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WESTLAW Securities Enforcement & Litigation Daily Briefing

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April 30, 2024

(April 30, 2024) - A federal appeals court has vacated an order certifying a class of shareholders alleging that Anadarko Petroleum Corp. misled investors about the viability of an oil field project before taking more than \$900 million in write-downs in 2017.

Georgia Firefighters' Pension Fund et al. v. Anadarko Petroleum Corp. et al., No. 23-20424, (5th Cir. Apr. 25, 2024).

A Texas federal judge denied Anadarko and four former executives a fair opportunity to respond to evidence presented for the first time in the plaintiffs' reply brief supporting their motion for class certification, a panel of the 5th U.S. Circuit Court of Appeals ruled April 25.

Oil field fiasco

The shareholder lawsuit, filed in 2020 in the U.S. District Court for the Southern District of Texas, says Anadarko hailed the Shenandoah oil field in the Gulf of Mexico as a "prolific" reservoir with as much as \$4 billion in potential resources.

The defendants received internal data in 2014 showing that the projections were vastly overstated, but they concealed that information from the public and provided "glowing reports" about appraisal wells at the site in 2015 and 2016, the amended complaint says.

Anadarko continued to tout Shenandoah until May 2, 2017, when it took a \$467 million impairment charge and wrote off \$435 million in costs related to the project, the suit says.

The company's share price fell 8% the next day, closing at \$51.95, according to the complaint.

The suit names as defendants Anadarko, former Chairman and CEO R.A. Walker, former Chief Financial Officer Robert G. Gwin and two other executives. Occidental Petroleum Corp. acquired Anadarko for \$55 billion in 2019.

The District Court sustained securities fraud claims against the defendants in January 2021 and granted the plaintiffs' motion for class certification in September 2022.

U.S. District Judge Charles Eskridge said the defendants had failed to rebut the presumption of classwide reliance on the alleged misstatements. *In re Anadarko Petroleum Corp. Sec. Litig.*, No. 20-cv-576, (S.D. Tex. Sept. 28, 2022).

He also denied the defendants' motion to exclude a rebuttal expert report attached to the plaintiffs' reply brief supporting class certification.

The report, written by chartered financial analyst Bjorn Steinholt, highlighted flaws in the defendants' theory that the share price drop was related to news of Anadarko's involvement in a fatal explosion in Colorado rather than disclosures about Shenandoah, Judge Eskridge said.

Class certification vacated

The defendants argued on appeal that the District Court improperly certified a class based on new evidence in a reply brief without giving them a chance to respond.

The ruling ran afoul of the U.S. Supreme Court's holding in *Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System*, 594 U.S. 113 (2021), that courts must consider "all probative evidence" when evaluating classwide reliance in securities fraud suits, the appellants' brief said.

The 5th Circuit panel agreed, saying Anadarko should have been granted leave to file a sur-reply to the motion for class certification.

The District Court considered new evidence in Steinholt's report that Anadarko's share price had fallen 4% after it disclosed the Shenandoah write-downs but before news of the Colorado explosion had emerged, the panel said.

Although sur-replies are "heavily disfavored," Anadarko was entitled to an opportunity to respond to new evidence in the plaintiffs' reply brief, according to the panel.

The District Court also failed to perform a full analysis of the admissibility of Steinholt's report under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), the panel said.

Kevin Orsini of Cravath, Swaine & Moore LLP represented Anadarko in the appeal.

Joseph D. Daley of Robbins Geller Rudman & Dowd LLP represented the shareholders.

By Nicole Banas

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Date: Jan. 26, 2021

Anadarko Petroleum Corp. shareholders can proceed with claims that the oil and gas company and top executives issued "glowing reports" about an oil field in the Gulf of Mexico that they knew were false, a Texas federal judge has ruled.

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April 29, 2024, 3:00 PM PDT

Root Inc. Gets Dismissal of Investor Suit Over Costs Affirmed

By Martina Barash

Bloomberg Law News 2024-04-30T10:10:27520929674-04:00

Root Inc. Gets Dismissal of Investor Suit Over Costs Affirmed

By Martina Barash 2024-04-29T18:00:03000-04:00

Root Inc. didn't make false or misleading statements about its costs to acquire car insurance customers in its initial public offering documents, the Sixth Circuit affirmed Monday in a securities suit.

Two company statements challenged in the proposed investor class action were based on historical data and weren't inaccurate, the US Court of Appeals for the Sixth Circuit said. And a third statement, saying customer acquisition costs "could" rise substantially, was accompanied by cautionary statements, Judge Alice M. Batchelder said.

- The claims, under Sections 11 and 12 of the Securities Act of 1933, needed to meet a heightened pleading standard because they relied on the same set of facts as their securities fraud claims, which weren't at issue on appeal, Batchelder said, joined by Judge Stephanie Dawkins Davis
- Judge Eric L. Clay dissented in part, criticizing "a categorical approach that will subject almost every negligence claim under Sections 11 or 12 to a heightened pleading standard when pleaded alongside fraud claims"
- But Clay concurred in the judgment because, he said, the investors failed to meet the lower standard

Robbins Geller Rudman & Dowd LLP and Murray Murphy Moul & Basil LLP represented the investors. Cravath, Swaine & Moore LLP and Vorys, Sater, Seymour & Pease LLP represented Root. Sullivan & Cromwell LLP and Dinsmore & Shohl LLP represented underwriter defendants.

The case is *Kolominsky v. Root, Inc.*, 6th Cir., No 23-3392, 4/29/24 .

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By [Martina Barash](#)
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Bloomberg Law News 2024-04-30T13:46:21869106534-04:00
Commerzbank Gets Claims Revived Over Some Subprime-Era Trusts

By Martina Barash 2024-04-30T10:49:44000-04:00

Commerzbank AG may pursue contractual claims over residential mortgage-backed securities despite clauses in those agreements requiring pre-suit demands on trustees, the Second Circuit ruled Tuesday.

The suit stems from Commerzbank’s purchase of RMBS certificates from U.S. Bank NA, the trustee that allegedly managed the securities, before the collapse of that sector of the market during the financial crisis now more than a decade ago.

Courts considering such “no action clauses” in similar contracts “should consider whether such requirements would entail potential conflicts of interest on the demanded party” to such an extent that the request would be futile, the US Court of Appeals for the Second Circuit said.

The case is Commerzbank AG v. U.S. Bank, N.A. , 2d Cir., No. 22-854, 4/30/24 .

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Large Avis Shareholder Benefited From Share Buybacks, Suit Says

By Martina Barash

- **COURT:** D.N.J.
- **TRACK DOCKET:** [No. 2:24-cv-05687](#)

Bloomberg Law News 2024-04-30T10:10:56487300572-04:00

Large Avis Shareholder Benefited From Share Buybacks, Suit Says

By Martina Barash 2024-04-29T16:36:12000-04:00

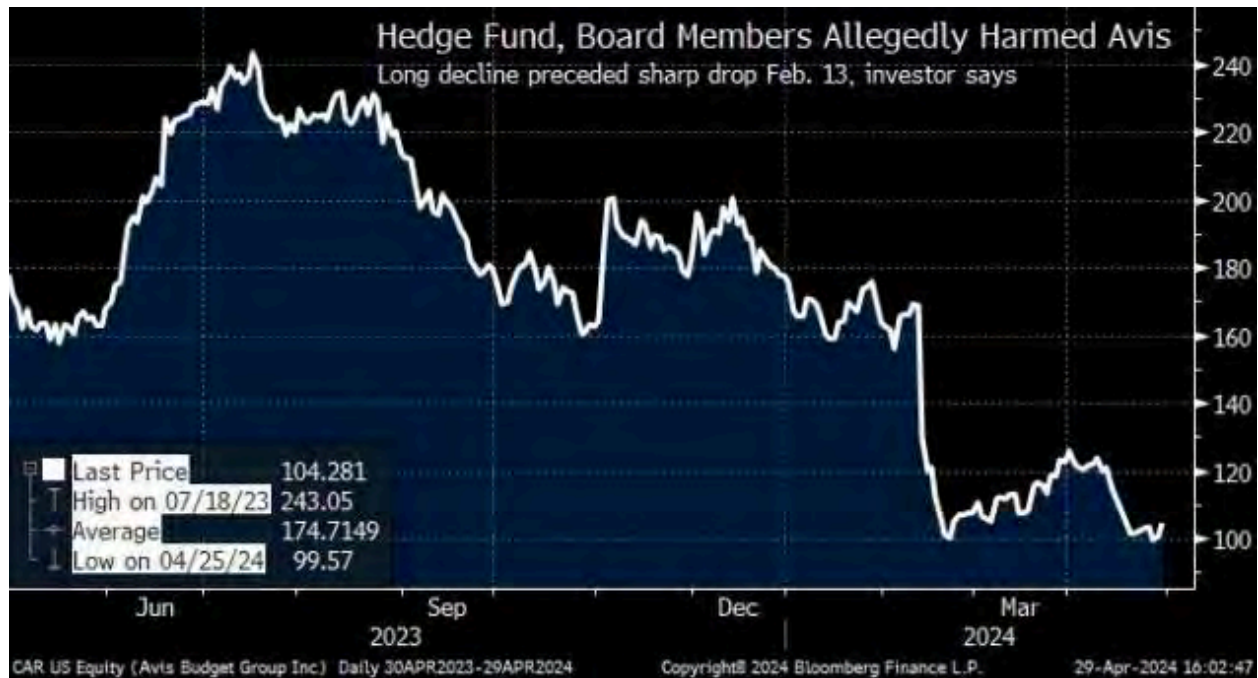
- **COURT:** D.N.J.
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A hedge fund that invested in Avis Budget Group Inc. used share repurchases to gain control of the vehicle rental company without paying a premium and to improve its ownership position, according to a new derivative suit.

The fund, SRS Investment Management LLC, also made several profitable same-day stock transactions once it became a controlling shareholder, investor Paula DeAngelis says in the suit filed April 26 in the US District Court for the District of New Jersey.

Avis President and CEO Joseph Ferraro and Executive Vice President Izilda Martins sold Avis stock based on inside information, DeAngelis also says. And Avis mismanaged the rental fleet despite Ferraro's statements touting its fleet management, according to the complaint.

The share repurchases and other actions harmed the company, denting its earnings and depleting its borrowing capacity, she says. "Avis stock began a long decline from a close of \$208.96 on August 30, 2023 to \$168.36 on February 12, 2024 until its approximately \$40 per share drop on February 13, 2024," she says. The steep tumble followed a fourth-quarter revenue report below analyst estimates, according to Bloomberg News.



DeAngelis brings claims of insider trading, breach of fiduciary duties, violations of proxy statement provisions under Section 14(a) of the Securities Exchange Act, unjust enrichment, and declaratory judgment. She seeks corporate governance reforms, damages, and disgorgement.

Avis didn't immediately respond to a request for comment Monday on behalf of itself or the individual defendants. SRS has no comment, its general counsel David Zales said by telephone Monday.

Squitieri & Fearon LLP and Moore Law PLLC represent DeAngelis.

The case is DeAngelis v. Hees, D.N.J., No. 2:24-cv-05687, complaint 4/26/24.

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Berkshire brokerage HomeServices hit with new lawsuit over commissions

 [reuters.com/legal/litigation/berkshire-brokerage-homeservices-hit-with-new-lawsuit-over-commissions-2024-04-30](https://www.reuters.com/legal/litigation/berkshire-brokerage-homeservices-hit-with-new-lawsuit-over-commissions-2024-04-30)

Mike Scarcella

A home for sale sign hangs in front of a house in Oakton, on the day the National Association of Realtors issues its Pending Home Sales for February report, in Virginia March 27, 2014. REUTERS/Larry Downing Purchase Licensing Rights  , opens new tab

April 30 (Reuters) - The real estate brokerage unit of Warren Buffett's Berkshire Hathaway (BRKa.N)  , opens new tab is facing a new proposed class-action lawsuit accusing it of charging commissions that artificially inflated the cost of buying a home in the United States. The lawsuit against HomeServices of America was filed  , opens new tab on behalf of home buyers in Miami federal court on Monday, days after the company said it would pay \$250 million to resolve nationwide claims from home sellers challenging the same commission.

U.S. home sellers typically must pay for the services of a buyer's agent in order to get a home included on a "multiple listing service," the platforms where most homes in the U.S. are bought and sold. A commission as high as 6% of the price of a home is then split between the buyer's and seller's agent.

Home sellers have accused HomeServices and other large U.S. real estate brokerages in several lawsuits of using the requirement to drive up commissions as part of an antitrust conspiracy with the industry's trade group, National Association of Realtors.

Home buyers in the new lawsuit claim the commission rule leads agents to steer their clients to houses with higher commissions, arguing that the inflated commissions are baked into home prices and keeps them artificially raised.

The lawsuit seeks at least \$5 million in damages for a class estimated to include at least thousands of home buyers.

HomeServices had no immediate comment on Tuesday. Berkshire Hathaway owns 92% of Berkshire Hathaway Energy, which owns HomeServices. The company has previously denied any wrongdoing.

The plaintiffs' lawyers who filed the case on Monday for a Colorado resident declined to comment.

The same group of lawyers is pursuing a related case for home buyers in Chicago federal court. A judge in February dismissed HomeServices from that lawsuit after the company argued it did not have enough of a connection to Illinois.

Minneapolis, Minnesota-based HomeServices, the country's largest residential real estate brokerage, is the lone defendant in the new lawsuit in Florida.

The complaint named as conspirators a group of large real estate brokerages, in addition to the Chicago-based National Association of Realtors.

The realtors group in March agreed to pay \$418 million and to implement some changes to how Americans buy and sell homes.

The case is James Lutz v. HomeServices of America Inc et al, U.S. District Court for the Southern District of Florida, No. 4:24-cv-10040.

For plaintiff: George Zelcs and Randall Ewing of Korein Tillery; and Vincent Briganti of Lowey Dannenberg

For defendant: No appearance yet

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Warren Buffett's real estate brokerage reaches \$250 mln antitrust settlement

US realtor group's \$418 million antitrust settlement wins tentative approval

Real estate commission antitrust settlements face legal objections

Home buyers can sue brokerages over real estate commissions, US judge rules

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Reporting by Mike Scarcella

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April 29, 2024, 4:45 AM PDT

Billionaire Agnellis Bought US Legal Risk and Won: Chris Hughes

By Chris Hughes

Opinion

Bloomberg Law News 2024-04-30T10:15:04463073143-04:00

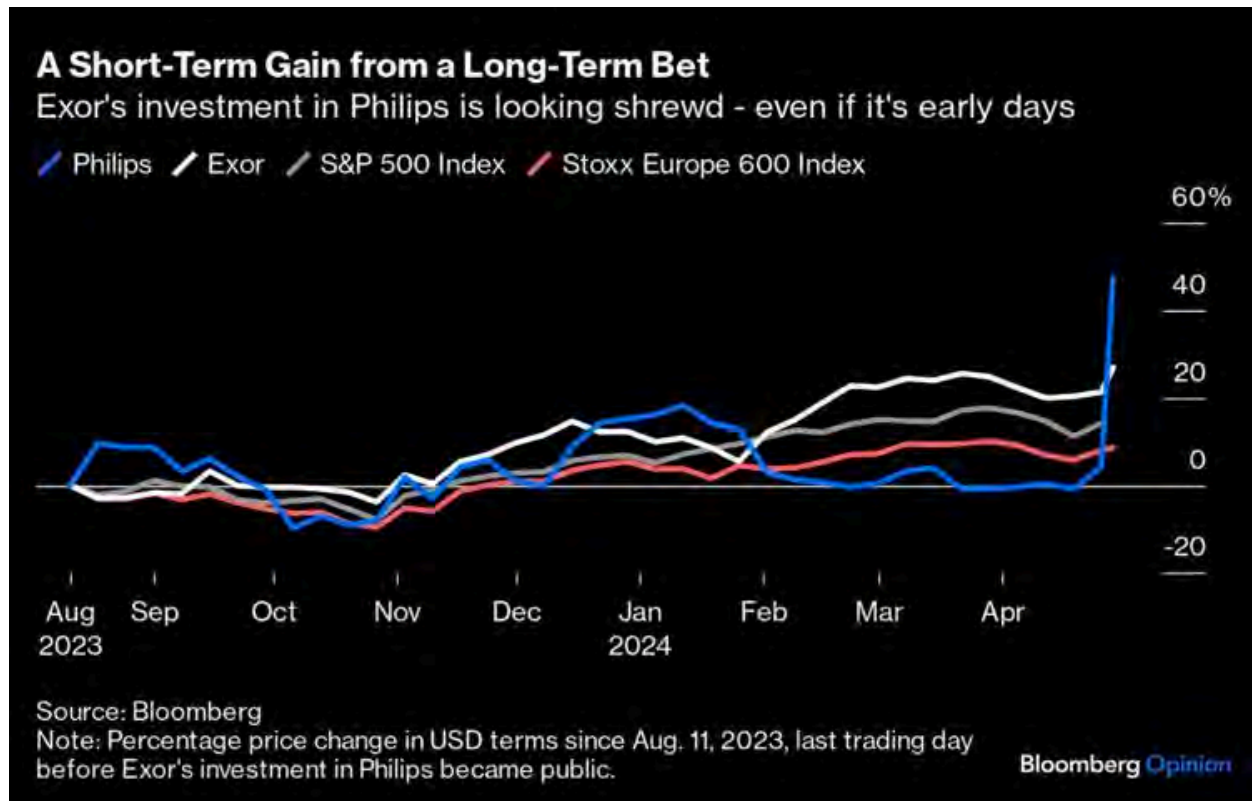
Billionaire Agnellis Bought US Legal Risk and Won: Chris Hughes

By Chris Hughes 2024-04-29T07:45:40692-04:00

“Uninvestible” has become the standard way to describe companies facing sizable US litigation — especially personal-injury claims. That pretty much summed up the stock market’s view of medical-devices maker Royal Philips NV following a 2021 recall of appliances designed to alleviate sleep apnea. But Italy’s billionaire Agnelli family saw an investment opportunity amid the fear. Now comes the reward.

Philips got into difficulties because the foam in its sleep machines degraded, creating the risk of users inhaling the particles and prompting concern these could be carcinogenic. The company has repeatedly said the issue poses “no appreciable harm” to patients. As well as the operational challenge of conducting mass repairs, the recall triggered individual injury claims and investigations by the US Food and Drug Administration and the US Department of Justice. By late 2022, Philips had shed more than three-quarters — or €36 billion (\$39 billion) — of its market value.

Exor NV, the Agnellis’ investment vehicle, revealed a 15% stake last August, reportedly using Goldman Sachs Group Inc. to help amass the position under the radar. Philips stock was already off its lows by then, but this year has brought increasing clarity around the legal risks weighing on the company. On Monday, Philips unveiled a settlement of around 60,000 existing legal claims, capped at \$1.1 billion. That came faster and lower than many expected. The stock jumped nearly 40%.



The news followed a recent accord with the FDA setting out the conditions under which the company could operate in the US sleep apnea market.

With litigation, the goal is always to achieve a decisive end to the uncertainty. But while that makes settlements attractive, they aren't always the end of the matter. Pharmaceuticals firm Bayer AG is still grappling with individual lawsuits surrounding its glyphosate weedkillers inherited with its disastrous acquisition of seed-maker Monsanto. That's despite having agreed a large settlement several years ago.

Philips Chief Executive Officer Roy Jakobs says his settlement is as final as it gets in US. The market is giving him the benefit of the doubt that the issue is concluded, and has some reasons to do so. The plaintiff group here is easier to circumscribe than users of Bayer's Roundup herbicide. Individuals pursuing solo action will have to produce their own expert reports and may face time pressure, giving them an incentive to join the deal.

Even now, Philips still trades on a roughly 15% discount to rival Siemens Healthineers AG on forward earnings. The conclusion of the DOJ probe could be costly both financially and reputationally. Meanwhile, Philips is still restricted to servicing existing sleep apnea devices and selling ancillaries in the US. There's no clear timeline for when it will be to sell new machines.

And Philips must convince patients and investors that it's learned the necessary lessons from the manufacture of a defective device and established whether its response was as good as it could have been. All that said, questions from analysts about bolt-on acquisitions on a call with the company discussing the settlement are a glimpse of what a return to normality might look like — even if it's not there yet.

The Agnellis' investment may have been a gamble, but it was a well-researched, long-term bet on health care that came after months of deliberation. At the time it was made, analysts' targets for Philips weren't much higher than the prevailing share price. Philips stock plunged in January when provisional conclusions of the FDA's work emerged, alongside disappointing results. But both Philips and Exor — which also owns a chunk of soaraway Ferrari NV — have outperformed since the relationship between the two was made public.

A pact with the company means Exor can't cash out for a few years, so it's too soon to call this a success. But the Agnellis are reaping some paper gains — and kudos to them for ignoring the gloomy consensus and spotting that not all litigation risk is the same.

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Lawmakers push for transparency to combat foreign influence in litigation funding

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Apr. 30, 2024

Last fall, Staton Capital's chairman acknowledged that Purplevine IP, a Chinese intellectual property service provider, was funding four lawsuits in the U.S., including one against Samsung.

Discussions around litigation funding disclosure regulations have floated around state legislatures and Congress for several decades, and while some judges across the country have implemented local rules, third-party financing remains largely unregulated.

However, as concerns around foreign influence in commercial litigation have cropped up in recent years, several states have taken steps toward requiring greater transparency about which parties are bankrolling lawsuits. Notably, Florida lawmakers proposed HB 1179 and SB 1276, intended to guard sensitive information against hostile countries like China, according to the bill's Republican sponsors. The companion bills, which died last month, were backed by the U.S. Chamber of Commerce, which has long pushed for reform in this area.

Some members of the litigation funding industry, including Burford Capital managing director Andrew Cohen, believe that broad disclosure requirements may be burdensome rather than helpful to the parties involved. "The concerns about foreign interference in litigation are completely without evidence," said Cohen. "You can cherry-pick some examples of Chinese entities that bring a claim in the U.S. but there are tons of U.S. companies with Chinese investors that exist, so there's nothing nefarious or strange about these situations."

Disclosure regulations are pending in at least 10 states, but U.K.-based Burford has not seen any reasonable proposal to make it easier for litigants to receive funding, said Cohen. "These efforts are funded and supported by industry groups opposed to litigation generally," he added.

