cited in the demand for fees focused on the exchange ratio between founder and preferred shares, with Orlando seeking a significantly higher upside for preferred than DWAC.

On March 7, Delaware Vice Chancellor Lori W. Will refused to issue an injunction barring DWAC and TMTG from moving ahead in a planned March 22 merger based on the same unresolved exchange ratio issue.

Meanwhile, on March 14, Orlando's suit said, an attorney for DWAC sent Orlando's attorney a letter

"accusing Mr. Orlando and his counsel of wrongdoing."

The letter alleged efforts by Orlando, "seemingly aided by unusual communications from or endorsed" by his counsel's firm "to undermine or influence merger votes," breaching his fiduciary duties as a director.

The same letter asserted that ARC's withholding of its vote in favor of the merger "has caused and continues to cause DWAC to incur substantial additional costs," warned that DWAC intended to seek recovery of the same costs and instructed Orlando and his attorney to preserve relevant documents.

DWAC and TMTG did not immediately respond to requests for comment.

Patrick Orlando is represented by Matthew D. Perri, Daniel E. Kaprow, Elizabeth J. Freud and Rae Ra of Richards Layton & Finger PA.

Counsel for Digital World Acquisition Corp. in the fees case was not immediately available.

The case is Patrick Orlando v. Digital World Acquisition Corp., case number 2024-0264, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas, Tom Zanki, Lauren Berg and Jessica Corso. Editing by Alex Hubbard.

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Google Defeats BIPA Suit Over IBM Face Dataset, For Now

By **Gina Kim**

Law360 (March 18, 2024, 5:25 PM EDT) -- Google has defeated a proposed class action by Illinois residents who accused the company of violating the state's biometric privacy laws with facial data collected by IBM, after a California federal judge said their claims don't establish that Google's alleged violations took place in the Prairie State.

In a Friday **order**, U.S. District Judge Beth Labson Freeman granted Google's motion to dismiss Steven Vance and Tim Janecyk's complaint alleging it breached Illinois' Biometric Information Privacy Act when it bought a "diversity in faces" dataset from IBM that allegedly contained geometric scans of their faces from photos they uploaded onto Flickr, a photo-sharing site based in San Francisco.

But the judge granted the men's request for leave to amend most of their claims.

Vance and Janecyk alleged that IBM created the dataset by scanning 100 million images from Flickr and making it publicly available to for-profit entities by request. Google then applied for that dataset, which the men claimed was used to bolster its facial recognition technologies and products, like Google Photos, Google Nest Hub Max, Google Pixel smartphones and its Cloud Vision API.

Google moved to end the case last fall, contending that the BIPA claims can't stand because the men can't point to how it engaged in any conduct in Illinois, or how it otherwise profited from their biometric data.

On Friday, Judge Freeman noted that the BIPA statute indeed does not say the law is intended to apply outside the boundaries of Illinois.

While Janecyk and Vance argue that they uploaded images of their faces onto Flickr, and New York-based IBM created its DiF dataset, the judge said their complaint is absent of any indication that Google's actions occurred in Illinois.

"Plaintiffs do not allege that Google processes, stores, or otherwise makes use of the DiF dataset (or any other biometric data for that matter) in Illinois," he said. "Nor do plaintiffs allege that Google ever interacted with them or any other person or entity in Illinois to obtain the DiF dataset."

And their alleged harms aren't connected to Google's actions in Illinois either; while Vance and Janecyk claim that Google exposed them to possible surveillance or other privacy risks within the Prairie State, they don't point to any injuries stemming from BIPA violations, since their suit doesn't lay out any direct interactions with Google, the order said.

Nor are their Illinois residencies sufficient to link Google's conduct to the state either, Judge Freeman wrote. Janecyk and Vance's complaint doesn't show that Google's conduct primarily and significantly took place in Illinois, and they even acknowledged at the dismissal hearing earlier this month that it might be tough to allege supplemental facts linking Google's actions to the state without discovery, the order said.

The men's unjust enrichment claim against Google was also dismissed, but Janecyk and Vance were given a chance to try again. Judge Freeman, however, permanently tossed their claim for injunctive relief since nobody disputes that that claim wasn't properly pled.

Friday's ruling came a week after **oral arguments** on Google's motion to dismiss Vance and Janecyk's complaint, which was first filed in July 2020.