Maya Steinitz, a professor at Boston University School of Law and one of the nation's top experts in litigation finance, said she had not observed an inherent risk of foreign influence and investment in U.S. litigation. "Anything can happen in any given case as the parties have due process rights to conduct discovery and understand who and what they're dealing with," she said. "But do I think that we have again a systemic problem and a threat to our justice system? No, I don't think that we do."

Third-party litigation finance has exploded into a multibillion-dollar industry since the practice started in Australia in the 1990s. In a letter last fall to the chief judges of Florida's three federal districts, U.S. Senators Marco Rubio and Rick Scott said the effects of allowing "unfettered and undisclosed" foreign third-party litigation funders could include frivolous lawsuits and excessive domestic disclosures. "Tactics such as these, which seek to exploit the openness of American institutions and undermine critical infrastructure sectors, are frequently done by foreign adversaries, particularly China, are not in the strategic interest of the United States and serve as an example of the need to defend the U.S. against hostile foreign actors seeking to undermine our national interests," they wrote.

While California lawmakers have yet to address third-party commercial litigation funding, state Sen. Anna Caballero introduced SB 581 last March, intended to protect consumer litigants from predatory lenders. The bill failed after drawing opposition from groups like the Consumer Attorneys of California. An email from Gov. Gavin Newsom's deputy communications director said legislation requiring additional disclosures from third-party funders was "possible."

Other states wading into litigation finance regulations include Arizona and Georgia, although they have not been as explicit about the perceived threat of foreign influence as Florida. In September, U.S. Senators Joe Manchin (D-WV) and John Kennedy (R-LA) introduced the bipartisan Protecting Our Courts from Foreign Manipulation Act. "Foreign actors such as China and Russia use third-party litigation funding to support targeted lawsuits in the United States, undermining our economic and national security. This legislation would provide a commonsense strategy to protect our legal system by requiring greater transparency and accountability from third-party groups and preventing foreign governments and sovereign wealth funds from funding litigation," said Manchin. The bill has not yet been heard in committee.

A Bloomberg investigation last month revealed that Russian investment firm A1, connected to Vladimir Putin, spent millions of dollars in New York and London bankruptcy courts to recover \$2 billion embezzled from a Moscow bank. When asked about the findings at a Senate hearing on Apr. 9, U.S. Treasury Department deputy secretary Wally Adeyemo noted that Russia has become "quite expert" at avoiding sanctions, including through cryptocurrency, and said the issue needed to be addressed.

Last fall, Staton Capital chairman Daniel Staton told news outlets that Purplevine IP, a Chinese intellectual property service provider, was funding four lawsuits in the U.S., including one against Samsung. The disclosure came after one of the lawsuits was filed before U.S. District Judge Colm F. Connolly in the District of Delaware, who has a standing order requiring third-party funders to be revealed for cases in his courtroom. The case has since been transferred to another judge. *Staton Techiya LLC v. Harman International Industries Inc. et al.*, 1:23-cv-00802-JCG (Del. Dist. Ct., filed Jul. 25, 2023).

In November, Connolly said he would refer some lawyers with Texas patent firm IP Edge LLC to the U.S. Justice Department, Patent & Trademark Office, and ethics officials. In a 105-page letter, the judge said these attorneys flouted professional conduct rules and violated his standing order by shielding IP Edge's identity. *Nimitz Technologies LLC v. CNET Media, Inc.*, 1:21-cv-01247-CFC (Del. Dist. Ct., filed Aug. 30, 2021).

Pointing to Burford's announcement in October that it was expanding its partnership with an unidentified "sovereign wealth fund strategic partner," attorney Jonathan Stroud said there was clear evidence of overseas entities financing cases in U.S. courtrooms. According to a news release, the partnership had committed \$872 million to direct capital provision assets, of which \$435 million was remaining, as of June 2023.

Noting that there was little data available about the prevalence of foreign third-party funders, Stroud said the news about the Russian firm and Abu Dhabi-based Mubadala Investment Co.'s \$3 billion purchase of Fortress Investment Group showed that there is a real concern about the impact of international backers in U.S. litigation. The deal is under review by the Committee on Foreign Investment in the U.S.

For national security purposes, there should be a federal database for litigation funders, said Stroud, a lawyer with Unified Patents LLC. "But litigation funding disclosures would probably be most efficiently handled by the courts themselves, just because they are the vehicle for the investment and it's a financial outcome tied directly to the outcome of the litigation," he added.

Thibault Denamiel, an associate fellow at the Center for Strategic and International Studies whose focus includes U.S. national security, said there is little data to determine whether the threat of foreign interference is significant. "The lack of transparency around third-party

funders means that we do not know what kind of entities may have access to our legal system," he said.

Denamiel highlighted an antitrust lawsuit in Minnesota involving wholesale food distributor Sysco, backed by Burford, as a notable case involving an overseas funder. In February, U.S. Magistrate Judge John F. Docherty denied Burford's request to allow a subsidiary to take over as the plaintiff, writing in his order that Burford was primarily motivated by financial interests. U.S. District Judge Thomas Durkin in Chicago granted Burford's request in a similar case a month later, saying the plaintiff substitution was "an unsurprising and logical result of the dispute between Sysco and Burford that arose from the funding agreement."

Burford does not generally take control of litigation in which it invests, said Cohen. The Sysco situation "resulted from a lot of interaction between the parties and the resulting agreement was a workout between us and Sysco that is not the normal course of business for us," he said.

While pressing issues need to be addressed within third-party litigation finance, Stroud said meaningful regulations will likely not be passed anytime soon, even though the topic has been debated since at least the 1970s. "You talk to people on the Hill or at the state level, or even funders themselves, and most of them don't vociferously oppose disclosure as part of the next logical step for the industry ... but creating the political will to actually generate a new disclosure requirement, it's so much easier for the courts and Congress to do nothing," he said.

In 2016, the Northern District of California considered amending its local rules to explicitly require the disclosure of litigation funders but decided against the change. Instead, the district updated its local rules the following year to require the disclosure of any party with a financial interest in the proceedings.

Denamiel said reform in this area will likely gain traction for national security reasons rather than the other disadvantages that merit attention. Third-party litigation funding "risks skewing incentives by encouraging financial return over fair reparation for plaintiffs and perhaps provokes frivolous lawsuits. These issues are not tied to geopolitics and niche cases of espionage; they're probably the larger problem at hand because they're more likely to occur. Nevertheless, Washington's eyes are turned on managing economic competition with China, at the heart of which lies considerations around preventing IP theft by [Chinese] entities. That policy direction is here to stay, and third-party litigation funding reform will likely happen at the federal level under these auspices," said Denamiel.

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NOT FOR REPRINT

Rental Applicants Reach \$2.28M Settlement Agreement for Discriminatory AI-Powered Screening Tool

"The changes SafeRent has agreed to make are key to ensuring the original intention of the nation's voucher programs, helping to erase historic discrimination in the housing markets," said Brian Corman, a partner at Cohen Milstein who leads the firm's fair housing litigation efforts and helped negotiate the settlement.

April 30, 2024 at 10:41 AM

Class Actions



Marianna Wharry



What You Need to Know

- A lawsuit against SafeRent Solutions reached a settlement Thursday, pending final approval.
- The settlement came after a federal judge allowed a \$2.28 million settlement on behalf of Massachusetts housing voucher recipients to move forward.
- The lawsuit claimed that SafeRent's algorithmic tenant screening program disproportionately harmed housing voucher recipients, including Black and Hispanic individuals, under federal and Massachusetts law.

Rental applicants in Massachusetts recently reached a \$2.28 million settlement agreement against a tenant screening service, SafeRent Solutions, after alleging the company's algorithmic screen program disproportionately harmed Black and Hispanic rental applicants using federally funded housing choice vouchers.

U.S. District Judge Angel Kelley for the District of Massachusetts certified the two settlement classes and ordered SafeRent, formerly known as CoreLogic Rental Property Solutions, to provide names and other identifying information to send settlement notices, according to an order filed April 25.

A settlement approval hearing will be held in November and, if approved, will resolve the litigation against SafeRent which claimed that its algorithm assigns disproportionately lower scores to Black and Hispanic rental applicants compared with white rental applicants.

Cohen Milstein Sellers & Toll, Greater Boston Legal Services and the National Consumer Law Center represent the plaintiffs and will act as settlement class counsel. The plaintiffs brought the complaint against SafeRent under the Fair Housing Act and Massachusetts discrimination laws in May 2022, and the judge denied the defendant's motion to dismiss in July 2023.

“Federal and state housing voucher programs were established to give recipients, who are disproportionately Black and Hispanic renters, more choice in where they live,” said Brian Corman, a partner at Cohen Milstein who leads the firm’s fair housing litigation efforts and helped negotiate the settlement. “The changes SafeRent has agreed to make are key to ensuring the original intention of the nation’s voucher programs, helping to erase historic discrimination in the housing markets.”

Christine E. Webber, co-chair of Cohen Milstein’s civil rights and employment practice, [said in a statement](#) that the court’s decision is a case of first impression for the home rental and property management industries.

“Decision-making algorithms, such as the ones at issue here, are often opaque,” Webber said. “Vendors who develop these algorithms are not willing to disclose all the data they consider or how the data is weighted in score modeling. This is gravely concerning to fair housing, employment, and civil rights advocates as potentially discriminatory bias can be easily coded into automated decision-making platforms. The ability to hold such vendors accountable is essential for full enforcement of the civil rights laws.”

The SafeRent screening service, available both nationwide and in Massachusetts, generates tenant screening reports which instruct housing providers to either accept or reject a rental application based on a numerical screening score, ranging between 200 and 800. The company markets its SafeRent scores as being capable of ranking applicant quality to help housing providers select what they deem to be “better renters,” and its calculation considers applicants’ credit history, other credit-related information, including nontenancy debts, and eviction history.

A spokesperson for SafeRent told Law.com that the company is committed to being an industry leader, and it looks forward to its continued partnerships with property managers, landlords, real estate professionals and the communities it helps build.

“While SafeRent continues to believe the SRS Scores comply with all applicable laws, litigation is time-consuming and expensive,” the SafeRent spokesperson said. “It became increasingly clear that defending the SRS Score in this case would divert time and resources SafeRent can better use to serve its core mission of giving housing providers the tools they need to screen applicants. With this settlement, SafeRent can focus on providing its customers with solutions that enable them to easily, efficiently, and reliably screen rental applicants.”

Each settlement class will include rental applicants who used publicly funded housing vouchers and sought but were denied housing in Massachusetts due to their SafeRent score at any property using the company’s tenant-screening services. One class will be specifically for Black and Hispanic rental applicants and one for all other applicants.

Joining Webber and Corman in representing the plaintiffs were Todd S. Kaplan, of Greater Boston Legal Services, and Ariel C. Nelson, Shennan A. Kavanagh and Stuart T. Rossman, of the National Consumer Law Center in Boston.

Andrew Soukup, Lelia A. Ledain, Marc P. Capuano, Rachel Ellen Grossman, Jeffrey Huberman and Robert Allen Long Jr., of Covington & Burling in Washington, D.C., are representing SafeRent.

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Airlines

EU investigates 'greenwashing' at 20 airlines

Environmental claims come under scrutiny, including the benefits of offsetting emissions from flying



Airlines are facing growing regulatory scrutiny about their environmental impact and the EU has started a wider crackdown on green claims in corporate marketing © Bruce Bennett/Getty Images

Philip Georgiadis and **Kenza Bryan** in London 2 HOURS AGO



EU regulators have opened an investigation of 20 airlines over their potentially “misleading greenwashing practices”, including the claimed benefits of offsetting emissions from flying.

The European Commission said on Tuesday that it had [written to the airlines](#) and to national consumer protection authorities “identifying several types of potentially misleading green claims”.

The airlines were not named, but the national regulators involved are Belgian, Dutch, Norwegian and Spanish.

The regulators’ concerns centre on claims that the carbon emissions from flying can be offset either through investments in environmental projects or the use of more sustainable jet fuels, which still emit carbon when they are burnt but are less polluting than the kerosene that is currently used.

“The airlines are yet to clarify whether such claims can be substantiated based on sound scientific evidence,” the commission said.

Industry body Airlines for Europe said its members “recognise the importance of clear, transparent information about sustainability and our efforts towards achieving net zero carbon emissions”.

It said it was “particularly concerned” about the questions over sustainable aviation fuels, which it said have been “supported and endorsed” by the EU. “The science supports that this is a more sustainable alternative to regular jet fuel,” it added.

Airlines are facing growing regulatory scrutiny about their environmental impact and the EU has started a wider crackdown on green claims in corporate marketing.

Last month, a Dutch court ruled that flag carrier KLM had acted illegally when it claimed customers could “[fly sustainably](#)”, while the UK advertising watchdog in December [banned adverts by three airlines](#).

Flying accounts for around 4 per cent of the EU’s greenhouse gas emissions and, despite an industry-wide pledge to reach net zero carbon emissions by 2050, it is seen as one of the hardest sectors to decarbonise because of the lack of alternatives to jet fuel.

Some airlines have set up schemes to allow passengers to contribute to carbon offsetting programmes or to the higher cost of sustainable aviation fuels.

But the commission said it had found a number of potentially misleading claims, including “creating the incorrect impression that paying an additional fee to finance climate projects with less environmental impact or to support the use of alternative aviation fuels can reduce or fully counterbalance the CO₂ emissions [from flying]”.

It also noted that airlines had made claims about plans to reach net zero emissions “without clear and verifiable commitments, targets and an independent monitoring system”.

It has written to airlines asking for proposals to address the concerns within 30 days, with a view to reaching an “agreed upon” set of changes. The national authorities have the power to sanction companies as a last resort.

The Science-Based Targets initiative, a voluntary standard-setting body that judges the quality of net zero targets set by industries including aviation, [is divided](#) about the benefits of using carbon credits to reach net zero emissions.

Under its existing rules, no major European airline has submitted a climate target ambitious enough to help limit global warming to 1.5C above pre-industrial levels, according to the group's database. EasyJet, Gol, Iberia, Lufthansa and Wizz Air have all been removed from an SBTi validation process for their climate plans after failing to submit sufficiently ambitious targets.

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Sex and Secrets Trigger Downfall of Star Texas Bankruptcy Judge

By James Nani and Ronnie Greene

Deep Dive

- Under David Jones, big-dollar Houston bankruptcies exploded
- Relationship with local lawyer exposed 'swamp' of Houston court

Bloomberg Law News 2024-04-30T10:11:29222692854-04:00

Sex and Secrets Trigger Downfall of Star Texas Bankruptcy Judge

By James Nani and Ronnie Greene 2024-04-30T05:00:18000-04:00

- Under David Jones, big-dollar Houston bankruptcies exploded
- Relationship with local lawyer exposed 'swamp' of Houston court

At "Meatfest," the judge and the lawyers were all smiles.

Judge David R. Jones, who had worked for years to make Houston a destination for high-dollar bankruptcy litigation, can be seen in an October 2022 photo huddled at the barbecue with local attorneys who brought cases before him and also formed a cooking crew.

Among them is Elizabeth Freeman, who had known Jones for years, clerked for him—and had an intimate relationship with him.

That they had been together at least since 2017 was not yet public knowledge, but an anonymous letter alleging favoritism would eventually reveal the relationship.

The revelations it contained cast a shadow upon the court Jones built to prominence, sparked scrutiny of the loose rules allowing lawyers to judge-shop their cases, and prompted a Justice Department unit to try to recover millions from Jackson Walker, Freeman's former firm. The issues are so severe federal officials are pushing to reopen scores of Jones' cases.

This is Part 1 of Bloomberg Law's investigation into the relationships in the Houston bankruptcy court. Coming tomorrow: Part 2.

Still, at the annual cookout all appeared to be well.

Jones, Freeman, and other attorneys can be seen wearing matching aprons embroidered with their team's name "CFN," or Chili F'n Nelson, in the photo posted on Instagram by Albert Alonzo, then Jones' case manager. The lawyers included some who attended evidence classes Jones taught and some, like Freeman, who were partners with Jackson Walker. The Texas law firm earned millions of dollars in fees in cases overseen by Jones while the two lived together.

Their relationship would eventually have consequences for a court and a firm that have handled high-profile bankruptcies, including Neiman Marcus and Gulfport Energy Corp.

By December 2022, Freeman had left Jackson Walker and started her own firm. Jones' and Freeman's years-long romantic involvement—and ownership of a house together—remained hidden until the anonymous letter was finally made public on October 6, 2023.

Jones announced his resignation nine days later as the scandal rocked the bankruptcy world, particularly in Houston, where a clubby, find-a-work-around culture helped put the US District Court for the Southern District of Texas among the top venues for large Chapter 11 bankruptcies.

Jones, ethics experts say, broke cardinal rules of the judiciary. He failed to disclose the relationship or remove himself from cases in which Freeman's firm was involved.

"When it's a hidden relationship, the perception is the judge is playing fast and loose with the rules," said Charles Geyh, an Indiana University law professor who teaches judicial ethics. "If the judge doesn't disqualify, then he damn well better disclose."

Jones didn't respond to interview requests or written questions from Bloomberg Law. Freeman, through her attorney, declined to comment. Jackson Walker did not answer written questions, but a spokesman said the firm responded appropriately when notified of the allegations.

The judge presided over at least 26 bankruptcies in which he awarded Jackson Walker fees while Freeman was a partner and living with him, the Department of Justice's bankruptcy monitoring unit, the US Trustee, said in court filings. He mediated another seven cases involving the firm and Freeman.

In all, Jones approved or oversaw cases in which Jackson Walker was paid at least \$13 million. That includes at least \$1.1 million in fees Freeman billed herself, the US Trustee has said.

"To me the real issue about Houston is not so much about David Jones, although I think it's horrific," said former Nevada bankruptcy judge Bruce Markell, a professor of bankruptcy law at Northwestern Pritzker School of Law. "It shows to me the environment down there is basically a swamp."

Bloomberg Law is investigating US bankruptcy courts. If you have information about questionable practices in the courtroom or relationships among judges and lawyers, please send tips to James Nani or Ronnie Greene.

Close Ties

Large bankruptcy cases are sprawling affairs that can take years and involve billions of dollars and scores of creditors. But the bankruptcy bar itself is a tight community. "It tends to be that everyone knows each other," one judge recently remarked.

In Houston, that closeness was exemplified by the tag-team relationship between Jones and fellow US Bankruptcy Judge Marvin Isgur. A former executive for his uncle's Houston-based real estate empire, Isgur pivoted careers to become a bankruptcy attorney after the city's 1980s housing bust.

The two went back. Isgur and his former law partner hired Jones as an associate at their downtown law firm after he graduated from the University of Houston in 1992. Jones has called Isgur his mentor.

"Everything I am and everything I know I owe, at least in part, to him," Jones said of Isgur in a podcast hosted by law firm Sheppard Mullins and the American Bankruptcy Institute.

Jones, a North Carolina native, worked as a corporate financial analyst and a self-employed computer consultant before going back to school to become a lawyer.

Isgur, in turn, called Jones his "stubborn adopted son" during a banquet last year in Jones' honor. Isgur, who remains on the bench, declined to comment.

When Isgur became a judge in 2004, Jones moved to Porter Hedges LLP in Houston, where he worked with Freeman.

Jones joined Isgur as a bankruptcy judge in 2011 after practicing for 19 years. At the end of 2012, his assets ranged from \$2.8 million to \$9.3 million, according to disclosure forms.

Freeman left Porter Hedges to become Jones' permanent law clerk when he joined the bench. It's not clear when their intimate relationship began. By 2012, both Freeman and Jones filed for divorce from their respective spouses.

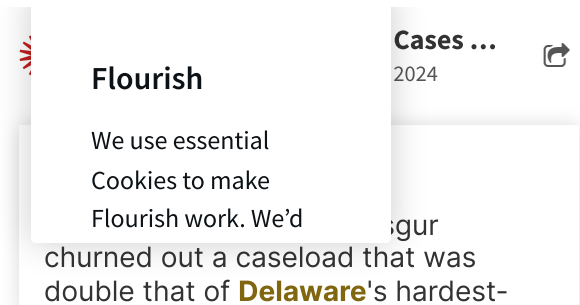
'The Judge Who Saved Texas'

Isgur and Jones presided over a bankruptcy court previously known for the case that got away.

In 2001, Houston-based Enron Corp. filed what was then the largest corporate bankruptcy in US history—in New York's southern district. The loss stung the pride and wallets of the Houston bar.

John Ray, who oversaw Enron's liquidation, said it was typical that New York lawyers chose New York or Delaware for complex Chapter 11s back then.

Jones became chief bankruptcy judge for Houston in 2015 and set about putting in place a slew of rules that turned the district into a national powerhouse. Vitally, those who filed complex Chapter 11s knew they would get one of two judges—Jones or Isgur—despite others being available. That provided what Jones called "predictability."



"Texas became a favored forum in the last several years because of the perceived ability to handle the Chapter 11 cases with speed," Ray said.

Yet predictability "is only something lawyers like if it means that they win," said Georgetown University law professor Adam Levitin. "The whole 'predictability' trope is hogwash."

The judges scheduled emergency hearings quickly, even on weekends or evenings, and often ruled from the bench the same day. Jones convinced the clerk's office to get his case manager, Alonzo, a government-issued cell phone, and then published that number on the court website to ensure lawyers easy access to the court.

For companies seeking a quick resolution, the judges provided a "really tight, choreographed playbook," said Nick Montgomery, head of research at BankruptcyData.com.

Houston's docket grew—and then exploded—in what Isgur has called the "David revolution."

From 2017 to his resignation in 2023, Jones took on 81 large corporate cases with assets ranging from \$50 million to billions of dollars, the most among bankruptcy judges nationwide, according to data compiled by BankruptcyData.com and New Generation Research Inc. Isgur ranked second in handling such cases, with 58.

Jones was the "judge who saved the Texas bankruptcy practice," said an article in The Texas Lawbook. He approved hourly fees of \$1,400 or more that were in line with New York or Delaware rates. "Bankruptcy lawyers today are so specialized, they are so talented," he told the Lawbook. "It doesn't bother me one bit."

Backwater to Boomtown

The changes made Houston a "judge shopping district" that could "attract a megacase clientele," Levitin wrote. "Houston went from being a bankruptcy backwater to becoming the single most popular destination for large, public company bankruptcy filings."

Jackson Walker moved strategically to file cases in its hometown.

At least five companies Jackson Walker represented used a Houston-area PO Box address as their hook to file in the Southern District of Texas, records show. A shareholder in one of those cases, involving California-based drug developer Sorrento Therapeutics, as well as the US Trustee, accused the law firm of manufacturing a connection so it could bring the case locally. In court, Jackson Walker said its actions were proper.

With Houston taking off, bankruptcy behemoth Kirkland & Ellis, the world's largest law firm by revenue, began teaming up with local firms such as Jackson Walker.

The firm's appeal was "straightforward," Kirkland said in court papers. It had "substantial on-the-ground resources," and its partners included former clerks for both Isgur and Jones. By early 2016, Kirkland had brought at least three cases to Houston.

The court created a committee stacked with local and national bankruptcy attorneys to help improve procedures. It eventually grew to 21 members, including then-Kirkland partner James H.M. Sprayregen — and Freeman.

Jones and Isgur "were the heroes of the Southern District of Texas," said Lynn LoPucki, a law professor at the University of Florida Levin College of Law.

With those cases come enormous fees for the bankruptcy bar, some of whose members may have known about Jones' relationship with Freeman but were hesitant to speak out.

"There's a natural reluctance to be turning in your colleagues," LoPucki said. "I don't think anybody would want to be the snitch who causes the end of cases."

In May 2017, the judge agreed to pay \$985,000 cash for a four-bed home in the growing Houston neighborhood of Westview Terrace, records show. Freeman and Jones had toured the home together, said a source with knowledge of the deal. They soon filed paperwork with the Harris County clerk's office showing they jointly owned it.

Freeman left her clerkship with Jones in 2018 and started working at Jackson Walker, which made her a partner. The firm said it didn't formally learn of the relationship until 2021.

Jones had a rule that his former clerks couldn't personally appear before him for the amount of years they clerked for him, which applied to Freeman when she joined the firm, a Jackson Walker spokesman previously said. That rule didn't prevent Freeman from working or billing on cases before Jones, the spokesman has noted.

She was a success at the firm, which "grew very substantially" after she joined, Jackson Walker's then-general counsel Patrick R. Cowlshaw said in an internal memo filed in court.

By the beginning of 2021, Freeman was promoted to an equity partner, meaning she could share in Jackson Walker's firmwide profits.

By then, she and Jones had owned their home for more than three years and had lived together continuously “except during the COVID-19 school closures when she lived with her children at another location,” the US Trustee has said in court records.

Amid Houston’s bankruptcy bonanza, these connections remained undisclosed in court.



Bankruptcy Club - SDTX Asset Va...

By Jon Meltzer on 18 Apr 2024



A Haven for Pricey Cases

As Jones and Isgur's influence grew, the Southern District of Texas became a magnet for bankrupt entities with

Clubby Culture

For years, Jones navigated potential conflicts of interest that surfaced in the insular bankruptcy world. All the while, Jones stayed close with many of the lawyers who came before him, and closer still to Freeman.

The “Meatfest” gathering in 2022 offers a glimpse into the inner circle of Houston’s bar and bankruptcy court.

Jones had other social ties to those in attendance. In 2019 he certified the marriage of Christopher Adams, a partner at local firm Okin Adams, and Susan Tran Adams, a partner at Tran Singh, another local firm. He also certified the marriage of Genevieve Graham, another lawyer at the cookout, before she went to work at Jackson Walker.

Tran had practiced in front of Jones, including in the bankruptcy of Sorrento Therapeutics, though the firm said it had no connection to any bankruptcy judge. Adams and Tran didn’t respond to interview requests, nor did Graham.

Nancy B. Rapoport, a bankruptcy law professor at the University of Nevada, Las Vegas, said behind-the-scenes gatherings raise questions of fairness and access.

“The fuzziness (and thus the risk) increases as soon as a social relationship between a judge and a lawyer appearing before her slips away from the public eye,” Rapoport wrote in a paper analyzing the Jones imbroglio.

In court, Jones praised lawyers who came before him, including those from Jackson Walker and Kirkland & Ellis.

In J.C. Penney Co.'s \$4.9 billion bankruptcy, for instance, Jones defended the Kirkland-Jackson Walker lawyers from shareholder complaints. "I am ashamed to some degree that I live in a country where people are targeted for trying to do good work," he said. In that 2020 case, Jones awarded Jackson Walker \$1.1 million in fees, with \$286,000 attributable to Freeman.

With Jones and Isgur on the bench, conflicts were sometimes resolved on the fly.

In April 2019, attorney Jim Prince of Baker Botts, appearing for Weatherly Operating LLC, told the court his client urgently needed cash from its bankrupt affiliate, Weatherly Oil & Gas LLC, to make payroll.

Botts' appearance took Isgur by surprise because his son-in-law, Scott A. Keller, was then a Baker Botts partner. "It's a concern," said the judge, who announced he had to recuse himself from the hearing.

Isgur had a quick solution. He left to go get Jones, who walked in six minutes later.

Then came another conflict.

Among the attorneys representing debtor Weatherly Oil & Gas were Jones' former judicial staffers, Freeman and Veronica Polnick of Jackson Walker. Jones announced that they usually would have been prohibited to appear in front of him.

But on that day, he said: "If anybody has an issue with it, please raise it and I'll figure out what to do about it."

When no one objected, Jones signed off on the related company's financing request. Prince stepped away, Isgur returned to the bench, and the session continued.

The obvious conflict was resolved. But as in so many other hearings, Jones said nothing about his relationship with Freeman.

Coming tomorrow in Bloomberg Law: Part 2

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Dentons, Boies Schiller sued over failed Senegal power plant deal

 [reuters.com/legal/legalindustry/dentons-boies-schiller-sued-over-failed-senegal-power-plant-deal-2024-04-29](https://www.reuters.com/legal/legalindustry/dentons-boies-schiller-sued-over-failed-senegal-power-plant-deal-2024-04-29)

David Thomas

Signage is seen outside of the law firm Dentons in Washington, D.C., U.S., August 30, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

April 29 (Reuters) - Law firms Dentons US and Boies Schiller Flexner have been hit with a lawsuit demanding \$900 million over accusations that the firms misled a client for years about the enforceability of a contract with Senelec, Senegal's state-owned electric power company.

The lawsuit , opens new tab, filed Friday in Manhattan federal court by a Massachusetts businessman and the energy companies he owns, alleges Dentons and Boies Schiller and several of their attorneys engaged in "wholesale acts of fraud, extortion, obstruction of justice, perjury" and other violations.

A Boies Schiller spokesperson said the lawsuit has no merit and the firm is "confident that it will be resolved quickly."

A spokesperson with Dentons did not immediately respond to requests for comment on the allegations.

New York-based attorney Paul Batista, who is representing plaintiffs Frank Corsini and his companies, Liberty ECO and Liberty-CITIC, said he believes they "have a pretty significant case against the defendants."

The plaintiffs hired Dentons in 2012 as they negotiated with Senelec over the development of a "large energy generation facility," the lawsuit said. Batista said his clients are involved in the construction of power plants and other power-generating facilities.

The plaintiffs negotiated a power purchasing agreement with Senelec in 2012, the complaint said, but the agreement was never approved by Senelec's board. For years, the plaintiffs' former lawyers at Dentons and later Boies Schiller insisted that the agreement was valid and enforceable, the lawsuit alleged.

The lawsuit said Dentons and Boies Schiller ignored "red flags" with the contract in order to "generate millions of dollars in fees."

The plaintiffs later accused Senelec of violating the power purchasing agreement and lodged a claim before the ICC International Court of Arbitration, seeking more than \$250 million in damages. An ICC tribunal in May 2020 ruled that the contract was not binding and that

Senelec did not breach it.

The New York complaint alleges violations of the federal Racketeer Influenced and Corrupt Organizations Act, as well as fraud and other claims. It seeks more than \$300 million in damages, which would be automatically tripled under RICO.

The case is Corsini v. Dentons US LLP, U.S. District Court for the Southern District of New York, No. 1:24-cv-03196

For Frank Corsini and plaintiff companies: Paul Bastista of Paul Batista PC; and Michael McNutt and Benoit Le Bars of Lazareff Le Bars

For the defendants: Not yet available

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Reporting by David Thomas

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David Thomas
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<https://www.law.com/2024/04/29/another-roundup-trial-kicks-off-in-missouri-monsanto-faces-3-plaintiffs/>



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NEWS

Another Roundup Trial Kicks Off in Missouri. Monsanto Faces 3 Plaintiffs

Jury selection began Monday in St. Louis in a case brought by two Ohio women and one woman in Oklahoma.

April 29, 2024 at 05:34 PM

Toxic Torts



Amanda Bronstad
staff reporter



What You Need to Know

- McDermott Will & Emery partner Anthony Upshaw, in Miami, is stepping in for Bayer's Monsanto, as is Shayna Cook, a partner at Chicago's Goldman Ismail Tomaselli Brennan & Baum.
- The plaintiffs' team is: Al Stewart and Scott Frieling of Allen Stewart; Susannah Chester-Schindler, of Waters Kraus Paul & Siegel; and Walt Cubberly from Williams Hart & Boundas.
- Juries since the COVID-19 pandemic have split in Roundup trials across the country, including in Missouri, where Monsanto has won five defense verdicts but lost awards of \$1.25 million and \$1.6 billion.

A Roundup trial involving three women began on Monday in St. Louis, Missouri.

Jury selection began in a case brought by two Ohio women and one woman in Oklahoma who alleged their exposure to Roundup pesticide caused them to get cancer. McDermott Will & Emery partner Anthony Upshaw, in Miami, is stepping in for Monsanto, now owned by Bayer, as is Shayna Cook, a partner at Chicago's Goldman Ismail Tomaselli Brennan & Baum.

Meanwhile, the plaintiffs' team is: Al Stewart and Scott Frieling of Allen Stewart in Dallas; Susannah Chester-Schindler, of Dallas-based Waters Kraus Paul & Siegel; and Walt Cubberly from Williams Hart & Boundas in Houston.

"Monsanto has substantial verdict exposure," said Peter Kraus of Waters Kraus, who is settlement counsel in the case. "They're going to win some cases. But the cases they lose are going to, in many instances, result in massive verdicts and punitive damages, and, ultimately, there's no way they're going to litigate themselves out of this problem. They're going to need to come up with a more creative resolution strategy if they want to resolve this litigation."

Juries since the COVID-19 pandemic have split in Roundup trials across the country, including in Missouri, where Monsanto has won five defense verdicts but lost awards of \$1.25 million in St. Louis and \$1.6 billion in Jefferson City.

In a statement, Bayer said: “While we have great sympathy for the plaintiffs in this case, the full evidentiary record at trial will demonstrate that Monsanto is not responsible for the injuries at issue.”

The trial that began Monday “largely parallels prior Roundup cases,” Monsanto added.

‘Unspecified Claims Regarding PCB Exposure.’

Since the COVID-19 pandemic, Monsanto has lost nearly \$4.3 billion in jury awards but won 12 defense verdicts.

Last month, an Arkansas jury came out with a defense verdict for Monsanto, while a Delaware judge declared a mistrial in another Roundup trial. An Illinois jury came out with a defense verdict last year, as did jurors in Oregon in 2022.

In California, where plaintiffs lawyers won the first Roundup verdicts in 2018 and 2019 totaling more than \$2.3 billion, Monsanto has won three verdicts and lost a \$332 million award in San Diego County Superior Court. Judges have reduced all those verdict awards after trial. Last month, plaintiffs lawyers in Sonoma County Superior Court voluntarily dismissed their Roundup case on the third day of trial.

Juries in the Philadelphia Court of Common Pleas have awarded \$2.25 billion, \$3.5 million and \$175 million. But, last month, a jury sided with Monsanto in the fourth Roundup trial.

The plaintiffs in this month’s Missouri trial are: Deborah Mayes, 70, who used Roundup at her home in Cincinnati for 30 years before being diagnosed with non-Hodgkin lymphoma in 2014; Deborah King, 63, diagnosed in 2018 after spraying Roundup at her various homes in Bellefontaine, Ohio; and Carolyn Wilson, 77, an Oklahoma resident who used Roundup at her home since 2009 and was diagnosed six years ago.

Bayer, in its statement, said the case also involves “unspecified claims regarding PCB exposure.”

“The extensive body of scientific research on glyphosate-based herbicides over four decades, as well as the assessments of leading health regulators and scientists worldwide, support the conclusion that Roundup is safe to use,” Bayer said in its statement.

Bayer added: “Also, the relevant science shows PCBs do not cause NHL, and Monsanto discontinued its production of PCBs nearly five decades ago, conducted hundreds of studies about their safety, and provided warnings to its customers based on the state-of-the science at the time, including warnings to customers and government regulators regarding the need to avoid the use of PCBs where they could come in contact with food.”

Monsanto has been hit with \$1.6 billion in multiple verdicts in Seattle’s King County Superior Court, where former students, teachers and parents at a school have sued over PCB exposure. Another trial begins with opening statements on May 20.

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Ex-Ohio House speaker to be arraigned from prison on state charges, as scheme's impact persists

Ex-Ohio House speaker to be arraigned from prison on state charges, as scheme's impact persists

By JULIE CARR SMYTH

COLUMBUS, Ohio (AP) - Former Republican Ohio House Speaker Larry Householder will be arraigned from federal prison on the 10 new felony counts recently brought against him by the state, as revelations mount surrounding the scandal that landed him there.

Cuyahoga County Common Pleas Court Judge Brendan Sheehan this week agreed to allow Householder to appear at the May 13 proceeding by video stream from Elkton Federal Correctional Institution south of Youngstown, where he is serving 20 years for his role in the largest corruption case in state history. The permission follows postponement of an earlier arraignment on the state's charges where Householder was to appear in person.

A jury convicted Householder, 64, on a federal racketeering charge in June for his role orchestrating a \$60 million bribery scheme funded by Akron-based FirstEnergy Corp. in exchange for passage of a \$1 billion bailout of two nuclear plants owned by one of its subsidiaries.

He has appealed that conviction, arguing that federal prosecutors overstepped the limits of their authority. His lawyers contend that the \$60 million, while undisclosed, amounted to legal campaign contributions permitted under federal law.

"Unlike most other bribery prosecutions, Householder did not receive an envelope of cash or extravagant gifts or trips. Rather, the government presented evidence that Householder helped raised money into a 501(c)(4) organization, Generation Now," his lawyers wrote in February, contending "there is nothing criminal about that."

It turns out the dark money payments flowing from FirstEnergy to benefit powerful Ohio politicians as it was pushing for the nuclear bailout didn't stop with those raised as part of the Householder prosecution.

Recently released records tied to the scandal have revealed that the utility gave \$2.5 million to State Solutions, a 501(c)(4) benefiting Ohio Gov. Mike DeWine's 2018 campaign, and \$1 million to a nonprofit called Freedom Frontier that backed Lt. Gov. Jon Husted gubernatorial bid that same year. The USA TODAY Network Ohio Bureau and The Plain Dealer/cleveland.com, respectively, first reported the sums. DeWine has said he didn't know of the contributions and that his positions are not impacted by political donations. Husted's spokesperson has said he was not affiliated with the dark money group.

The scandal's tentacles for the first time touched DeWine and Husted in November, when both received subpoenas as part of a civil lawsuit brought by impacted FirstEnergy investors. Neither has been accused of wrongdoing.

Householder's federal appeal also raises a host of other issues unrelated to dark money, including that the federal government never charged - nor even brought as witnesses - the fired FirstEnergy executives accused of making the bribes. Prosecutors did, however, secure a sweeping \$230 million nonprosecution agreement with the energy giant admitting to the crimes.

The state's case charges two former FirstEnergy executives - ex-CEO Chuck Jones and Senior Vice President Michael Dowling - on a combined 22 counts, including engaging in a pattern of corrupt activity, bribery, telecommunications fraud and money laundering. Both have pleaded not guilty.

Another man charged alongside Jones and Dowling, former Public Utilities Commission of Ohio Chairman Sam Randazzo, had pleaded not guilty in both federal and state courts before dying by suicide at age 74 earlier this month.

The state indictment on which Householder will be arraigned in May alleges that he misused campaign funds to pay for his criminal defense in his federal case and failed to disclose fiduciary relationships, creditors and gifts on required ethics filings, including in relation to the bailout bill, known as House Bill 6. Specifically, Householder faces one count of theft in office, two counts of aggravated theft, one count of telecommunications fraud, one count of money laundering, and five counts of tampering with records.

Householder was one of five people arrested in July 2020 and charged in the scheme. All were accused of using the \$60 million in secretly funded FirstEnergy cash to get Householder's chosen Republican candidates elected to the House in 2018 and then to help him get elected speaker in January 2019. The money was then used to win passage of the tainted energy bill and to conduct a dirty-tricks campaign to prevent a repeal referendum from reaching the ballot.

Lobbyist and former Ohio Republican Party chairman Matt Borges was convicted alongside Householder last summer and sentenced to five years. He also has appealed.

Lobbyist Juan Cespedes and Jeffrey Longstreth, a top Householder political strategist, pleaded guilty in October 2020 and cooperated with the the government in its prosecution. The third person arrested, longtime Ohio Statehouse lobbyist Neil Clark, had pleaded not guilty before also dying by suicide in March 2021.

The dark money group used to funnel FirstEnergy money, Generation Now, also pleaded guilty to a racketeering charge in February 2021.

[Editor notes: Eds: UPDATES: Adds attorney comment. With AP Photo.; Updates Media.]

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Shining a light on dark money

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Sandusky Register

Shining a light on dark money

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Several of Ohio's top leaders are apparently in the dark when it comes to the schemes of dark-money groups.

Gov. Mike DeWine, Lt. Gov. Jon Husted and Senate President Matt Huffman, all Republicans, pleaded ignorance when recent reporting revealed that money flowed from FirstEnergy into dark-money groups that supported their campaigns.

DeWine, for instance, told reporters this week that he didn't know about \$2.5 million that the electric utility funneled into State Solutions, a dark-money group that backed his 2018 gubernatorial campaign. One \$500,000 donation was labeled "DeWine."

At the time, FirstEnergy was spending big to support candidates it thought would back a bailout of two northern Ohio nuclear-power plants owned by one of its then-subsidaries.

State Solutions is a 501(c)(4) nonprofit, which means that, unlike a candidate's campaign committee, it isn't required to disclose its donors and can take in as much money as donors will give.

Dark-money groups aren't supposed to coordinate with political campaigns, although it is at least usually possible to figure out which candidates they support.

State Solutions was affiliated with the Republican Governors Association, which also supported DeWine and benefited from FirstEnergy's largesse.

The company also plowed \$60 million into bribing then-House Speaker Larry Householder, R-Glenford. The money was funneled through Generation Now, a dark-money group controlled by Householder, who is now serving a 20-year prison sentence after being convicted of federal corruption charges.

Before his fall, though, Householder shepherded House Bill 6 through the Ohio legislature. The bill forced Ohio ratepayers to bail out the two nuclear-power plants and two coal-fired plants, one of which is in Indiana.

DeWine signed HB 6 into law in 2019. After Householder was charged, DeWine initially resisted rolling back the nuclear bailout, but quickly relented to public pressure and supported the successful effort to do so. (The subsidies for the coal-fired plants remain on the books.)

DeWine, Husted and Huffman have never been accused of criminal wrongdoing in the scandal.

It is important to note that receiving political donations or having support from a dark-money group isn't evidence in and of itself of corruption. Donors typically back candidates they believe will advance their agendas.

DeWine insisted that his support for nuclear power wasn't conditioned on contributions to his campaign or outside groups supporting him. He also pointed out that he and Richard Cordray, his Democratic opponent in 2018, both wanted to keep the two nuclear plants operational.

"Both candidates for governor came out with basically the same position, that nuclear energy was important," DeWine said before referencing FirstEnergy. "You'd have to ask those individuals. They were the ones who made the decision. Obviously, we want as much help as we can in a campaign. But contributing to an independent expenditure, we don't have that information."

Therein lies the problem: Almost no one outside the dark-money groups has that information.

Only recently has the public been getting a better sense of how dark money works, at least as it relates to FirstEnergy and its bailout push, because of records made public in criminal cases, lawsuits and regulatory probes stemming from the HB 6 scandal.

It was also reported this month that FirstEnergy gave \$1 million to Freedom Frontier, a 501(c)(4) group that backed Husted when he was running for governor in 2017. He later joined DeWine's ticket.

The money, The Columbus Dispatch reported, was earmarked for the "Husted campaign."

Here's what a Husted spokeswoman told The Dispatch: "The Husted campaign never received this donation and is not affiliated with any of these groups."

Again, campaigns aren't allowed to coordinate with dark-money groups.

Then there's Huffman.

In 2019 and 2020, FirstEnergy gave \$300,000 to Liberty Ohio, a 501(c)(4) nonprofit that company officials and lobbyists viewed as "Huffman's C4," The Plain Dealer reported this week.

Huffman told reporters Wednesday that he wasn't raising money for any dark-money group.

"Random conversations from five or six years ago, I don't know why people are saying that," he said. "Most C4s, I don't really think, are very effective. Folks are making money off it, trying to get donors to give them money, telling donors they're doing things they want them to do."

Except dark-money groups are effective, which is why donors keep giving them money.

And three of the most powerful elected officials in Ohio should have some idea what's going on with dark-money groups that apparently supported them.

So should voters, but that would require putting in place laws requiring dark-money groups, which have few checks on how they spend money, to, at a minimum, disclose their donors.

The U.S. Supreme Court's Citizens United decision in 2010 opened the floodgates to unlimited political spending, which the court equated to free speech.

Again, though, voters deserve to know who's letting their money talk in political campaigns.

Democrats have been far more critical of unlimited spending and dark money than Republicans, but both parties have benefited from them.

Unfortunately, proposed bills that would require greater transparency from dark-money groups have failed to gain much traction in Congress or the Ohio Statehouse.

There are millions and millions of reasons why.