Janecyk sued IBM in Illinois state court in early 2020, claiming it **gathered his and others' facial data** without their consent in violation of BIPA. A few months later, two **nearly identical actions** were initiated in California against Google and face-matching software company FaceFirst Inc., and another two were launched against Amazon and Microsoft in Washington state.

In February 2021, Judge Freeman **stayed** the case against Google to await the results of the other pending actions, and the parties agreed to start up the litigation again in October 2023, when Google moved to dismiss it.

Google argued that Janecyk voluntarily dropped his state complaint against IBM in May 2023, and after **surviving the pleading stage**, U.S. District Judge James L. Robart in Washington granted summary judgments in favor of Amazon and Microsoft in 2022, concluding that the litigation improperly sought to apply BIPA **outside the boundaries of Illinois**.

Meanwhile, the parties agreed to voluntarily end the California case against FaceFirst in October.

Representatives for the parties did not immediately return requests for comment Monday.

Vance and Janecyk are represented by Gary Lynch of Lynch Carpenter LLP and Scott R. Drury of Drury Legal LLC.

Google is represented by Bobbie J. Wilson and Anna M. Thompson of Perkins Coie LLP.

The case is Vance et al. v. Google LLC, case number 5:20-cv-04696, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins, Celeste Bott, Lauraann Wood, Allison Grande and Bonnie Eslinger. Editing by Adam LoBelia.



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Kimberly-Clark Gets OK For \$6M Deal Over Tainted Wipes

By Jonathan Capriel

Law360 (March 18, 2024, 6:18 PM EDT) -- A Texas federal court has granted final approval to a deal worth as much as \$17 million — with \$3.6 million going to plaintiff attorney fees — that would resolve claims that paper products manufacturer Kimberly-Clark sold flushable wipes contaminated with a bacteria particularly dangerous to those with weak immune systems.

U.S. District Judge Barbara M.G. Lynn signed off on a settlement Kimberly-Clark Corp. secured ending a class action suit representing up to 5 million consumers who bought recalled lots of Cottonelle Flushable Wipes between Feb. 7 and Dec. 31, 2020.

The company agreed to pay between \$6 million to \$13.5 million into a common fund that would go to class members and would be overseen by Kroll Settlement Administration LLC. With proof of purchase, each consumer could get fully reimbursed for the wipes they bought. Without, each household will get just \$5.

While class members who take the payment agree to drop product liability claims, the settlement does not totally close off consumers injured as a result from filing personal injury claims, according to the judge's order.

Counsel for the consumers are set to receive \$3,547,157 in attorneys' fees and just over \$100,000 in costs associated with the litigation. The attorney fee will be paid by the company separately from the settlement fund, unless the total amount of approved claims is less than \$6 million, in which case the company will be allowed to use some of that money towards paying plaintiffs counsel.

The nearly two dozen lead plaintiffs will get \$2,500 each.

"The reaction to this settlement has been overwhelmingly positive and we appreciate the Court's thorough analysis in approving it as fair, reasonable, and adequate," said lead plaintiff's counsel Austin Moore of Stueve Siegel Hanson LLP. "We look forward to promptly distributing payments to class members."

The litigation began with a proposed class action filed in the Northern District of Texas in October 2020. It was later consolidated with **another suit filed in New York**. The consumers claimed that Kimberly-Clark put Cottonelle Wipes on the market in February 2020 despite knowing that they were contaminated with *pluribacter gergoviae*, a bacterium that can cause serious health issues to those with weakened immune systems, according to the U.S. Food and Drug Administration.

The company recalled the product on Oct. 9, 2020, but only after a spike in consumer complaints "regarding skin irritation, infection, and other complications became overwhelming," the Texas suit said.

Prior to the settlement, the company paid \$4 million to consumers as part of a refund program, Judge Lynn's order noted.

Kimberly-Clark is represented by Veronica S. Moye, Andrew Patrick LeGrand, Heather Lynn Richardson, John Membrano Sandoval, Lee Ross Crain, Mark A. Kirsch and Timothy W. Loose of Gibson Dunn & Crutcher LLP.

The consumers are represented by Austin Moore of Stueve Siegel Hanson LLP, Joshua L. Hedrick of Spencer Fane LLP, Michael R. Reese of Reese LLP and Jordan S. Palatiello of Lewis Johs Avallone Aviles LLP.