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Apollo Had Some Death Bets

By Matt Levine

(Bloomberg Opinion) --

Insurance

Life insurance is, financially, a bet on your early death. If you buy a 20-year term life insurance policy with a \$5 million death benefit and premiums of \$25,000 a year,¹ and you live for 21 more years, then you pay a total of \$500,000 in premiums and get back \$0 in benefits. If you buy that same policy and die the day after you buy it, you pay roughly \$0 of premiums and get back \$5 million of benefits. The earlier you die, the better you do. Financially. Only financially. Otherwise you'd prefer to die later.

Of course the central problem is that, if the insurance policy *does* pay out the \$5 million, *you* don't get it. You're dead; that is the prerequisite for getting the money. Somebody else gets it. Ordinarily that somebody else will be your heirs: your spouse, your children, whoever. You hope that they too will prefer that you die later, even if it means that they don't get the \$5 million,² but that is not always true, and murdering your spouse for the life insurance money is a fairly common plot element in fiction and also in real life.

On the other hand if you walked into an insurance office and asked to buy a \$5 million life insurance policy on your neighbor down the street, they would probably refuse to sell it to you. You have no particular emotional attachment to you neighbor, as far as the insurance company knows, and they figure you'd probably be happier with him dead and \$5 million than you are with him alive and no money. They don't necessarily think that you're planning to murder him, but they'll have suspicions. This is called the "insurable interest" requirement.³

There are nuances. Two important ones are:

1. You can buy life insurance on yourself, which will pay off when you die, and you can decide (before you die) who will get the payout. Often it will be your spouse or children, but you can write whoever you want into your will. (More practically, you can set up a trust while you are alive, have the insurance pay out into the trust when you die, and set the beneficiaries of the trust to your heart's content. ⁴) If you want to leave all your worldly possessions to Harvard University, then Harvard will get the \$5 million when you die, and it will presumably be better off with you dead (and the money) than with you alive (and no money). Lots of people write Harvard into their wills and Harvard does not, as far as I know, go around murdering them, though that would be a pretty good plot element in fiction.
2. If you have a life insurance policy, you can *sell* it. There is a relatively recent history of people who take out life insurance policies, realize that their circumstances have changed, and decide that they'd rather get some money now than get all the money when they die. ⁵ A "life settlement" business exists in which investors buy these people's insurance policies, make their premium payments, and collect when they die. This can be good for the people selling their policies: Instead of just letting their policies lapse for nothing, they can sell the policies to get cash now. And it can be good for the investors: They get exposure to a risk (people dying) that is probably uncorrelated to the rest of their investments. (It is bad for insurance companies because it means that they have to pay out on some policies that, in the absence of a resale market, would lapse. ⁶) This remains controversial, but it is a multibillion-dollar business these days, and there do not seem to be any reported cases of the investors murdering the insureds.

In fact, the life settlement business seems to be so good that demand for insurance policies as an investment asset outstrips supply: Plenty of investors want that exposure, but there are not a lot of people, these days, with life insurance policies that they want to get rid of.

But if you combine the two nuances, a solution presents itself: People could take out new life insurance policies *specifically* to sell to investors. ⁷ Go to an insurance company, get a \$5 million policy, have it pay out to a trust, make an investor the beneficiary of the trust, have the investor pay the premiums, and charge the investor a fee for the exposure. This is called "stranger-originated life insurance," or STOLI, and it is largely *not* allowed. It goes too far. It is too icky, and too far from the traditional purposes of insurance. Here is a 2010 Federal Deposit Insurance Corp. paper on "Senior Life Settlements: A Cautionary Tale," warning against it:

In the case of wet-ink policies (new life insurance policies sold immediately after being issued – before the ink is dry), the applicant commits fraud on the application by claiming he or she needs life insurance for estate planning purposes. One type of wet ink policy is STOLI.

STOLI has many variations but only one purpose: to allow an investor without an insurable interest to initiate and profit from a life insurance policy on a stranger. The mainstream insurance industry strongly opposes STOLI, arguing it is fraud for a person to buy a policy with only a profit - and not insurance - motive. STOLI is prohibited or statutorily restricted in many states.

But it does seem to be quite a business, with agents and brokers going around looking for older customers to take out insurance policies to resell to investors. ⁸ They seem to be on shaky legal ground in many places. But if you are an investor who buys life insurance policies on the secondary market, you don't necessarily *know* the history of the insurance policy. Perhaps the insured bought the policy for her legitimate estate-planning purposes, changed her mind, and sold it for cash. Or perhaps a broker talked her into buying the policy specifically to resell it. If it's the former, then you can go ahead and buy it and collect the death benefit. If it's the latter, then you can't.

Anyway here's this:

Apollo Global Management Inc. bet on the longevity of senior citizens by acquiring illegal life insurance policies and funneling the payouts through shell entities, according to a new lawsuit. ...

"Apollo has been carrying out a widespread fraudulent human life wagering conspiracy designed to not only hide its involvement, but to create the false appearance that the policies it owns are somehow legitimate," according to the complaint. "Worse still, when Apollo senses a claim is going to be brought, it attempts to dissolve its shell entities to give itself yet another layer of protection."

A spokesperson for Apollo didn't immediately respond to a request for comment Monday.

The lawsuit was filed April 26 in Delaware's Chancery Court by the estate of Martha Barotz, whose policy allegedly paid out \$5 million after she died in 2018. The case stems from earlier litigation between the Barotz estate and the Apollo-linked trusts, along with the estate's subsequent attempts to collect on the nearly \$7 million judgment it won, according to the new complaint.

The policy allegedly originated in 2006 when Barotz, then in her 70s, agreed to let an enterprise called Life Accumulation Trust III take out the policy in exchange for a payment equaling 3% of the death benefit. Stranger-originated policies are often securitized in large portfolios that obscure their details from the people they "prey on," according to the lawsuit.

"In this way, the senior citizens have no idea who owns a policy on their life, and who wants them dead," the suit says. "This is precisely what happened with the policy here."

Martha Barotz died in 2018, at the age of 83, and there is no reason to suspect that Apollo murdered her. Here is the complaint, and here is the earlier court decision. As far as I can tell the situation is that, in 2006, Barotz took out a \$5 million life insurance policy specifically to sell it: A life-settlement company offered her \$150,000 to take out a \$5 million policy and name its vehicle, Life Accumulation Trust III, as the beneficiary. Here is how the earlier decision describes it:

LATIII, a Delaware trust created in 2005, operated the Life Accumulation Program (the "Program") which invited certain "qualified" senior citizens to create Delaware statutory trusts which would then be utilized to acquire life insurance policies on their behalf. LATIII provided all of the capital to the trusts to pay for the premiums on the policies. In addition, LATIII was made the initial "sole beneficiary" of the trust, with power to transfer the policies to other secondary market purchasers. The senior citizens who participated in the Program received 3% of the face value of the life insurance policies taken out by LATIII via the Delaware statutory trusts.

Apparently Barotz did this a lot: She had multiple life insurance policies that she sold, and the investors here "characterize the Barotzs as 'veterans of the secondary life insurance marketplace.'" ⁹ She got the \$150,000, the investor made the premium payments, and she signed a disclosure statement acknowledging that "a third party investor with an 'economic interest' in the death of Ms. Barotz could own any life insurance policies procured on Ms. Barotz's life through the Program." That *sort of* says "we have an economic incentive to murder you"? Again, though: no murder!

In 2011, Life Accumulation Trust III sold the policy to Financial Credit Investment, an Apollo entity. From the complaint:

William Sullivan, an Apollo employee who served as the managing director of the FCI suite of funds between 2010 and at least 2019, indicated in trial testimony that "FCI is mainly focused on longevity mortality risk assets," which are "most sensitive to the risk of people living longer or not . . . by buying life insurance policies that people no longer need anymore and would otherwise surrender back to the carrier." ...

Because "FCI has a lot of capital put to work," the suite of funds does not dabble in the individual policy market but, instead, "only purchase[s] portfolios of policies from existing investors ... that have already aggregated a portfolio," otherwise referred to as the "tertiary market."

So Apollo allegedly bought life insurance policies in bulk, without necessarily knowing which were (1) legal valid normal life insurance policies whose holders eventually decided to sell them or (2) bad fake policies like this one. But then Barotz died, the policy paid out, the Apollo fund claimed the benefit, and Barotz's estate sued for the money back, arguing that this was a bad fake insurance policy. ¹⁰

The investors argued that actually *Barotz* had done a fraud on *them*: She took the \$150,000 to set up the policy for investors, and then her estate tried to get the money back: "Defendants raise arguments that Ms. Barotz was, purportedly, the sole driving force in the 'fraudulent scheme' to benefit herself and her family, and that her estate should not be able to benefit from Ms. Barotz's 'unclean hands.'" It does seem a little odd that they paid her for the policy, they paid the premiums, and her estate gets to keep the money. But the court was not sympathetic to the investors' arguments, and last year it awarded the money to her estate. Which is now suing Apollo to try to collect.

What a weird market. There is just a lot of money sloshing around here: On a deal like this, the investor has to pay the insurance premiums, it has to pay the insured a 3% commission to get her to take out the policy, it has to pay the agent a commission for signing her up, and of course it has to pay lawyers and take the risk that the policy will be invalid. And yet there's apparently still enough money in it to make it a good, securitizable investment. Who is selling all this underpriced life insurance?

SocGen Delta One

The basic idea of a delta one desk is that you are selling Thing X to a customer, and buying Thing Y from the market, and Thing X and Thing Y are exactly equivalent. Thus "delta one": If you sell stock options, you hedge the options by trading stock, and the amount of stock you need to buy or sell – the "delta" of the option – changes over time as the stock price changes. But if you sell index futures contracts, you can hedge them by buying the stocks in the index (or an exchange-traded fund, etc.), and the ratio never changes: It's always one-for-one, always a delta of one. You're buying a thing at a low price and selling an equivalent thing at, ideally, a higher price.

At some level this should be a fairly low-risk business: The stuff that you are long and the stuff that you are short exactly offset each other, so you shouldn't make or lose money as the market moves. On the other hand, you are trying to make money, and the only way to make money is to take *some* risk. If you are not taking market risk – if all your trades are fully hedged – and you're making money, then you're taking some other, slightly more esoteric risk. You're taking funding risk, or interest-rate risk. You're taking the risk of the basis between Thing X and almost-but-not-quite-identical Thing Y. You're writing one-day lookbacks into your swaps trades, and taking the legal and reputational risk that a regulator will fine you for tricking your customers.

Or bigger risks. One of the great delta-one failures of recent years is when Archegos Capital Management did bazillions of dollars of equity total return swaps with big banks. Those banks fully hedged their stock-price risk – they were long a bazillion dollars of the underlying stock, and short an offsetting bazillion dollars of swaps to Archegos – but they were taking enormous *credit* risk to Archegos, and when Archegos blew up several of them lost money.

But of course *the* great delta-one failure of recent years was Jérôme Kerviel's rogue trading at Société Générale in 2007 and 2008. The risk that he took was even simpler: He'd buy Thing X for himself, and *pretend* to sell Thing Y as a perfect hedge. He was doing completely unhedged directional trades, and tricking the computer systems into thinking he was doing completely hedged trades. When the stuff he bought went up, this was good: It is easier to make money by buying a thing that goes up than it is to make money while being perfectly hedged. And then the stuff he bought went down and he lost \$5.2 billion and went to prison.

I do not have a fully developed theory of delta one roguishness, but it does seem to have a higher-than-usual incidence of roguishness. There is something about its technicality, about the discipline of making money by buying and selling almost-but-not-quite identical things, that might give people ideas. Especially at SocGen:

A pair of traders in Hong Kong have left Societe Generale SA after the French bank discovered a batch of risky bets that went undetected by the firm's risk-management systems, according to people familiar with the matter.

Kavish Kataria, a trader on the bank's Delta One desk, departed last year along with team head Ken Ng after an internal review of the transactions, said the people, asking not to be identified as the details are not public.

While SocGen didn't lose any money from the transactions, the trades could have cost the Paris-based lender hundreds of millions of dollars had an intense market downturn occurred, the people said. The lapse raised questions about risk management at one of Europe's biggest banks.

"Our strict control framework has allowed us to identify a one-off trading incident in 2023, which didn't generate any impact and led to appropriate mending measures," a SocGen spokesperson in Paris said in an emailed statement.

A famous stylized fact about rogue traders is that you only hear about the ones who lose money. From this, you might reasonably conclude that (1) lots of traders take less-than-explicitly-authorized risks with their firms' capital, (2) some of them make money and get promoted, possibly with a "good trade but stop taking unauthorized risks, you lovable scamp" warning, and (3) others lose money and get fired in disgrace. But here we have the rare case of traders getting in trouble for taking less-than-explicitly-authorized risks *without* losing money. Investment bank risk management is sophisticated enough, and taken seriously enough, that now you can get fired for *theoretical* losses as well as real ones. (Though if they had *made* hundreds of millions of dollars, instead of being flattish, I wonder if they'd still be there.)

Also it's not clear how delta one the actual trade was:

Kataria had bet on volatility staying low across Indian stock-market indices, the people said, a strategy that involves dealing in options. SocGen's risk managers failed to pick up on the trades because of a glitch related to their timing, the people said.

I suppose if you're an index trader you're also allowed to buy index options. (Or not: "The person who made the trades in Hong Kong had not exceeded authorised trading amounts, but had placed bets on options contracts linked to Indian stock market indices that they had not been authorised to carry out.") Also I must say that Indian stock options are having a moment now: First Jane Street Group was apparently making buckets of money trading Indian options, and now SocGen had a brush with losing hundreds of millions of dollars trading them.

CZ

"The richest person ever to do time in US federal prison" is an odd distinction, but it does seem only right that it would belong to a crypto mogul. The thing about crypto in 2024 is:

1. There is just a *ton* of illegality, ranging from the US Securities and Exchange Commission's crackdown on all crypto as securities-law violations, to the US Department of Justice's crackdown on crypto money laundering, to the widespread fraud involved in the collapse of so many crypto lending platforms in 2022. A lot of crypto moguls really are in custody!
2. The market is still pretty good, and people are somehow still making fortunes in crypto.

It would just be weird and old-fashioned if the richest person in prison was, like, a Mafia boss or an arms merchant or a regular Ponzi schemer. So:

It's "better to ask for forgiveness than permission" when it comes to complying with the law, the billionaire founder of the Binance cryptocurrency exchange once told his team, according to the US government.

Now it's time for Changpeng "CZ" Zhao to ask for forgiveness, yet prosecutors aren't exactly in the mood to grant it. In a court filing before his sentencing hearing on Tuesday, they cited the flippant attitude on display in this and other remarks as one of the reasons they're recommending the court give him three years in prison – longer than what guidelines prescribe – following his guilty plea to violating anti-money laundering laws in November.

Should a Seattle judge agree with prosecutors and order him jailed, Zhao would enter the history books as the richest person ever to do time in US federal lockup since his ownership of Binance – and an estimated \$43 billion personal fortune tied to it – remain intact. His wealth is likely to grow even bigger as Binance's business accelerates amid crypto's latest bull run.

I think that if the founder and until-a-minute-ago chief executive officer of a traditional financial firm was sent to prison for the actions of that firm, that would generally be, you know, bad for business. But in crypto it is not so obvious; it's possible that a certain willingness to defy the US government – even at the cost of prison for a billionaire – is good branding for a crypto exchange. Binance's explicit message, since settling with the Justice Department, has been that it is investing in compliance and is now a safer and more compliant exchange than most of its competitors. But it is possible that there are some customers to whom "hey our founder went to prison for facilitating money laundering" is an appealing message.

Elsewhere: "FTX Millionaire Pays \$1.5 Million for Gold Watch Recovered From Titanic," perfect.

McKinsey rap

"McKinsey Seeks to Pump Up Partner Morale With Rap and Rock" is the ominous headline here, but to be fair the McKinsey partners were not the ones rapping:

McKinsey & Co. sought to rally its partners with upbeat declarations and blasts of rock and rap music in Copenhagen earlier this month, attempting to boost morale during a tumultuous period for the giant consulting firm.

Global Managing Partner Bob Sternfels told his fellow partners at the mid-April event that McKinsey is expecting a good 2024 after its challenges of the past 18 months. He called it a "turn the page" moment, a person familiar with the matter said. ...

The musical soundtrack included a selection of hits from pop artists including American rapper Eminem and singer Bob Marley. "Tubthumping" by former British rock band Chumbawamba was also played, with its signature lyrics: "I get knocked down, but I get up again. You are never gonna keep me down."

Obviously if there is video of a sea of McKinsey consultants shouting along to Tubthumping I would like to see it.

Things happen

Cocoa Plunges Most Ever With Trader Exodus Sparking Huge Moves. HSBC's Noel Quinn Ends 37-Year CEO Dream With Surprise Departure. Office-Loan Defaults Near Historic Levels With Billions on the Line. A Drought of Treasury Bills Risks Muddying End of Fed's Balance-Sheet Tightening. BOJ Accounts Suggest Japan Intervened Monday to Support Yen. Walmart Takes On Trader Joe's and Whole Foods With New Premium Brand. Executive Flights on Corporate Jets Worth Millions More Than Reported. Mets celeb Seymour Weiner, age 97, has heard your jokes – and he loves them. Man who ate tub of cheese balls in NYC admits he nearly threw up.

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1. An insurance company's online calculator gives me an estimate of \$2,197 per month, or \$26,364 per year, for a 20-year term life policy for a nonsmoking 60-year-old woman with a \$5 million death benefit.
2. For two reasons: Because they love you and want to have you around, but also because the most normal use case for term life insurance is that you are a middle-aged employed parent of minor children who rely on your income, and if you die they'll get the insurance money but will lose the income. A great many life insurance customers really are worth more to their families, just **financially**, alive than dead. But not all of them.
3. Title 18, section 2704(c) of the Delaware Code explains the insurable interest requirement in Delaware, the relevant state for today's story. "In the case of individuals related closely by blood or by law, a substantial interest engendered by love and affection" is enough for insurable interest; otherwise you want some economic interest (employment, etc.) in the person **remaining alive**.
4. See section 2704(c)(5) for insurable interests of trusts.
5. The history is laid out in Susan Lorde Martin's 2011 article "Betting on the Lives of Strangers: Life Settlements, STOLI, and Securitization," and the modern life settlement business dates from the AIDS crisis: "In the 1980s, ... people with AIDS were suffering dire medical and financial circumstances to be followed by a sure and imminent death. The idea of viatical settlements developed to allow AIDS patients to sell their existing life insurance policies to strangers, who would pay for them immediately in exchange for receiving the death benefit. The viatical settlement industry waned as medical advances allowed AIDS patients to maintain their jobs and live longer lives," but some form of it is still around, though without the expectation of imminent death.
6. Lorde Martin: "The life insurance industry argues that its surrender value schedule and the fact that policyholders allow thirty-eight percent of all policies to lapse (receiving no death benefit) permit life insurance companies to keep premiums as low as they are." That is, from the insurance company's perspective, the bet is (1) they collect premiums, (2) they pay out if you die during the term but (3) they **don't** pay out if you stop paying the premiums before the term expires. Some people stop paying their premiums, so their insurance expires worthless – even though actuarially it has some value. If those people all sold their policies, instead of letting them lapse, they'd be better off, but the insurance company would pay more benefits, which would mean that insurance would be more expensive.
7. See *PHL Variable Insurance v. Price Dawe 2006 Insurance Trust ex rel. Christiana Bank & Trust Co.*, a 2011 Delaware Supreme Court case: "In approximately 2004, securitization emerged in the life settlement industry. Under this investment method, policies are pooled into an entity whose shares are then securitized and sold to investors. Securitization substantially increased the demand for life settlements, but did not affect the supply side, which remained constrained by a limited number of seniors who had unwanted policies of sufficiently high value. As a result, STOLI promoters sought to solve the supply problem by generating new, high value policies."

8. Lorde Martin described the typical mechanism in 2011: "The insured may be lured to participate by the promise of two years of free insurance, gifts of a car or a trip or cash, and the promise of a substantial profit on the sure sale of the policy. Typically, the broker or agent, under an arrangement with a life settlement company, will solicit a senior to purchase a life insurance policy with a high face value, with the company lending him the money to pay the premiums for two years, or whatever term state law sets as the period during which a claim can be contested by the insurance carrier. It is common for the insured to set up an insurance trust naming his spouse or other loved one as the trust beneficiary. If the insured dies within that period, his spouse, as beneficiary of the insurance trust, will get the death benefit (the free insurance), pay back the loan plus interest from the proceeds, and often pay the broker up to fifty percent of the benefit received. If the insured lives beyond two years or the contestability period, then the life settlement company buys the beneficial interest in the insurance trust, paying the insured a lump sum percent of the face value of the policy, usually between ten and thirty percent, and the agent will get a commission of about ten percent or more of the purchase price. The life settlement company or its investors will continue to pay the premiums on the policy, and when the insured dies, they will get the death benefit. Clearly, the sooner the insured dies, the greater the company's profit."
9. A 2022 Delaware Superior Court decision about a *different* policy of hers gives some context: "In 2006, the Barotz family became clients of Spalding Financial Group ('SFG') through Craig Stack, one of its insurance agents. ... Lindsay Spalding – another insurance agent at SFG – offered testimony concerning the business practices that SFG employed at the time. ... In the current case, Ms. Spalding testified that SFG maintained a 'streamlined' process under which SFG would contact various groups to secure financing for their clients' insurance needs." One gets the sense that the agent might have been the one who came to Barotz with the idea.
10. To me, if it was a bad fake insurance policy, it seems like the right answer would be for the *insurance company* to get the money back. But that's not how it works: "Section 2704(b) 'directs that if a death benefit is paid under an insurance policy that lacks an insurable interest, the estate of the insured may recover the death benefit from the recipient,'" said the court, so "the Estate is entitled to the proceeds paid out to the Defendants from the Policy as a matter of public policy."

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Tesla Inc

What does Elon Musk's China trip mean for Tesla?

EV maker's chief executive held talks with Chinese premier and secured key approval for data use



Tesla has sealed a deal with Chinese tech giant Baidu to use the group's mapping and navigation systems © Qilai Shen/Bloomberg

Edward White in Shanghai and **Peter Campbell** in London YESTERDAY



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Elon Musk appears to be on the cusp of deploying Tesla's "full self-driving" system in the world's biggest car market.