The case is Armstrong et al. v. Kimberly-Clark Corp., case number 3:20-CV-3150-M, in the U.S. District Court for the Northern District of Texas.

--Editing by Andrew Cohen.

Correction: A pervious version of this story used an incorrect title for Judge Lynn. The error has been corrected.

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Plaintiffs Call For Sanctions Over PFAS MDL Deal Threat

By **Mike Curley**

Law360 (March 18, 2024, 6:04 PM EDT) -- A proposed class in multidistrict litigation against DuPont and others alleging they contaminated drinking water with PFAS chemicals is urging a South Carolina federal court to sanction attorneys for a California water service, saying they violated court rules in their latest objections to a settlement.

In a **motion** filed Friday, the plaintiffs said attorneys that represented Metropolitan Water of Southern California, or Met, which opted out of the settlement months ago, suddenly demanded a last-minute change to the "releasing parties" section of the **settlement**, and threatened to file an intervention if those demands weren't met over the course of a single weekend.

While Met's attorneys at Marten Law LLP described their communication as a bid for a meet and confer, the plaintiffs wrote this was a sham given its threatening nature and unreasonable timeline, particularly because Met's objections to the settlement had been heard and overruled months ago, and it never appealed that rejection.

Met's attorneys had also said in their motion to intervene, which was filed on March 11 after class counsel was unable to meet with them on short notice, was in response to the court's issuance of a final order approving the deal. But the plaintiffs wrote that this, too, could have been filed the same day that Met opted out of the settlement in November.

"Rather than timely file a motion to intervene, Met waited and launched a last minute Saturday afternoon take-it-or-leave-it ultimatum, unilaterally demanding a response within 18 hours to its proposed changes, without any advanced notice to class counsel," the plaintiffs wrote in their **memorandum**. "This latest example of Met's flouting of the local rules, together with its counsel's long documented antics of bad-faith conduct, should not be countenanced any longer."

In addition, the plaintiffs argued that Met's attorneys have slandered class counsel by mischaracterizing a court-approved settlement notice as an improper direct communication with class members and accusing them of trying to make people opt out of the deal.

The motion further claims that Met has itself communicated with other class members and urged them to file their own complaints against the settlement based on false information, while further alleging that Marten Law has broadcast misinformation on the settlement and advanced frivolous arguments in the past.

According to the motion, Met's proposed changes wouldn't even alter the substance of the release, and in any case its objections are moot because it has opted out of the settlement and is not bound to its terms.

This "last-minute sandbagging" will delay payouts to the settlement plaintiffs, according to the motion, and the bad-faith tactics Met's attorneys have employed warrant punishment.

In the motion, the plaintiffs asked the court to revoke the pro hac vice admission of Marten Law's Jeff Kray and Met general counsel Marcia Scully and to strike the motion to intervene.

Representatives for the parties could not immediately be reached for comment Monday.

More than 300 suits have been filed over PFAS contamination since 2018, with many being consolidated in the South Carolina-based MDL focused on pollution involving PFAS in aqueous film-forming foam, used in firefighting applications.

PFAS chemicals, which have been used by companies such as DuPont and 3M to manufacture products like Teflon, firefighting foam and water-resistant fabrics have been shown to have a number of negative impacts on health, including birth defects, increased rates of cancer and elevated cholesterol and obesity rates.

The class is represented by Michael A. London of Douglas & London PC, Scott Summy of Baron & Budd PC, Paul J. Napoli of Napoli Shkolnik PLLC, Elizabeth A. Fegan and Megan E. Shannon of FeganScott LLC, and Joseph Rice of Motley Rice LLC.

Met is represented in-house by Marcia Scully, and by Jeff B. Kray and Jessica K. Ferrell of Marten Law.

The Chemours Co. is represented by Jeffrey M. Wintner and Graham W. Meli of Wachtell Lipton Rosen & Katz.

DuPont de Nemours Inc. is represented by Kevin T. Van Wart of Kirkland & Ellis LLP.

Corteva and E.I. DuPont are represented by Michael T. Reynolds of Cravath Swaine & Moore LLP.

The cases are In Re: Aqueous Film-Forming Foams Products Liability Litigation, case number 2:18-mn-02873, and City of Camden et al. v. E.I. DuPont de Nemours and Co. et al., case number 2:23-cv-03230, in the U.S. District Court for the District of South Carolina.

--Additional reporting by Adrian Cruz. Editing by Adam LoBelia.

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