Musk flew out of Beijing on Monday after meeting China's premier, Li Qiang, on Sunday and sealing a deal with Chinese tech giant Baidu to use the group's mapping and navigation systems. Hours earlier, a Chinese industry group said [Tesla's](#) electric vehicles were among more than 70 cars that had been successfully tested for data security compliance.

Taken together, Musk appears to have smoothed the path for the US company's semi-autonomous driving technology to be rolled out in [China](#). Tesla's share price closed 15.3 per cent higher on Monday at \$194.05 on reports of the Baidu deal but remains at half of its 2022 peak.

Here is what the [billionaire's trip to China](#) means for Tesla and the government in Beijing.

How much is Chinese approval worth to Tesla?

As sales fall and competition grows fiercer, Tesla has increasingly talked up the commercial opportunities that its self-driving technology offers.

“Going balls to the wall on autonomy is a blindingly obvious move,” Musk wrote on X, his social media platform, this month.

Tom Narayan, an analyst at RBC Capital Markets, said income from autonomous driving accounted for a fifth of his share price target for Tesla. The carmaker charges US drivers \$99 a month to activate “full self-driving”, a partially autonomous system that ostensibly chauffeurs drivers but still requires motorists to pay attention.

Being allowed to offer the same service in China, where the company has about 1.6mn cars on the road, “would unlock a significant fleet of Tesla vehicles able to charge subscription fees”, said Narayan.

The move into China would also “push Tesla further to be an industry standard for software,” he added, and encourage other carmakers to license its technology.

Dan Ives, an analyst at Wedbush, said Musk's trip resulted in the “long-awaited FSD approval”, which amounted to a “watershed moment” for the company. Tesla's long-term valuation “hinges” on income from autonomy, he said, and China had been a “missing piece of the puzzle”.

“This is a key moment for Musk as well as Beijing at a time that Tesla has faced massive domestic EV competition in China along with softer demand,” he added.

Tesla shares jump after reports of China deals

Share price, \$



Source: LSEG via markets.ft.com

© FT

Will new technology turn around slowing sales growth at Tesla?

Tesla has put significant stock in the value of globalising its self-driving technology as its core EV line-up ages compared with newer products from its Chinese rivals.

While arch-rival BYD aims to launch cars within 18 months of conception, it has been four years since Tesla released the Model Y, its best-selling car. The company announced the Roadster sports car in 2017 but has yet to begin production.

Musk last week promised that a new lower-cost model was coming next year. But despite a “refreshed” Model 3 entering production this year, the company is still nurturing a product offering that is significantly older than that of its competitors.

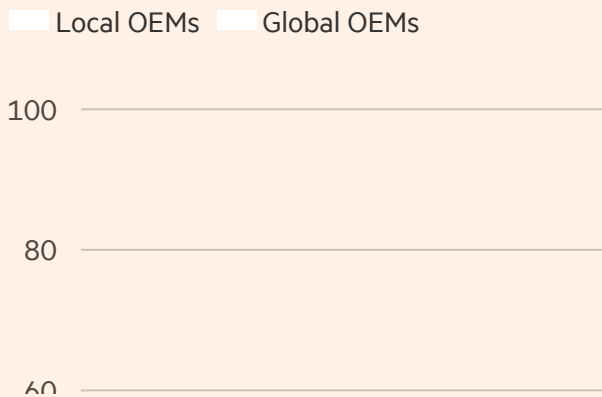
“The Tesla range is looking quite old,” said one former Tesla executive. “The [battery] tech is fine, but there are others out there, especially the Chinese, who are arguably better. The question [if he deploys FSD], is how much longer does he have a technology advantage on that?”

Expansion in China will be a test of how Tesla’s self-driving technology stacks up against local rivals. “They are betting it is the tech that makes or breaks a purchase decision,” said the former executive.

But it is not clear how confident consumers outside of urban areas are in the technology. “FSD works in Silicon Valley but not in Illinois,” the person added. “For the mass market it is still witchcraft.”

China's car brands have been gaining ground in domestic market

China's passenger vehicle volumes by brand origin, % of total



FINANCIAL TIMES

Source: Automobility

Why is helping Tesla important to China?

Under President Xi Jinping, many experts believe China has [prioritised security over economic growth](#) and domestic technology independence over integration with the outside world.

Angela Zhang, a professor of law at the University of Hong Kong and author of two books on Chinese technology regulation, said there were signs that Beijing was “easing” its approach as it needed foreign investment to shore up an economy in “deep trouble”.

Chinese EV producers want to dominate global markets and Beijing has a “strong incentive” to show the world that data security issues are not a barrier to international trade for Chinese EVs, she said.

Feng Chucheng, a partner at China-focused Hutong Research, said allowing Tesla’s self-driving technology had “strategic value” to Beijing.

The Cyberspace Administration of China has for several years been rolling out a sweeping legal framework for how businesses collect and use data, with strict rules on cross-border data flows and data viewed as a risk to Chinese security or citizens.

Despite western concerns about “over-securitisation”, the recent development of China’s data rules has been more “pro-growth”, Feng said. Beijing has been aligning its rules on outbound data transfer in line with the CPTPP and DEPA, two key regional trade pacts.

“Tesla’s rollout in China will be much desired for Beijing to prove that its data regulatory regime is gaining traction,” he said.

Tesla China's local sales and exports appear to stagnate

Tesla China's quarterly sales

Local sales Exports

250,000

200,000

Can Tesla win back the Chinese market?

China is Tesla's biggest market outside the US, a vital part of the supply chain for its EVs and of growing importance as a regional export hub. Musk's decision in 2018 to build a multibillion-dollar factory in Shanghai is credited with helping to spearhead the rapid growth of China's EV industry.

But since then, the Chinese EV industry has stormed ahead. Tesla's share of new EV sales stands at 7.5 per cent compared with 33 per cent for Warren Buffett-backed BYD. A core complaint from Chinese consumers has been the dearth of new Tesla models and high-tech features.

Despite the share price jump on Monday, analysts in China voiced caution.

Tom Nunlist, an expert in Chinese technology regulation with Beijing-based consultancy Trivium, said China's regulatory environment was "still emerging". "The folks that are overseeing the safety of automatic driving on highways are highly professional. They're not going to relax their standards because of this [Musk's visit]," he said.

Tu Le, founder of the Sino Auto Insights consultancy, said local rivals including Xpeng, Nio and Li Auto had their own self-driving systems and would drop their prices "the second" they thought consumers favoured Tesla's technology. "Western analysts think Tesla automatically wins," he said. "There are no guarantees."

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News from Bloomberg Terminal

April 30, 2024, 10:00 AM PDT

Tesla's Self-Driving Cars Can't Duck US-China Silicon Curtain

By David Fickling

(Bloomberg Opinion) --

https://www.bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/SCRLWTT0G1KW?bc=W1siU2VhcmNoICYgQnJvd3NlliwiaHR0cH...

1/4





Falling behind the competition.

Source: AFP/Getty Images

What's the value of a good story? \$82 billion, to judge by Tesla Inc.'s 15% share price gain Monday.

That's the effect of news that the company had won tentative approval to roll out its driver-support technology in China, following a surprise meeting Sunday with the Premier Li Qiang.

Trying to decipher the entrails of Elon Musk's gnomish pronouncements is never an easy task. Is he planning to release a cut-price Model 2 sedan next, or a robotaxi? Is he in favor of action on climate change, or does he think it's communism? Does he even care that much about making cars these days, when there is so much fun to be had posting memes and launching rockets?

The lightning visit to China at least clarifies the narrative on the last point, according to Morgan Stanley analyst Adam Jonas: "Even the smallest gesture of commitment (an unannounced trip to Beijing) has elevated meaning here, combating concerns over Musk's commitment to Tesla."

The difficulty comes when you dig beneath the vaporware of stories and ambitions, and look at what has actually changed for Tesla. It's rather less than meets the eye.

You might not know it from the way Musk talks, but Tesla's driver-assistance system — misleadingly, and dangerously, dubbed "Full Self-Driving" or FSD — has been falling behind the competition of late. Mercedes-Benz Group AG is already selling vehicles in the US that allow drivers to take their hands off the wheel and eyes off the road in low-risk conditions.

That's known as Level 3 autonomous driving, a step beyond the Level 2 technology used by Tesla's FSD. BMW AG has added the same feature to its new 7 Series saloons in Germany, while Honda Motor Co. released a small number of Level 3 cars as far back as 2021.

Alphabet Inc.'s Waymo is aiming a step further, with Level 4 self-driving that won't even prompt passengers to take over in tricky circumstances. That's put it well in advance of both Tesla and General Motors Co.'s Cruise, as my colleague Dave Lee wrote earlier this year.

This makes reports of a Tesla tie-up with Baidu Inc. perhaps the most interesting thing to come out of Musk's trip. The Chinese search giant has been building an open platform for autonomous cars, and is running robotaxi pilot projects in Beijing, Wuhan and Chongqing. It's not clear how deeply the collaboration will go, but Tesla's best prospect of catching up on autonomous driving will require pooling expertise with rivals, rather than following its existing strategy of remaining in splendid isolation. The Baidu alliance might be a first step toward that.

Even so, it's hard to find justification for Monday's \$82 billion share price pop. In America, FSD is a way of taking advantage of steadily improving consumer confidence and lackluster offerings from rivals to sell EVs for a significant premium to the sticker price. Conditions in China could scarcely be more different.

With sentiment still stuck around the pessimistic levels it hit during Shanghai's 2022 lockdown, inflation barely in positive territory, and dozens of EV-makers bringing new models to market, the industry is engaged in a cutthroat price war. For the cost of a single Tesla Model 3, you could buy three of BYD Co.'s Seagull mini-hatchbacks, or instead splash out on Xiaomi Corp.'s SU7 sports car, which looks and drives like a Porsche. The Model Y is still holding on to its position as China's best-selling car, but the race in Asia this year will be won by the cheapest hardware, not the most cutting-edge software.

Given geopolitical sensitivities around data privacy and national security, it's a coup that Tesla has managed to clear Beijing's requirements on FSD at all. Washington is investigating Chinese sensor technology in cars and just forced Bytedance Ltd. to divest its TikTok social network, and US social networks operated by Alphabet and Meta Platforms Inc. remain banned from China.

Even so, it will be challenging for Tesla's machine-learning to translate any lessons picked up in China to other countries where it posts more than three-quarters of its revenue. With a Silicon Curtain descending between the US and China, Baidu is already cut off from the most advanced AI chips and having to deny reports that its chatbot is being used by the People's Liberation Army.

There's one darker risk, too. The best way to learn how to avoid accidents is to have accidents. There were 956 crashes and 29 fatalities between 2018 and 2023 in cars using Tesla's autonomous technology, the National Highway Traffic Safety Administration reported recently.

That this toll has barely attracted adverse comment is a testament to Musk's status, however tainted, as a modern American folk hero who moves fast and breaks things. Should self-driving American cars start killing people on the streets of Shenzhen and Changchun, Tesla might not be able to count on such a forgiving attitude.

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April 30, 2024, 3:00 AM PDT

UnitedHealth Stock Sales Prompt Lawmakers to Call for SEC Probe

By John Tozzi

- Warren, other Democrats question timing of executives' trades
- Transactions occurred before antitrust probe became public

Bloomberg Law News 2024-04-30T10:09:58639912102-04:00

UnitedHealth Stock Sales Prompt Lawmakers to Call for SEC Probe

By John Tozzi2024-04-30T06:00:00001-04:00

- Warren, other Democrats question timing of executives' trades
- Transactions occurred before antitrust probe became public

Democratic US lawmakers led by Massachusetts Senator Elizabeth Warren are asking the Securities and Exchange Commission to investigate the timing of stock sales by UnitedHealth Group Inc.'s chairman and three executives.

The company officials netted a combined \$101.5 million through trades made after the company was reportedly notified of an antitrust investigation but before the probe became public, Bloomberg News disclosed earlier this month. "The reports regarding these trades reveal a disturbing fact pattern," the lawmakers wrote in a letter to SEC Chairman Gary Gensler this week.

The transactions occurred between October, when the health insurer reportedly learned of the investigation, and February, when the probe was reported in the media. Shares of UnitedHealth fell 5.2% over two trading sessions following the reports.

Warren and her colleagues are asking the SEC to review whether the antitrust investigation was material to UnitedHealth investors and, if so, whether the disclosures were sufficient. The company hasn't explicitly acknowledged this probe but in regulatory filings says it's subject to "routine, regular and special investigations, audits and reviews" from various state and federal agencies, including the Justice Department.

An SEC spokesperson said Gensler will respond to members of Congress directly.

UnitedHealth said its protocols for trading company stock include restrictions and processes that ensure the company complies with all SEC trading rules and regulations. All of the officials followed these protocols and received approval from the company, UnitedHealth said in a statement.

Reports that US antitrust regulators were examining the managed care industry first surfaced in mid-2023.

Warren has been a frequent critic of health insurers — and UnitedHealth in particular — and has called on regulators to closely scrutinize the company's dealmaking. She sits on the Senate Finance Committee, which is expected to hear testimony from UnitedHealth Chief Executive Officer **Andrew Witty** in a hearing Wednesday about a cyberattack at the company's Change Healthcare subsidiary.

The letter was also signed by more than a dozen other lawmakers, including Representative Jake Auchincloss and Senator Edward Markey, both of Massachusetts.

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Catherine Larkin, Tonya Garcia

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Supreme Court Spurns Musk's Twitter Sitter Appeal in SEC Win (2)

By Greg Stohr

Bloomberg Law News 2024-04-30T10:08:52685160094-04:00

Supreme Court Spurns Musk's Twitter Sitter Appeal in SEC Win (2)

By Greg Stohr2024-04-29T16:49:41151-04:00

The US Supreme Court rejected an appeal from Elon Musk in his "Twitter sitter" case, leaving intact his agreement with the Securities and Exchange Commission to have an in-house lawyer pre-approve his social media posts about Tesla Inc.

The justices, without comment, refused to hear contentions from the billionaire Tesla chief executive officer that the accord he signed in 2018 now violates his constitutional free speech rights.

Musk, the world's third-richest person, has battled the SEC over his social media posts since he tweeted in August 2018 that he had "funding secured" to take Tesla private, sending shares of the electric carmaker surging.

Elon Musk's Mystery Twitter Sitter Has One Wild and Crazy Job

The regulator claimed in a lawsuit the following month that Musk misled shareholders with that post. Two days later, Musk settled with the SEC, agreeing to resign as Tesla chairman and pay \$20 million as part of the deal.

Musk reignited the dispute in 2021 when he posted a Twitter poll asking whether he should sell 10% of his stock. The SEC then sent subpoenas to Musk and Tesla, and he went back to court seeking to void his pre-screening agreement. A federal appeals court rejected his contentions last year.

His agreement with the SEC is a "quintessential prior restraint that the law forbids," Musk's lawyers argued in the Supreme Court appeal. "The pre-approval provision at issue continues to cast an unconstitutional chill over Mr. Musk's speech whenever he considers making public communications."

The SEC urged the court to reject those arguments without a hearing. "This court has consistently held that, in resolving litigation, parties may choose to waive even fundamental constitutional rights," the SEC said in a brief filed by US Solicitor General **Elizabeth Prelogar**, the Biden administration's top Supreme Court lawyer.

It isn't clear who at Tesla is vetting Musk's tweets. Yun Huh, the company's former deputy general counsel, handled the task until he left in 2021.

Musk and his attorneys didn't respond to requests for comment.

The SEC said it was pleased the court declined to hear the case. "There should be little controversy in holding defendants to terms they agreed to in order to obtain a settlement," the commission said in a statement.

Musk is also embroiled in an SEC probe over his 2022 acquisition of Twitter, now known as X Corp. A judge in February gave him a new chance to avoid testifying, saying she had erred in ordering him to comply with a subpoena.

The SEC fights are part of a long list of courtroom clashes involving Musk and his companies, including employment discrimination cases, investor claims, defamation complaints against him, and his suit against OpenAI and its Chief Executive Officer Sam Altman.

The case is Musk v. SEC, 23-626.

(Updates with SEC reaction in 10th paragraph.)

--With assistance from Ed Ludlow, Lydia Beyoud and **Dana Hull**.

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April 29, 2024, 9:58 AM PDT

Binance US Wins Bid to Send Crypto User's Suit to Arbitration

By Matthew Bultman

- User alleges UST is a security, Binance.US failed to disclose
- Judge said delegation provision in agreement enforceable

Bloomberg Law News 2024-04-30T10:07:11853876947-04:00**Binance US Wins Bid to Send Crypto User's Suit to Arbitration****By Matthew Bultman 2024-04-29T12:58:31000-04:00**

- User alleges UST is a security, Binance.US failed to disclose
- Judge said delegation provision in agreement enforceable

Binance's US unit convinced a federal court to send to arbitration a proposed class action brought by a user who claimed the cryptocurrency exchange violated federal regulations.

Jeffrey Lockhart bought over \$437,000 in TerraUSD, or UST, on Binance.US, court filings said. He sued the exchange after UST crashed in May 2022 and essentially lost all of its value. Lockhart alleged the exchange failed to disclose that UST is a security.

Binance.US's arbitration agreement included a clause stating an arbitrator, rather than a court, must decide whether user claims must be arbitrated. The clause is enforceable, Judge Jacqueline Scott Corley in the US District Court for the Northern District of California said in a ruling last week.

The lawsuit will now be paused pending arbitration.

US securities regulators have been cracking down on the crypto industry. The Securities and Exchange Commission in June 2023 sued Binance and its US arm, alleging various crypto tokens traded on the exchange are securities, including UST.

Lockhart's lawsuit argues that because UST isn't registered with a federal or state regulator, buyers don't have access to "the precise disclosures designed to avoid a repeat of the 1929 stock market crash and the Great Depression that followed."

His case had been on hold while the Ninth Circuit Court of Appeals considered a similar delegation provision in Coinbase Global Inc.'s arbitration agreement.

Coinbase's provision required a user try to resolve any dispute with Coinbase before starting arbitration. The plaintiff in that case also argued Coinbase's agreement was one-sided, only requiring users to arbitrate.

But the Ninth Circuit in a December ruling said the provision was enforceable. Corley said the same outcome was warranted here.

"Plaintiff has shown only a low degree of procedural unconscionability," Corley said. "Such a showing is insufficient to render the delegation clause unconscionable without a high degree of substantive unconscionability—a showing that Plaintiff has not made."

Freedman Normand Friedland LLP represents Lockhart. Hahn Loeser and Parks LLP represents BAM.

The case is Lockhart v. BAM Trading Servs. , N.D. Cal., No. 22-cv-03461, 4/26/24 .

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f in t p e c

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NEWS

FTC Says Amazon Execs Used Messaging App's Auto-Delete, Even as Antitrust Probe Unfolded

"It is highly likely that relevant information has been destroyed as a result of Amazon's actions and inactions," the Federal Trade Commission said in a filing last week.

April 29, 2024 at 04:55 PM

Discovery



Greg Andrews

f in t p e c

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

What You Need to Know

- The FTC notified Amazon of its antitrust probe in June 2019 and told the company to retain all relevant documents and electronic correspondence.
- Even so, the agency said executives for many months continued to the encrypted-messaging app Signal, including its auto-delete feature.
- Amazon says it has provided the FTC with 1.7 million documents and says the agency

In a new filing in its antitrust lawsuit against Amazon, the Federal Trade Commission blasts the tech giant for its executives’ “widespread deletion of Signal messages” in the months after it learned it was under investigation and was supposed to be preserving relevant communications.

“Amazon executives deleted many Signal messages during plaintiffs’ pre-complaint investigation, and Amazon did not instruct employees to preserve Signal messages until over fifteen months after Amazon knew that plaintiffs’ investigation was underway,” the FTC claimed in the April 25 filing.

It says that notable users of the messaging app included Amazon founder Jeff Bezos, General Counsel David Zapolsky and current CEO Andy Jassy. The app encrypts messages and has an auto-delete feature that, when activated, permanently eliminates any record of the message on the devices of both the sender and receiver.

The FTC in September [filed its antitrust suit against Amazon](#) in its home state of Washington, alleging the company abuses its market power by inflating prices and overcharging sellers. Amazon denies the claims and says the practices the FTC challenges “have helped to spur competition and innovation across the retail industry.”

The FTC leveled the allegations involving Signal in a [19-page motion to compel production of documents related to spoliation](#)—the intentional or negligent withholding, altering or destroying of evidence relevant to a legal proceeding.

The filing says Amazon so far has deflected the FTC’s effort to learn more about the company’s “document preservation efforts (or lack thereof),” citing privilege. The agency asks the court to make a preliminary finding of spoliation, thereby stripping the company of privilege over document-preservation practices. The FTC says what it’s already learned “easily” meets that standard.

The FTC’s filing does not foreshadow what the agency’s next steps would be if federal Judge John Chun finds spoliation occurred. Courts can impose a variety of remedies, including monetary sanctions or advising jurors to make an adverse inference regarding missing evidence or testimony—in other words, to infer that if the information had been available it would have been unfavorable to the party that committed spoliation.

In response to questions from to Law.com, Amazon provided a statement from Tim Doyle, its director of policy communications for the Americas, saying the FTC’s “contentions are baseless”

“The FTC has a complete picture of Amazon’s decision-making in this case including 1.7 million documents from sources like email, internal messaging applications, and laptops (among other sources), and over 100 terabytes of data,” Doyle’s statement says.

The FTC’s motion on spoliation is the latest evidence of federal regulators’ deep frustration with so-called off-channel communication—messages sent through messaging apps or collaboration tools, including WhatsApp, Signal and Slack.

In January, the agencies said in a press release that they have updated the document-retention notice they send to companies under investigation to underscore that they [extend beyond their official communication channels](#).

“These updates to our legal process will ensure that neither opposing counsel nor their clients can feign ignorance when their clients or companies choose to conduct business through ephemeral messages,” Manish Kumar, deputy assistant attorney general of the DOJ’s antitrust division, said in the press release.

“The Antitrust Division and the Federal Trade Commission expect that opposing counsel will preserve and produce any and all responsive documents, including data from ephemeral messaging applications designed to hide evidence. Failure to produce such documents may result in obstruction of justice charges.”

The Securities and Exchange Commission, exercising its regulatory authority of broker-dealers and investment advisers, also is cracking down. For more than a year, it’s been unleashing enforcement actions alleging the highly regulated firms’ off-channel communications put them in violation of its strict message-retention rules. So far, the SEC’s probes and parallel inquiries by the Commodities Futures Trading Commission have yielded more than \$2.7 billion in fines.

For regulators, use of Signal is particularly problematic because of its unique “disappearing message” feature.

The FTC’s filing says, “Although the contents of deleted messages are impossible to recover, the app shows when a user turns the disappearing message feature on, off, or changes the timer for deletions, leaving breadcrumbs showing Amazon executives’ deletions were widespread.”

According to the agency, Amazon executives began using Signal in April 2019, two months before the FTC notified the company that it was investigating it for possible antitrust violations. That notification highlighted Amazon’s obligation to preserve documents and information that might relate to the inquiry.

Though Amazon in July 2019 sent out the first wave of document-preservation notices to employees, Bezos did not receive one until April 2020, according to the FTC. It says Signal, and its disappearing-message feature, were still being used by executives as recently as May 2022.

The use was continuing even though Amazon had issued guidance to senior leaders on use of secure-messaging apps in October 2020 and issued another round of guidance in August 2021 on how to turn off the disappearing-message feature.

In addition, in March 2022 General Counsel Zapolsky sent an email to several executives instructing them how to download Wickr, a new, Amazon-owned secure-messaging app that allows the company to save messages of individuals on legal hold in a central location.

The FTC says Amazon did not disclose executives’ use of Signal to the FTC until March 4, 2022, six days before The Wall Street Journal disclosed it in an in-depth article on the company’s strained relationship with political leaders in Washington, D.C.

In his statement, Amazon’s Doyle said that that timeline is false. He said the company had disclosed its employees’ use of the app years ago.

Included in Amazon’s filing is a [partly redacted, four-page letter](#) that Amazon attorney Thomas Barnett, a partner at Covington & Burling, wrote to the FTC in March 2022 responding to the agency’s document-production concerns.

In the letter, Barnett said the company had gathered and provided to the FTC a mountain of information, including hard copies and information gathered from more than 130 individuals’ work and personal devices.

It was a massive undertaking, he said, made more difficult by the COVID-19 pandemic, which had emptied out offices and caused nearly all the custodians of information responsive to the FTC’s discovery requests to be working from home.

He said Amazon’s inquiry turned up 22 employees who used Signal for work, though most did so for “non-substantive purpose,” such as arranging travel. He said it found six executives who used Signal for substantive work communications, including Bezos, the executive chairman, and Mike Hopkins, the head of Prime Video and Amazon MGM Studios.

However, Bezos’ phone and Hopkins’ phone were beyond the scope of the collection process used to respond to the FTC’s February 2022 civil investigative demand, the letter from Covington’s Barnett said.

The four covered under the CID who used Signal for substantive work communications were Senior Vice Presidents Jeff Blackburn and Peter Krawiec, devices chief Dave Limp and worldwide consumer chief Jeff Wilke.

In the letter, Barnett acknowledged that “it is possible some responsive communications have not been preserved,” though he downplayed the likelihood of significant gaps. “We believe [there] was a de minimis number of potentially responsive documents that were not available for production.”

In its motion, the FTC said it suspects otherwise.

“It is highly likely that relevant information has been destroyed as a result of Amazon’s actions and inactions,” the filing said.

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NEWS

Justices Will Eye Reach of Civil RICO Law in Medical Marijuana Case

The petitioners—Medical Marijuana Inc., Dixie Holdings LLC and the two companies' joint venture that launched Dixie X—argue that RICO does not allow plaintiffs to bring claims for civil damages stemming from a personal injury.

April 29, 2024 at 04:38 PM



Jimmy Hoover



The Supreme Court on Monday took up an appeal from three cannabis companies in a case involving the reach of the civil RICO statute aimed at targeting corrupt organizations.

In *Medical Marijuana Inc. v. Horn*, the justices will consider whether economic losses from a personal injury can form the basis of a civil damages claim under the federal Racketeer Influenced and Corrupt Organizations Act. The court has yet to set oral arguments in the case, but will likely hear the dispute in October or November and render a decision by July 2025.

The underlying case involves a lawsuit from a commercial truck driver alleging he was fired after taking the companies' cannabidoil product Dixie X and failing a drug test.

Douglas Horn and his wife claimed the defendants fraudulently marketed the CBD product as free of the psychoactive chemical THC found in marijuana. Horn, who had sought treatment for chronic pain from a trucking accident, brought state law claims and a civil claim under the RICO Act.

The defendants—Medical Marijuana Inc., Dixie Holdings LLC and the two companies' joint venture that launched Dixie X—argue that RICO does not allow plaintiffs to bring claims for civil damages stemming from a personal injury.

“Permitting RICO claims for the economic harms of personal injuries risks eliminating an otherwise critical limitation on RICO’s scope. Virtually all personal injuries produce some ‘monetary losses,’ the companies wrote in their successful [petition](#) for high court review filed by lawyers at Williams & Connolly, Mura Law Group and Mazzola Lindstrom.

Mostly known for its criminal component, RICO was enacted in 1970 and used by the Department of Justice as a key weapon in the fight against organized crime. But the law also includes a civil provision that enables “any person injured in his business or property by reason of a violation” of the statute to sue in federal court and recover treble damages, costs and attorney fees.

The cannabis companies referred to a “deeply entrenched” split among the circuit courts over whether a personal injury that leads to economic loss can sustain a civil RICO claim and that this disagreement has “no hope of abating.”

Medical Marijuana Inc., Dixie Holdings and Red Dice Holdings found themselves on the wrong end of that split last August when the U.S. Court of Appeals for the Second Circuit reversed their victory in the trial court and revived Horn’s civil RICO claim.

Allowing that decision to stand would allow plaintiffs to plead state tort claims as federal RICO claims, the companies stated in their high court petition.

“A company could use RICO against a hot-air-balloon manufacturer if the manufacturer’s shoddy labor practices cause the balloon to crash, injuring the company’s CEO and harming the company’s bottom line,” they wrote. “Customers could lob RICO claims against casinos if the slippery casino floor causes customers to break bones in a slip and fall, with the customer asserting lost-wages damages for missed work.”

Horn had originally declined to file a response to their petition but did so after the Supreme Court issued an order requesting him to do so.

“Since the statute’s adoption over half a century ago, this Court has repeatedly rebuffed efforts to narrow civil RICO’s scope,” Horn’s attorney, Jeffrey Benjamin of the New York consumer fraud law firm The Linden Law Group, wrote in [a brief in opposition](#).

The brief counseled the Supreme Court against creating an “atextual” restriction on the scope of the civil RICO law. Horn’s lawyer also suggested that the companies are trying to limit civil RICO claims to those against organized crime.

“This Court has already made clear that civil RICO applies to organized criminal organizations that don’t look like the Corleone family as well as those that do,” the brief stated. “That breadth is a feature, not a bug. Congress surely intended RICO to target organizations like the Mafia. But it also recognized that ‘[t]oday’s corruption is less visible, more subtle and therefore more difficult to detect and assess than the corruption of the prohibition and earlier eras.’”

The case is *Medical Marijuana Inc. v. Horn*, No. 23-365.



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April 30, 2024, 7:42 AM PDT
SQM Discloses Revised Accounting Treatment for Lithium Tax
By Eduardo Thomson

Bloomberg Law News 2024-04-30T13:47:31051137995-04:00
SQM Discloses Revised Accounting Treatment for Lithium Tax

By Eduardo Thomson2024-04-30T10:42:37749-04:00

Company's board reviewed accounting treatment of claims it has with tax authority SII from application of specific tax on mining activities for the exploitation of lithium, according to a statement on its website.

Financial statements on Form 20-F include differences with respect to financial statements issued in Chile

Differences include a \$927m charge on non-current tax assets and a recognition of \$162.7m in current tax liabilities which adds up to a \$1.09b charge on retained earnings

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Securities Law News

April 29, 2024, 7:08 PM PDT

Missold Chinese Exotic Notes Risk \$4 Billion Loss for Koreans

By Youkyung Lee

- Firms sold hundreds of thousands of China-linked securities
- More than 20% of people impacted are 65 years or older

Bloomberg Law News 2024-04-30T10:13:1513032924-04:00

Missold Chinese Exotic Notes Risk \$4 Billion Loss for Koreans

By Youkyung Lee2024-04-29T22:08:01727-04:00

- Firms sold hundreds of thousands of China-linked securities
- More than 20% of people impacted are 65 years or older

Park Soon Ja spent five decades working as a cleaner to build her life savings. Now, more than half of her 660 million won (\$480,000) has been lost after the South Korean retiree invested in a structured product so complex a regulator said even the bankers who sold it struggled to understand how it works.

The 75-year-old is one of hundreds of thousands of South Koreans who were sold equity-linked securities tied to the Hang Seng China Enterprises Index — a gauge of Chinese stocks listed in Hong Kong — by some of the nation's most prominent lenders and brokerages.



Park Soon Ja at a protest in Seoul on March 29.

Photographer: Woohae Cho/Bloomberg

The notes are at the center of one of the nation's biggest misselling scandals, with authorities estimating losses for retail investors may reach 5.8 trillion won (\$4.2 billion) this year. It's the latest in a series of shocks that have rattled the nation's 94 trillion-won market for structured products, and has dented trust in the financial industry.

"The banker deceived me," Park, who didn't finish elementary school and doesn't know how to use the Internet, said of the investment she made three years ago with Kookmin Bank, the retail banking unit of South Korea's largest financial firm KB Financial Group Inc. "That money is my entire life."

The widespread sale of the products exposes a retail investing landscape in South Korea where middle-aged and elderly customers were enticed to buy the risky notes being aggressively marketed by banks. The mom and pop investors were won over by the potential for high returns, viewed as necessary to alleviate an insufficient pension system, rising living costs, low interest rates and relatively weak returns on Korean stocks.

"It's hard to find a country where structured retail products with a risk of heavy losses are sold so widely to everyday consumers in such a large scale," said Lee Hyo Seob, a senior research fellow at Korea Capital Market Institute.

The five banks and six brokerages who were found to have missold the products, will pay an estimated 2.8 trillion won in combined compensation under the guidelines from South Korea's Financial Supervisory Service, according to **Hyosung Kwon**, an economist at Bloomberg Economics.

Exotic and Popular

ELS products, first introduced in South Korea in 2003, initially gained in popularity as an alternative to mutual funds and term deposits. The notes were easy to buy from retail banks and their record of high returns made them especially popular among the retirees seeking steady streams of income.

The HSCEI-linked notes at the center of the FSS inquiry were sold in 2021 against a backdrop of ultra low interest rates. Some Korean banks, which rely heavily on interest-related income, moved to offset falling profitability by expanding margins from fees and commissions. They found a sweet spot selling the structured products to retail investors hungry for higher returns.



The notes proved popular because the gauge's volatility allowed them to generate higher coupon rates of around 4% at a time when a term deposit offered about 1.2%.

But there was a catch: if the index fell 50% or more, investors stood to lose all their principal.

And fall it did. Hammered by persistent China-US tensions, worries about the outlook for Asia's largest economy and Beijing's regulatory crackdowns, the 50-member HSCEI capped an unprecedented fourth straight annual loss last year. While there has been a rebound in 2024, it's still down more than 48% from its February 2021 peak.

For 51-year-old railroad worker Ju Jae Hyeon, the financial hit came in February when he received a text message from Kookmin Bank saying the ELS product he had put 210 million won into three years ago had matured with a 53% loss, meaning he'd lost more than half of his initial investment. Until then, Ju had believed that his money was in fixed deposits.

"They only emphasized the product's higher yields," he said about the bank's sale process. "I never got explanations about the indexes behind it or how they were managed."



Ju Jae Hyeon

Photographer: Woohae Cho/Bloomberg

Kookmin Bank declined to comment about individual cases or about the customers' allegations.

In addition to Kookmin, the FSS probe also looked at Shinhan Bank, Hana Bank, NongHyup Bank, Standard Chartered Bank Korea, Korea Investment & Securities Co., Mirae Asset Securities Co., Samsung Securities Co., KB Securities Co., NH Investment & Securities Co. and Shinhan Securities Co.

'No Need to Worry'

Korea is well known for its legions of individual investors and their penchant for risky investments. Many people in their 20s and 30s have embraced crypto currencies, leveraged funds and even placed large bets on Tesla Inc.

Yet, 22% of people facing ELS losses are 65 years or older and many say they should never have been sold the notes because they don't meet the criteria of being sophisticated investors.

Yu Dong-in, a 61-year-old retiree from Incheon near Seoul, said he told his banker at Kookmin that he needed to put his retirement money in a safe place.

"The banker told me to just trust him and put all my money in the ELS, saying it's similar to savings and term deposits, with no need to worry as long as there is no war," he said. "I'm really a timid person. If I had heard there was a risk, I wouldn't have signed up."

In March, the FSS said its probe found the notes were sold to investors unsuitable to buy such high-risk products, saying many bankers misrepresented the products. It recommended banks and brokerages compensate consumers based on their age and past investment experience. The watchdog is preparing to impose sanctions on the firms.

All five banks that were investigated by the FSS, as well as Citibank Korea that wasn't part of the probe, have accepted the guidelines, under which consumers are expected to be compensated between 20% and 60% of their losses. NH Investment & Securities said it will consider the FSS recommendations, while the other brokerages declined to comment.

Shinhan and NongHyup declined to comment further, while Standard Chartered Bank Korea said it had hired an external expert and would start providing information to affected customers. Hana Bank didn't return phone calls and emails.

Many ELS buyers say they will reject anything but full compensation — an approach that will likely end up before the courts. Hundreds of customers have protested outside some of the banks urging them to pay the losses in full.

Still, the FSS said only 6.7% of the accounts were held by first-time investors in ELS. This may complicate customers' efforts to seek full recovery, because authorities have advised banks to return less money if they have invested in ELS before.

For people such as 78-year-old Moon Kui-ho, receiving full compensation is vital.

"All my lifetime's savings are gone at once," the former security guard and auto-factory worker said.

"Young people can work to make money but old people like myself have got nowhere to work. There is no hope."

(Adds comment from Standard Chartered Bank Korea)

--With assistance from **Shinhye Kang** and **Kyungji Cho**.

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SocGen Traders in Asia Exit After Options Bets Go Undetected (1)

By Donal Griffin, Alexandre Rajbhandari and Ambereen Choudhury

- Delta One traders in Hong Kong left the French lender
- Risk systems had failed to register complex stock trades

Bloomberg Law News 2024-04-30T10:14:17182819751-04:00

SocGen Traders in Asia Exit After Options Bets Go Undetected (1)

By Donal Griffin, Alexandre Rajbhandari and Ambereen Choudhury2024-04-30T08:04:33022-04:00

- Delta One traders in Hong Kong left the French lender
- Risk systems had failed to register complex stock trades

A pair of traders in Hong Kong have left Societe Generale SA after the French bank discovered a batch of risky bets that went undetected by the firm's risk-management systems, according to people familiar with the matter.

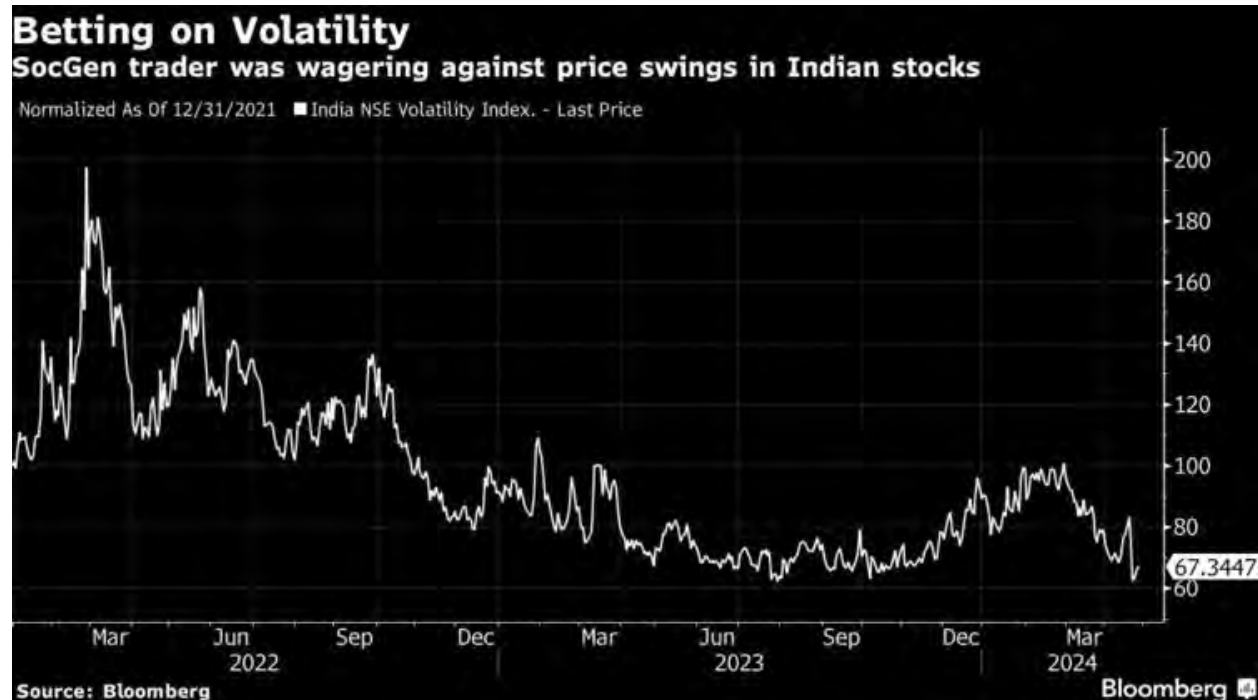
Kavish Kataria, a trader on the bank's Delta One desk, departed last year along with team head **Ken Ng** after an internal review of the transactions, said the people, asking not to be identified as the details are not public.

While SocGen didn't lose any money from the transactions, the trades could have cost the Paris-based lender hundreds of millions of dollars had an intense market downturn occurred, the people said. The lapse raised questions about risk management at one of Europe's biggest banks.

"Our strict control framework has allowed us to identify a one-off trading incident in 2023, which didn't generate any impact and led to appropriate mending measures," a SocGen spokesperson in Paris said in an emailed statement.

Kataria and Ng declined to comment.

Kataria had bet on volatility staying low across Indian stock-market indices, the people said, a strategy that involves dealing in options. SocGen's risk managers failed to pick up on the trades because of a glitch related to their timing, the people said.



Wall Street banks spend billions of dollars every year on their risk and control systems to try to curb losses. SocGen remains haunted by memories of **Jerome Kerviel**, a rogue trader on a Delta One team in Paris who cost the bank €4.9 billion(\$5.2 billion) in 2008.

Read More: Kerviel Loses Last Appeal in SocGen Unfair Dismissal Case

Chief Executive Officer **Slawomir Krupa** has focused on improving risk controls at SocGen. Prior to taking the reins of the second-biggest French bank last year, he oversaw a turnaround of the firm's business in the Americas that included overhauling those systems.

"Strength is best-in-class risk management and on these strong foundations, high-performance businesses can thrive," Krupa told investors in September.

Delta One traders sit within banks' broader stock-trading divisions and they deal in baskets of stocks and related derivatives. Kataria, who joined SocGen in Hong Kong in 2021, focused on trading Indian shares and had helped the desk to make tens of millions of dollars last year, the people said.

Some of Kataria's transactions failed to register properly on SocGen's systems because he executed the options contracts during the day — rather than holding them overnight — and tended to arrange them for the date when they expired, the people said.

When SocGen discovered Kataria's trades, the lender carried out stress tests to examine how they would have performed during a market downturn, the people said. Those tests found that in the most extreme case they could have potentially lost the bank hundreds of millions of dollars, the people said.

Ng, the head of the desk who joined SocGen in early 2023, was unaware of the transactions, the people said.

Wall Street banks have struggled with risk management in Hong Kong before. The Securities and Futures Commission in Hong Kong fined Citigroup Inc. \$45 million in 2022, accusing the New York-based bank of "pervasive dishonest behaviour" over the course of a decade there.

A spokesperson for SFC declined to comment on SocGen's recent moves.

(Updates with SocGen's comment in fourth paragraph.)

--With assistance from **Kiuyan Wong**.

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NOT FOR REPRINT

NY's Top Court Says It Won't Accept Amicus Briefs That Create Conflicts

While Judge Caitlin Halligan has had to recuse from two high-profile cases, a court spokesman said the rule was in development before she joined the high court.

April 29, 2024 at 05:14 PM

Court Administration



Brian Lee
Litigation Reporter



The original version of this story was published on [New York Law Journal](#)

New York’s highest court is adopting a rule change that could reduce its reliance on substitute jurists.

In the wake of the New York Court of Appeals using three Appellate Division judges for arguably two of its biggest appeals since December, the court will limit its acceptance of amicus briefs going forward, according to a notice to the bar on April 23.

Beginning May 8, the court will reject the brief if it’s from a party with which one of the seven judges had a previous affiliation, and the jurist feels the need to recuse him or herself, the rule states.

The Court of Appeals announced the looming rule two days before it handed down its controversial split decision that overturned Harvey Weinstein’s rape conviction, based on the majority’s belief that the trial court wrongly admitted three Molineux witnesses.

Judge Caitlin Halligan recused herself, marking on a standardized recusal form that she wanted off the case because she had served as a lawyer within the past two years for an organization that sought to participate as an amicus curiae.

Judge Shirley Troutman also recused herself, but the reason was less revealing: she checked off that she wanted to avoid any appearance that her impartiality might be questioned.

Halligan, the court’s newest jurist, had also recused herself from the court’s redistricting ruling in December that ordered a new mid-decade Congressional map.

That was another controversial split decision for which Chief Judge Rowan Wilson has been accused of hand-picking a substitute judge to join him in the majority.

Court of Appeals spokesman Gary Spencer dismissed the notion that the new rule is designed with Halligan in mind, telling a reporter it had “been in the works for awhile,” and he doubted it was spurred by any one particular case.

Spencer said Wilson chooses substitute judges from outside of the jurisdiction that the appeal arose. For instance, Weinstein’s case arose from the First Department, and so the two replacement jurists were chosen from the Second and Third Departments.

Spencer said flatly that Wilson “doesn’t choose judges who he thinks will take a particular side in a case.”

But Senate Democrats who confirmed Wilson’s elevation to chief judge in April 2023 are taking hits on New York’s editorial pages for the court’s majority opinion in both the Weinstein and redistricting appeals.

State Sen. Judiciary Chairman Brad Hoylman-Sigal, D-Manhattan, could not be reached for comment about the court on Monday.

On Friday, Gov. Kathy Hochul told reporters her office is analyzing the impact of the Weinstein decision, along with how the state can make sure that all women feel safe coming forward.

State Sen. Anthony Palumbo, R-Brookhaven, criticized the court’s new rule, calling it a double-edged sword in that it’s providing “an unnecessary mandatory recusal” when the court accepts the amicus brief.

On the other hand, he said, it’s unfair to parties when the court rejects the brief because that doesn’t “comport with the Sixth Amendment.”

Palumbo said he is in the process of finalizing a bill that he will introduce to require that judges give more detailed explanations for recusals.

The former Suffolk County assistant district attorney classified a judge’s recusal as a “different animal” to the reasons for keeping details under wraps when a lawyer asks to be relieved from a case.

Palumbo said the only time a judge shouldn’t be required to explain a recusal is when there was a prior attorney-client relationship; nothing more needs to be disclosed.

The lawmaker said there should be stronger reasons than Halligan has been providing for asking off cases, given that she was an “active, quite prolific appellate attorney.”

“In that regard,” he asked, “how many cases was she going to be recused on?”

Palumbo noted that during his time in the DA’s office, he’s encountered former colleagues who moved onto the bench. Palumbo said he’s even golfed with them.

“It’s a small community, and that doesn’t mean that they have to recuse themselves every single time I appear,” he said.

Barros was the lone dissenter when the Second Department upheld ex-NBA player Sebastian Telfair's conviction on gun possession charges in 2021.

Barros' dissent said that it was among evidence that was barred by the Molineux rule, and did not fit within the rule's state-of-mind exception.

“We have had two extremely controversial cases in less than a year, both of which Caitlin Halligan decided to take a pass and recuse herself,” Palumbo said. “That’s really troubling. And that’s even more troubling when you look at the now newly adopted vouching in policy that Judge Wilson has implemented. He seems to be manipulating and manufacturing votes, and manipulating the court to the extent that he’s choosing judges that have already ruled on a particular issue.”

Palumbo said Wilson and Judge Jenny Rivera, who wrote the majority opinion in the Weinstein decision, are proving that they are “activist judges” with progressive leanings.

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Titan Of The Plaintiffs Bar: Robbins Geller's Spencer Burkholz

By **Rose Krebs**

Law360 (April 29, 2024, 3:04 PM EDT) -- Robbins Geller Rudman & Dowd LLP's Spencer A. Burkholz is quick to downplay his accomplishments litigating major securities cases during his lengthy career, saying effective teamwork has been the key to those successes.





Spencer Burkholz

Robbins Geller

On His Lengthy Career:

"If you're going to do the job, you've got to do it well ... and you've got to be in the trenches."

Burkholz told Law360 he learned the importance of teamwork early on as a soccer player in high school and at Clark University in Worcester, Massachusetts. Those formative years really matter, he told Law360, and he still draws on lessons he learned about hard work growing up in a middle class neighborhood outside New Haven, Connecticut, and while playing as a left halfback.

Soccer taught him wins result from good teamwork, and that has been an important theme in his legal career.

"A lot of the successes at the firm are due to the team aspect we have here," Burkholz said of Robbins Geller's track record of getting huge financial recoveries for investor plaintiffs.

Litigating complex securities cases certainly isn't a one-person job, so coordination among counsel team members to establish the best strategy is part of a winning formula just as in soccer, he said.

During his more than 30-year career, Burkholz has helped secure many massive financial recoveries for plaintiffs in major securities litigation.

Among his recent work, he helped broker a **\$177.5 million settlement** for investors in a securities fraud case against Envision Healthcare Corp. over its billing practices; and he was on a team that represented investors in a securities fraud class action against McKesson Corp. **that settled** for \$141 million last year, earning him a spot among **Law360's 2024 Titans of the Plaintiffs Bar**.

The Envision settlement received final approval in March, officially making it one of the largest securities settlements ever in the Middle District of Tennessee, according to Robbins Geller.

Both the McKesson case, which alleged a drug price-fixing scheme, and Envision were complex matters that required expertise and contributions from the entire team to get to a resolution, Burkholz said.

McKesson was a challenging case to research and develop a strategy, as there were so many drugs at

issue, he told Law360, characterizing the case as an antitrust matter within a securities action.

The Envision litigation, which dates to 2017, involved complex damages and liability issues and more than 50 depositions were conducted, Burkholz said.

"It was an incredible effort," he said, adding that the case was made more complex by Envision's sale to private equity giant KKR in 2018 and its May 2023 bankruptcy filing. The bankruptcy filing "threatened to extinguish our case," Burkholz told Law360.

Getting the litigation to settlement "involved many moving pieces," he said.

Effort, diligence and creativity to avoid relying on a "cookie-cutter" approach is often required to bring about such settlements, Burkholz told Law360.

Along with the importance of contributing to a team, another key lesson Burkholz told Law360 he learned early on is that there is no substitute for hard work.

"We weren't given anything," he said of his youth. "You had to work if you wanted something."

Decades into his career, he still handles a hectic caseload and "wouldn't have it any other way."

"If you're going to do the job, you've got to do it well," he told Law360. "And you've got to be in the trenches."

Burkholz's first job was at about age 12, and then it was a restaurant job he worked after graduating from college and moving to Washington, D.C., that set him on the path to becoming a lawyer. The attorneys who owned the place suggested he consider going to law school.

Joking that he "wasn't a very good waiter," Burkholz took their advice and ended up graduating from the University of Virginia School of Law in 1989.

He then headed out to California for work and better weather. He landed at Milberg Weiss Bershad Hynes & Lerach, a predecessor of Robbins Geller, in 1995. He is based in Robbins Geller's San Diego office.

His early years at the firm were spent establishing his work ethic and learning from mentors such as Michael J. Dowd, who Burkholz describes as one of the most talented litigators and best orators.

He had the opportunity to learn the ropes alongside talented lawyers at a firm that has staked its place as a securities plaintiffs' powerhouse, he said.

Burkholz has played a part in bringing about several blockbuster recoveries for investors, including In Re Enron Corp. Securities Litigation (\$7.2 billion); In re WorldCom Sec. Litigation (\$657 million); and Luther v. Countrywide Financial Corporation (\$500 million), his profile on Robbins Geller's website says.

He also highlights Jaffe v. Household Int'l Inc., with its \$1.57 billion **post-trial settlement** in 2016, and a more than \$90 million settlement **in 2006** in a shareholder class action against Cisco Systems Inc. as among highlights of his career.

As the first time he led a big case, the Cisco case led to more recognition and opportunities to take on additional responsibility, Burkholz told Law360.

Robert Y. Sperling, a partner at Paul Weiss Rifkind Wharton & Garrison LLP who was opposing counsel in the Cisco case, told Law360 that Burkholz is "a very capable guy."

"He knows the law, and he knows how to try a case," Sperling said. "He also knows when to cut his losses."

Sperling said Burkholz has "good common sense" and is "a straight shooter."

He also "knows the issues" and "isn't afraid to go to trial," Sperling said.

Now a senior partner who sits on Robbins Geller's management and hiring committees, Burkholz said he enjoys imparting some wisdom he learned along the way when mentoring younger attorneys.

"Helping them at the beginning stages of their career, I think it's very important," Burkholz told Law360.

"I don't want to tell them how to do things, but help them along the way," he said. Becoming a successful lawyer "involves working hard and not giving up," he said of advice he imparts.

"We spend a lot of time attracting the right people that will fit in here," Burkholz said. "You really have to be part of a team."

--Editing by Kelly Duncan.

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Pharma Co. Hit With Investor Suit Over Liver Drug Trials

By **Sydney Price**

Law360 (April 29, 2024, 8:48 PM EDT) -- Biopharmaceutical company Akero Therapeutics and three of its executives were hit with a proposed class action in California federal court alleging they made misleading statements about the patient population in a clinical trial for its liver disease treatment.

According to shareholder Dora Klobus' **suit** filed Friday, Akero has conducted trials to test the safety and efficacy of a protein and its lead product candidate, called EFX, to treat a liver disease known as nonalcoholic steatohepatitis, or NASH. Akero and its executives gave the impression that certain patients with risk factors that would hinder or confound the trial's results were excluded from the study. However, the defendants knew all along that they were actually being incorporated into the trial, the suit says.

"Akero had introduced a confounding factor into the study's design, materially influencing the study's potential results and increasing the risks that the study would fail to meet its primary endpoint," the suit states.

In addition to Akero, its CEO Andrew Cheng, Chief Financial Officer William White and Chief Development Officer Catriona Yale have been named as defendants.

The class period begins Sept. 13, 2022, the day Akero announced the 24-week results of the trial in a filing with the U.S. Securities and Exchange Commission. That filing, and others throughout the class period, did not disclose that 20% of the patients in the trial should have been excluded to prevent potential adverse effects on its results.

On Oct. 10, 2023, the defendants held a call with investors to discuss the trial's results, and the truth began to reveal itself, the suit alleges. The company disclosed that the inclusion of certain patients was a confounding factor in the results, and that the defendants knew about the trial's design flaw throughout the class period.

On the news, Akero's shares declined \$30.39, or about 63%, to close at \$18.15 per share, according to the suit.

The suit further claims that several analysts took issue with the previously undisclosed inclusion of certain patients in the trial, and they cut their price targets.

Klobus accuses the defendants of violating the Exchange Act and of knowingly misleading shareholders. She seeks damages with prejudgment and post-judgment interest on behalf of the proposed class.

Klobus is represented by Shawn A. Williams, Brian E. Cochran and Richard W. Gonnello of Robbins Geller Rudman & Dowd LLP, and Jack G. Fruchter of Abraham Fruchter & Twersky LLP.

Counsel information for Akero and the individual defendants was not immediately available on Monday.

The case is Klobus v. Akero Therapeutics Inc. et al., case number 3:24-cv-02534, in the U.S. District Court for the Northern District of California.



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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (April 29, 2024, 5:44 PM EDT) -- A multibillion-dollar Tesla trust proposal, a Truth Social bond, power plays over Prince's estate, and three in the ring for World Wrestling Entertainment. All of this and much more came up in Delaware Chancery Court dockets last week.

In case you missed it, here's all the latest from Delaware's Chancery Court.

Top News

Following Tesla's **announcement** that it would seek stockholder approval to reincorporate in Texas and reinstate CEO Elon Musk's \$55.8 billion compensation plan — the same one that Chancellor Kathaleen St. J. McCormick voided in January — class attorneys for Tesla Inc. stockholders last week asked the Chancery Court to **put billions worth of Tesla stock into trust**. Shareholder attorneys also asked the court to fast-track an order finalizing the January ruling and consider their proposed fee award of \$5.6 billion in Tesla stock.

Tesla Inc. **questioned the motives** behind the request, saying that the shareholders' push to hasten the court's decision in their suit over Elon Musk's compensation plan raises concerns that they want to "elicit commentary" ahead of the shareholder meeting.

Tesla announced it would hold a meeting on June 13 so that stockholders could vote again on the pay plan and whether to reincorporate the electric-vehicle company in Texas.

Corporate law attorneys **wondered** whether Tesla's bold strategy to salvage Musk's multibillion-dollar compensation plan could trigger more stockholder litigation in Delaware.

The news about Tesla is among several recent developments that has some attorneys questioning whether Delaware's **future as a business haven** is on shaky ground.

In the Courtroom

Four family members of the late musician Prince who claim to have taken over for two music industry veterans they once entrusted to run his estate **urged** Chancellor McCormick at a hearing in Wilmington to throw out the managers' lawsuit against them, calling it "unconscionable and unreasonable."

Decisions

In a 91-page memorandum opinion that tied up loose ends from a partial bench ruling in January, Vice Chancellor Morgan T. Zurn **preserved most claims** in a stockholder suit led by a Pittsburgh pension fund targeting a \$344 million tax-asset buyout at The Carlyle Group Inc.

Ongoing Disputes

A stockholder of Goosehead Insurance Inc. who struck a settlement last year with the Texas-based company to end his proposed class action over disproportionate insider control **sought to put the deal on hold** until another case involving investment bank Moelis & Co. plays out.

Delaware Vice Chancellor Lori W. Will **asked for more information** from the sponsor of the blank-check company that took Donald Trump's Truth Social public about a bond it requested during

litigation with some of the company's stockholders.

Hand-offs

Vice Chancellor Sam Glasscock III, slated to retire at the end of the year, **handed over** to Vice Chancellor Zurn a lawsuit that two former "Apprentice" contestants filed against Trump and his social media company over their equity in Truth Social.

U.S. District Judge Gregory B. Williams **sent the litigation** filed by Landbridge Port Services (Hong Kong) Ltd. back to Delaware Chancery Court after concluding he lacked jurisdiction over the dispute because the defendants, entities that include Notarc Port Investment LLC, did not have a plausible claim that the case belongs in arbitration.

Settlements

Chancellor McCormick **signed off on a \$1.5 million payment** to Delaware by a company that helped Purdue Pharmaceuticals market its opioid products, the latest step in a \$358 million, 50-state damages settlement reached with Publicis Health LLC.

An attorney for Fortress Acquisition Sponsor II LLP, a blank-check company that took ATI Physical Therapy Inc. public in 2021, **told the court that it will settle** two proposed stockholder class actions in Delaware, along with pending federal class and derivative suits in the Northern District of Illinois.

Get It Together

Block & Leviton, Bernstein Litowitz Berger & Grossmann LLP and Robbins Geller Rudman & Dowd LLP are **gearing up for a leadership battle** to represent World Wrestling Entertainment Inc. stockholders in a consolidated class suit against founder Vincent McMahon and others over the company's \$21 billion merger with the Endeavor Group.

New Cases

A shareholder of Agiliti **demanded details** about events leading up to the medical equipment management company's impending \$2.5 billion squeeze-out merger with an affiliate of its controlling stockholder, Thomas H. Lee Partners, echoing a similar lawsuit **filed in late March**.

An Ayala Pharmaceuticals stockholder **launched a derivative suit** against the company's board and controlling investors, accusing directors of issuing new shares to the controllers at far below market value, timed to take advantage of an asset sale worth up to \$85 million.

A stockholder of uranium supplier Centrus Energy Corp. **filed a proposed class action** to challenge allegedly hair-trigger shareholder rights "poison pill" restrictions that activate anti-takeover measures based on a relatively low share ownership percentage.

An NGM Biopharmaceuticals Inc. stockholder **petitioned the court for an appraisal** of his stock after the company closed on a \$1.55 per share cash tender offer with an affiliate of venture fund The Column Group.

A shareholder of Juno Care Systems Inc. **sued for books and records**, saying it needed them to investigate whether the board and officers of the medical clinic operator had breached their fiduciary duties to shareholders or wasted corporate assets.

A proposed class of PHX Minerals Inc. stockholders sued the natural gas and oil mineral company and its board, **arguing that the company's bylaws must be changed** to bring them into compliance with the Delaware General Corporation Law.

Three affiliates of Benefytt Technologies **petitioned for an assignment for the benefit of creditors**, a state-administered restructuring option, with \$41 million in unsecured debt and \$20 million worth of liens, saying the ripple effects of the health technology company's Chapter 11 drove them under.

A Tetra Technologies Inc. investor **filed a proposed class action** that accused the company of adopting a poison pill as a prohibited anti-takeover weapon rather than an allowable shield for \$411 million in tax-advantaged net operating losses.

Universal Life Insurance Co. **sought the court's help to unravel a business conversion** by embattled North Carolina insurance mogul Greg Lindberg, arguing that he was converting the company to a Delaware limited liability company in an illegal attempt to escape paying a \$580 million award.

Quotable

"Handler was initially an employee of the L.P., and was given the title 'Partner,' as were other employees. This was an honorific; such partners were no more equity holders than Colonel Harlan Sanders was a field officer..." -- Vice Chancellor Sam Glasscock III, in **an opinion** about the status of an employee at a Delaware LP.

—Additional reporting by Jeff Montgomery, Lauren Berg, Isaac Monterose, Emily Lever, Hailey Konnath, Caroline Simson, and Travis Bland. Editing by Michael Watanabe.

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AI Pharma Co. Sued By Investor Over Handling Of Fired CEO

By **Sydney Price**

Law360 (April 29, 2024, 5:28 PM EDT) -- Artificial intelligence-driven pharmaceutical company Exscientia PLC has been hit with a proposed class action alleging its former CEO engaged in inappropriate personal relationships with employees, and that the company's chairman knew but concealed it.

According to the suit filed by shareholder Orindo Dorin in New Jersey federal court on Friday, UK-based Exscientia, which says it uses AI to create medicines for diseases with high unmet patient needs, disclosed in February that the company's board fired CEO Andrew Hopkins after an internal investigation found that he was involved in relationships that were "inappropriate and inconsistent" with Exscientia's standards and values.

The complaint and company disclosures do not describe the nature of the allegedly inappropriate relationships.

Exscientia's disclosure also said the company discovered that its ex-Chairman David Nicholson had prior knowledge of Hopkins' relationships but never brought the information to the board. Nicholson announced his resignation the same day Exscientia announced Hopkins' termination, according to the suit.

The disclosures led to a 23% decline to Exscientia's share price, the complaint says.

In addition to Exscientia, Hopkins and Nicholson, Exscientia's Chief Financial Officer Ben R. Taylor is also a defendant in the suit.

According to the suit, the class period begins March 23, 2022, the day Exscientia filed its 2021 annual report with the U.S. Securities and Exchange Commission. The annual report and other filings throughout the class period affirmed that Exscientia's employees and officers were following the company's relevant code of conduct.

On Feb. 13, 2024, Exscientia announced the board's decision to terminate Hopkins following its investigation of his behavior.

The company's press release from that day stated that during the course of the investigation, Exscientia's board learned that Nicholson "had prior knowledge of the existence of ... Hopkins' relationships and had addressed the situation directly, and with the involvement of other outside counsel" rather than consult with the board, according to the suit. Nicholson had tendered his resignation from the board the previous day, the suit states.

Exscientia's shares declined \$1.72, or about 23%, to close at \$5.79 per share on Feb. 13, according to the suit.

Dorin claims Exscientia and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act. He seeks damages with pre- and post-judgment interest on behalf of the proposed class.

Counsel for Dorin and a representative of Exscientia did not immediately respond to requests for comment on Monday.

Dorin is represented by Thomas H. Przybylowski, Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP, and Peretz Bronstein of Bronstein Gewirtz & Grossman LLC.

Counsel information for Exscientia and the individual defendants was not immediately available on Monday.

The case is Dorin v. Exscientia PLC et al., case number 1:24-cv-05692, in the U.S. District Court for the District of New Jersey.

--Editing by Kristen Becker.

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Pomerantz, Glancy Prongay Spar To Lead LexUrban Fraud Suit

By **Emilie Ruscoe**

Law360 (April 29, 2024, 10:37 PM EDT) -- Glancy Prongay & Murray LLP and Pomerantz LLP are vying to represent a proposed class of investors in a New York federal suit against real estate company LuxUrban Hotels, with Glancy Prongay accusing Pomerantz of "cobbl[ing] together" a would-be co-counsel group and Pomerantz defending its proposed lead plaintiffs as a proper "cohesive duo."

In dueling briefs Friday, Glancy Prongay and Pomerantz sought to convince U.S. District Judge Paul A. Engelmayer to appoint their respective clients to represent the investor class in the suit over LuxUrban's shareholder disclosures.

In their filing, Glancy Prongay's clients, a trio of individual investors alleging losses of about \$5,300 in connection with the claimed fraud, suggested that Pomerantz's clients zCap Equity Fund LLC and Ross Marchetta comprise an "improper group of unrelated investors."

Glancy Prongay took aim at zCap Equity in particular, contending that the fund wouldn't be able to represent the class because it is subject to unique defenses that would be a distraction later in the litigation. Among other things, Glancy Prongay claimed, zCap "drastically" inflated its losses in an initial filing and would be vulnerable to allegations that it violated its fiduciary duty to its own investors because its trading patterns seemed to be at odds with the strategy it described to investors.

Pomerantz in its motion claimed that as "a small and cohesive duo of likeminded investors," its clients were a movant group "of the type expressly permitted by the [Private Securities Litigation Reform Act] and routinely appointed" in similar actions.

But most significantly, the Pomerantz clients claimed, they have "a larger financial interest in this action than the [Glancy Prongay clients], the only competing movant seeking appointment as lead plaintiff in this action," emphasizing that under three different approaches to loss calculation, its clients alleged losses several times greater than the losses claimed by Glancy Prongay's clients.

Depending on the analysis used, Pomerantz said its clients lost either \$17,219, \$17,406 or \$24,439.

In the suit launched in February by Glancy Prongay client Janice Pack, the LuxUrban investor claimed the company concealed legal disputes over its rent obligations from its shareholders.

Pack's suit cites market records showing that trading prices for LuxUrban shares fell in January and February.

Pack claimed the first trading price drop followed a short-seller's report alleging, among other things, that the company hadn't actually signed a lease with a certain Midtown Manhattan hotel, contrary to claims it made in November.

The second trading price falloff came after the company made the announcement that it was "withdrawing its prior statements" about the midtown hotel, including quarterly reports in which it included the hotel on a list of its properties under lease."

After the February decline trading price decline, Pack claimed, the company was trading at \$3.50 a

share, down from about \$4.90 before the January decline.

The short-seller's report also claimed that it had reviewed "dozens of lawsuits against LuxUrban and its affiliates," including suits brought by the company's landlords at four properties accusing the company of failing to pay rent.

The suit also cites the company's regulatory filings for the third quarter of 2023 in which the company stated that it is "not currently a party to any pending or threatened legal proceedings that we believe could have a material adverse effect on our business or financial condition."

LuxUrban's business model, which it describes as asset light, involves leasing hotels on a long-term basis and renting out the hotel's rooms.

Alongside the company, Pack's suit names the company's CEO Brian Ferdinand and its Chief Financial Officer Shanoop Kothari.

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

The LuxUrban Investor Group, comprising individual investors Joshua Leckner, Evan Weiser, and Matthew Halpern, is represented by Glancy Prongay & Murray LLP.

zCap Equity Fund LLC and Ross Marchetta are represented by Pomerantz LLP.

LuxUrban Hotels Inc. and individual defendants Brian Ferdinand and Shanoop Kothari are represented by John Patrick Curley and Connor George Shea of Hogue Newman Regal & Kenney LLP.

The case is Pack v. LuxUrban Hotels Inc. et al., case number 1:24-cv-01030, in the U.S. District Court for the Southern District of New York.

—Additional reporting by Sydney Price. Editing by Michael Watanabe.



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Bank Of China Beats Investor Suit Over Oil Derivative Trading

By **Katryna Perera**

Law360 (April 29, 2024, 7:48 PM EDT) -- The Bank of China has beaten a proposed class action alleging it misled investors and mismanaged an oil-linked derivative product, leading to \$1.6 billion in losses, with a New York federal judge saying the suit fails to assert specific allegations against each of the defendants and suffers from group pleading, among other things.

U.S. District Judge Lewis A. Kaplan issued an **order** on Monday saying the complaint, filed by plaintiffs identified as S.G. and M.G., contains insufficient allegations that are not specific to any of the named defendants, which included the Bank of China, Bank of China Commodities & Futures LLC, BOC International Holdings Limited, CME Group Inc. and New York Mercantile Exchange Inc.

The suit, filed a year ago, claims the defendants colluded to market the investment product, the crude oil treasure, to the retail market in violation of the Commodity Exchange Act and other laws and regulations.

According to the complaint, the crude oil treasure, or COT, is an "extremely risky" derivative investment product encapsulating the West Texas Intermediate light sweet crude oil futures contracts traded on the New York Mercantile Exchange.

Judge Kaplan said the complaint "lumps all the defendants together" and does not provide any facts to distinguish their alleged conduct.

The suit also falls short because the allegations do not "specify or detail" any fraudulent statements made by the defendants, according to the opinion.

"The complaint does make a handful of allegations against BOC USA and BOCI USA by name, but these allegations do not satisfy the applicable pleading standards because they name several BOCI-affiliated defendants together and without differentiation," the opinion states. "Plaintiffs fail to specify which BOCI entity was responsible for what conduct."

The judge also agreed with CME's argument that it is immune from the suit's claims as a self-regulatory organization. CME is a global derivatives marketplace. Judge Kaplan said each of the complaint's allegations of CME's alleged wrongdoing "springs from activity core to CME's regulatory function."

"For example, the complaint alleges that CME's anti-money laundering and know your customer programs 'should [have] but failed to detect ... defendant BOC Group's fraudulent acts, including its concealment of the true identity of the COT customers and shell accounts for the COT oil futures contracts,'" the opinion states. "But this activity falls within the category of 'general regulatory oversight over exchange members,' which, the court of appeals has held, is entitled to immunity as a quasi-governmental function."

Finally, Judge Kaplan denied the plaintiffs' request for leave to amend, saying the plaintiffs have not given any indication as to how they would fix the identified deficiencies and even if they were to add new claims, those claims "would be certain to fail."

Plaintiffs S.G. and M.G. alleged in their suit that the defendants collected more than \$10.8 billion in funds from them as a security deposit for COT accounts. However, the defendants actually

misappropriated the money and managed the COT in a "reckless and negligent manner."

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

The plaintiffs are represented by John Y. Tang and Wenjie Cai of Tang PC.

Bank of China and Bank of China Commodities & Futures are represented by Brian S. Weinstein and James I. McClammy of Davis Polk & Wardwell LLP.

BOC International Holdings is represented by Jonathan K. Youngwood and Bo Bryan Jin of Simpson Thacher & Bartlett LLP.

CME Group and the New York Mercantile Exchange are represented by Shari A. Brandt and Matthew M. Riccardi of Perkins Coie LLP.

The case is S.G. et al. v. Bank of China Ltd. et al., case number 1:23-cv-02866, in the U.S. District Court for the Southern District of New York.

--Editing by Patrick Reagan.

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Protein Co. Nutriati Insiders Rushed \$10M Sale, Del. Suit Says

By **Jeff Montgomery**

Law360 (April 29, 2024, 5:11 PM EDT) -- Stockholders of Nutriati Inc. have sued the plant-based protein producer's directors and officers and others in Delaware's Chancery Court, alleging that insider breaches of fiduciary duty resulted in a hasty, low-ball sale of the business in 2022 to one of its major investors.

In a complaint filed Friday, three individual shareholders and four investment funds accused Nutriati insiders of rushing a sales process to ensure that the venture capital arm of British food and beverage supplier Tate & Lyle PLC acquired the company for \$10 million. The deal went through despite upbeat financial forecasts, a \$14 million competing offer and a \$50 million valuation of Nutriati a month earlier, according to the suit.

The investors behind the suit cited what they described as "remarkable" factors, including the company's admissions in response to a 2023 demand for books and records that Nutriati went to Tate & Lyle without competitive bidding or pursuit of alternative proposals. Prior to the 2022 transaction, Tate & Lyle had a seat on Nutriati's board and 14.6% of the company's shares through the Tate & Lyle Ventures II LP fund, the complaint noted.

The \$10 million bid was chosen even as Nutriati had months earlier projected \$150 million in revenue by 2025, and in spite of its efforts to raise \$50 million in a Series D investment round, leaving nothing for common stockholders, they told the Court of Chancery.

"First, the board obtained legal advice on how to run a process that would comply with their fiduciary duties," the investors wrote. "Second, the board ignored that legal advice at every turn and ran a rushed process designed to deliver Nutriati's business to Tate & Lyle."

Founded in 2013, Nutriati developed a patented method for making chickpea-based protein and flour that "solved functional, taste, odor and environmental challenges" facing competing producers of plant-based protein, the shareholders said.

By 2019, a majority of the company's seven board members represented major shareholders, including Tate & Lyle, Open Prairie Rural Opportunities Fund, MTP COO2 Holdings LLC and New Richmond Ventures LLC, and a \$6.5 million convertible note sale added a fifth investor to the board, according to the suit.

The stockholders alleged that in 2021, Nutriati was targeted for a takeover after it announced it expects \$35 million to \$40 million in 2024 revenue and \$150 million in revenue the following year, with around 50% left after subtracting direct costs.

The outlook soured, however, after the protein producer agreed to retain Tate & Lyle as its global distributor and then Tate & Lyle failed to meet its own terms, putting strains on Nutriati's finances, the investors said. Soon after that, Tate & Lyle initially offered to buy the business for \$5 million, and the board launched a sales process without creating an independent special committee, engaging a financial adviser or taking other due diligence steps, the suit alleged.

"This was crucial because a majority of the board, including CEO Michael Todd, was incentivized to take any offer that would repay the convertible noteholders before any stockholder would receive any consideration," the complaint read.

In addition, the proposed deal included a no-financing provision that created an immediate advantage for Tate & Lyle, which has \$3 billion of market capitalization, the investors highlighted.

Although another potential bidder accepted a nondisclosure agreement, stockholders were never informed of the development or the alternative bidder's cash-and-stock, \$14 million valuation of Nutriati, according to the suit.

Instead, Tate & Lyle submitted a modified offer that assured \$6.5 million would be available to immediately pay off convertible notes, the investors told the court.

"Even setting aside the conflict issue, the board — without the assistance of a banker — plainly failed to act reasonably to maximize value and to follow a fair sales process — even according to company counsel's own advice," they said.

At the very least, the complaint went on, Nutriati's CEO and board should have forced Tate & Lyle to match the \$14 million offer from a customer, AuraPea LLC, adding: "But again, the board was not interested in creating a bidding war and driving stockholder value."

The five-count complaint accused Nutriati's board and Todd of breaching their fiduciary duties and alleged Tate & Lyle and its affiliates aided and abetted those breaches. It also brought unjust enrichment claims against Tate & Lyle and holders of the convertible notes worth \$6.5 million who the investors said received the majority of the cash from the transaction.

Nutriati did not immediately respond to a request for comment Monday.

The stockholders are represented by Andrew H. Sauder and Daniel S. Atlas of Dailey LLP.

Counsel information for Nutriati was unavailable.

The case is Brand et al. v. Atkinson et al., case number 2024-0424, in the Court of Chancery of the State of Delaware.

--Editing by Covey Son.



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Cyber Co. ZeroFox Investor Sues In Del. For Sale Docs

By **Jeff Montgomery**

Law360 (April 29, 2024, 8:45 PM EDT) -- A ZeroFox Holdings Inc. stockholder sued in Delaware's Court of Chancery Monday for books and records on the cybersecurity intelligence company's \$1.14 per share, \$350 million sale to private equity firm Haveli Investments, citing questions about a pre-closing reduction in the company's value estimate.

The ZeroFox action followed by less than two years the company's closing on a blank check company deal that took ZeroFox public for \$13.75 per share in a \$1.4 billion special purpose public acquisition company merger with L&F Acquisition.

As part of the take public deal in 2022, ZeroFox acquired and brought with it digital privacy and data breach response services group ID Experts. In the months that followed, the business experienced "downward pressure," including hefty goodwill impairment charges against overvalued assets in the months after the SPAC closing.

Attorneys for stockholder Cliff Mosco cited a credible basis for suspicions that the ZeroFox merger resulted from a conflicted process, saying ZeroFox's board and management "inexplicably" reduced the company's projections shortly before the merger, while also omitting material details regarding the sale process and potential conflicts of interest.

"Public information about the merger supplies a credible basis to suspect wrongdoing that warrants investigation," Mosco's suit said. It noted that at the end of the sales process in January 2023, ZeroFox substantially reduced projections issued only three months earlier, despite positive third-quarter 2024 results and renewal of a significant contract.

The merger with Haveli is expected to close before the second half of this year.

"Without any other explanation, it appears that company management may have reduced the projections in order to secure a fairness opinion so that the merger, which offered little value to common shareholders, would be deemed fair and could be approved," the suit said.

Company insiders who own 9.1% of the business voted in favor of the merger and will receive under the deal accelerated vesting of other equity as well as "lucrative" severance packages if terminated as a result of the merger.

"Meanwhile, the common shareholders will only receive a fraction of the company's inherent value – especially considering the company was hitting record-setting revenues every quarter, had just become cash-positive, and had a bright outlook," the suit said.

Haveli delivered a non-binding letter of intent on Jan. 26 to acquire ZeroFox for \$318 million, an amount later boosted to \$350 million.

The suit noted that ZeroFox received in early January notice of a new federal contract worth \$248 million through September 2028, resulting in an increase in the company's estimated 2024 revenue.

"However, and inexplicably, the January projections significantly reduced the company's estimated projected revenues" along with earnings, and free cash flows, the complaint said. "There is no explanation whatsoever in the proxy or the December earnings call that could explain these substantial reductions."

The complaint said that, in light of unanswered questions regarding ZeroFox's forecasts, "plaintiff is justifiably concerned that the merger is not the result of a full and fair process, but instead one manipulated by certain members of the company's board and/or management, who had conflicting interests regarding the consummation of the merger."

Mosco's complaint said the suit was filed Monday to protect the stockholder's standing to pursue the demands after closing, although negotiations with the company will continue.

ZeroFox did not immediately respond to a request for comment.

Cliff Mosco is represented by Christopher P. Quinn and Michael J. Palestina of Kahn Swick & Foti LLC.

Counsel information for ZeroFox was not immediately available.

The case is Cliff Mosco v. ZeroFox Holdings Inc., case number 2024-0453, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.

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Circuit Split Brews Over Who's A Securities Seller Under Act

By **Jeffrey L. Steinfeld** and **Daniel Aronsohn** (April 29, 2024, 5:52 PM EDT)

Section 12 of the Securities Act of 1933,[1] long thought of as a mere tagalong to Section 11,[2] has ballooned in significance in the last couple of years, especially in the context of alternative public offerings involving direct listings or digital assets.

The development of Section 12 case law is particularly important given the U.S. Supreme Court's **admonition** in the June 1, 2023, *Slack Technologies LLC v. Pirani* decision, that Sections 11 and 12:

- Do not "necessarily travel together;"
- Contain "distinct language that warrants careful consideration;" and
- Should be analyzed individually.[3]

Unlike Section 11, which only applies to registration statements, Section 12(a)(2) creates liability for misleading statements in "a prospectus or oral communication." Meanwhile, Section 12(a)(1) creates private liability for the offer or sale of an unregistered security in violation of Section 5.[4]

In recent years, purchasers of digital assets, such as digital tokens or cryptocurrency, have pursued claims against creators of digital tokens, operators of digital-asset exchanges — centralized and decentralized — and investors thereof, alleging the sale of unregistered digital assets is unlawful under Section 12(a)(1).

While the issue of whether a particular digital asset is a security initially dominated the conversation, another issue with Section 12 has begun to percolate in the courts, namely who can be sued for Section 12 violations.[5]

By its text, Section 12 applies only to a person who offers or sells a security and is liable only to "the person purchasing such security from him." [6]

Courts have termed such defendants "statutory sellers," which include only those who (1) pass title to the purchaser, or (2) solicit the purchase, motivated at least in part by their own financial interest.

Courts routinely dismiss cases against other improper defendants.[7]

However, who constitutes a statutory seller is not as straightforward as it may seem, especially with respect to digital assets. Recent decisions provide guidance, but a potential circuit split may complicate the matter for all involved in the digital-asset space, as well as the traditional securities market.

Passing Title



Jeffrey L. Steinfeld



Daniel Aronsohn

Analysis of the first category of defendants — those who transfer title to the purchaser — has traditionally been straightforward.

In the 1988 *Pinter v. Dahl* decision, the Supreme Court made clear that Section 12 "imposes liability on only the buyer's immediate seller; remote purchasers are precluded from bringing actions against remote sellers." [8] Thus, "a buyer cannot recover against his seller's seller." [9]

However, in the digital-asset context, who, if anyone, passed title is not always clear, especially with respect to decentralized exchanges, but also when the transfer occurs on a centralized exchange. A recent set of cases in the U.S. Court of Appeals for the Second Circuit dealt with these issues.

First, in the Aug 30, 2023, *Risley v. Universal Navigation Inc.* decision, [10] **the court addressed** whether the developers of and investors in a decentralized cryptocurrency exchange passed title of the tokens traded thereon.

Unlike a centralized exchange that relies on third-party intermediaries to match buyers and sellers, a decentralized exchange is programmed to run through smart contracts, which are automated digital contracts stored on a blockchain.

Further, instead of purchasing from a matched seller, buyers on decentralized exchanges acquire their tokens from "liquidity pools" — pools of tokens sitting on the exchange that were initially provided by the token's allocator.

Thus, a buyer does not purchase from a seller but rather acquires the desired token from the decentralized exchange's pool of assets. In *Risley*, the plaintiffs alleged that the defendants passed title because they wrote the smart contracts that allowed the exchange to function.

The court rejected the plaintiffs' position, finding instead that the developers of smart contracts did not pass title of the tokens.

The court analogized the smart contracts to the roles that lawyers and underwriters play in traditional exchanges, holding that

[j]ust as Section 12(a)(1) does not apply to those who draft base-level agreements for trades to access the stock market, it does not apply to software coders who create an exchange to efficiently facilitate trades.

In both cases, "the party sued facilitated — but was not party to — the contested transaction."

The court also found that the exchange and the other defendants did not "have title (even momentarily) over each token on the Protocol."

And even if "the Court were to find that title passes from, for example, the pool to the Protocol to one of the Plaintiffs, this split second, autonomous function would make the Protocol collateral to the transaction," which is an "insufficient predicate for Section 12 liability."

Second, in the April 5 *Oberlander v. Coinbase Global Inc.* decision, [11] the U.S. Court of Appeals for the Second Circuit addressed the issue of passing title of digital assets on a centralized exchange.

The plaintiffs alleged that Coinbase — a centralized digital-asset exchange — violated Sections 5 and 12(a)(1) of the Securities Act by selling unregistered securities to the plaintiffs.

The U.S. District Court for the Southern District of New York initially dismissed the Section 12 claims, finding that Coinbase did not hold title to the subject tokens, did not pass title to the plaintiffs, and thus was not a statutory seller. [12]

In doing so, the district court relied on a version of Coinbase's user agreement that provided purchasers were not buying digital assets directly from Coinbase. [13]

Specifically, the agreement provided that "when you purchase (buy) or sell Digital Currency on the Coinbase Site, you are not buying Digital Currency from Coinbase." [14]

On appeal, the Second Circuit reversed, holding that there were other user agreements in effect during the class period that stated the opposite, specifically that the users were purchasing "Digital Currency from Coinbase." [15]

The court held that

[i]n light of the varying language in different versions of the user agreement in effect during the class period, the district court could not treat [the nonsale version] as conclusive for the purposes of evaluating the legal sufficiency of the amended complaint [and therefore plaintiffs] have plausibly alleged claims under Section 12(a)(1) that survive a motion to dismiss. [16]

Notably, the Second Circuit did not confront the argument in *Risley* that "split second" passing of title is insufficient under Section 12 since it is collateral to the underlying transaction between a buyer and seller.

Rather, the Second Circuit focused on the fact that Coinbase's user agreement said buyers were purchasing from Coinbase. The Second Circuit's decision is instructive for digital-asset exchanges in drafting user agreements and other similar governance documents.

Solicitation

Analysis of the second category of defendants — those who do not pass title but instead solicit the purchase motivated by their own financial interest — is less straightforward.

The Supreme Court has been clear — in *Pinter* — that "mere participation in unlawful sales transactions" or being a "collateral" participant is insufficient to qualify as a statutory seller. [17]

Because Section 12 "contemplates a buyer-seller relationship not unlike traditional contractual privity," [18] courts had long required that the defendant directly solicit the buyer's purchase. [19]

In the last couple of years, however, both the U.S. Court of Appeals for the Ninth Circuit and U.S. Court of Appeals for the Eleventh Circuit have taken broader approaches, holding that solicitation need not be directed or targeted to a particular purchaser; rather, the promotion of a security in a mass communication may be enough to make someone a statutory seller. [20]

The loosening of the direct solicitation requirement has implications for anyone promoting a digital asset or traditional security, and has potentially created a circuit split with the Second Circuit, [21] as well as the U.S. Court of Appeals for the Third Circuit, [22] and the U.S. Court of Appeals for the Fifth Circuit, [23] as demonstrated in recent disparate district court outcomes.

For example, in the Sept. 20, 2023, *Houghton v. Leshner* [24] decision, the U.S. District Court for the Northern District of California declined to dismiss a case against the founders and partners of Compound DAO based on the theory that the defendants solicited purchases of Compound's governance tokens.

The purchasers alleged that the defendants designed the governance tokens, monetized the tokens by encouraging secondary markets, and commented publicly about them.

The court found that such allegations are sufficient to allege the defendants were statutory sellers because "[s]olicitation is broadly construed in the Ninth Circuit" and the defendants do not have to "directly or actively target the particular plaintiff." [25]

Houghton found inapposite cases from the Second Circuit, including the *Risley* decision discussed earlier. *Risley* held that the developers of and investors in a decentralized exchange were not statutory sellers because, inter alia, they did not directly solicit the plaintiffs' purchases. [26]

Likewise, the U.S. District Court for the Southern District of New York rejected a solicitation claim where plaintiff had not "shown that he was directly contacted by [d]efendants or that he purchased securities as a result of any active solicitation by [d]efendants." [27]

Houghton distinguished these cases as being decided under a "materially different standard," noting that the "standard is decidedly broader in the Ninth Circuit ... where 'direct' contact is not required and liability may flow from mass communications." [28]

A recent decision from the U.S. District Court for the District of Utah — in the U.S. Court of Appeals for the Tenth Circuit — also followed the Ninth and Eleventh Circuits' standard in declining to dismiss Section 12 claims against a token's creators and promoters who made a series of promotions on social media. [29]

It is apparent, then, that there is a developing circuit split, and the jurisdiction in which a case is filed may be outcome determinative at the pleading stage.

Takeaways

In sum, Section 12 is rapidly becoming a favored statute for plaintiffs to assert strict liability claims against a host of participants in both the digital asset and traditional securities markets.

Courts have just recently begun to grapple with Section 12's intricacies, including the statutory seller requirement. In this regard, courts look to contracts between the parties to determine who passed title of the asset to the purchaser.

And, with respect to solicitation, the Ninth and Eleventh Circuits' loosening of the so-called direct requirement has created potential liability for a vast number of defendants, while those same defendants may successfully move to dismiss such actions in the Second, Third and Fifth Circuits.

Absent congruent rulings from the circuit courts, the Supreme Court may have to decide this issue of nationwide importance.

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[1] 15 U.S.C. § 77l.

[2] 15 U.S.C. § 77k.

[3] *Slack Techs., LLC v. Pirani* , 598 U.S. 759, 770 n.3 (2023).

[4] 15 U.S.C. § 77e.

[5] Whether digital assets are securities is beyond the scope of this article.

[6] 15 U.S.C. § 77l.

[7] See, e.g., *Lozada v. TaskUs, Inc.* , 2024 WL 68571, at *17–20 (S.D.N.Y. Jan. 5, 2024); *In re 2U, Inc. Sec. Class Action* , 2021 WL 3418841, at *27–28 (D. Md. Aug. 5, 2021).

[8] *Pinter v. Dahl* , 486 U.S. 622, 643–644 n.21 (1988).

[9] *Id.*

[10] 2023 WL 5609200 (S.D.N.Y. Aug. 29, 2023), appeal filed, 2nd Cir., September 28, 2023.

[11] 2024 WL 1478773 (2d Cir. Apr. 5, 2024).

[12] *Underwood v. Coinbase Glob., Inc.* . 654 F. Supp. 3d 224, 236–39 (S.D.N.Y. 2023).

[13] Id. at 237.

[14] Id.

[15] Oberlander, 2024 WL 1478773 at *4.

[16] Id.

[17] Pinter, 486 U.S. at 650.

[18] Pinter, 486 U.S. at 642.

[19] See, e.g., *In Re Violin Memory Sec. Litig.* , 2014 WL 5525946, at *18 (N.D. Cal. Oct. 31, 2014).

[20] *Pino v. Cardone Cap., LLC* , 55 F.4th 1253, 1258 (9th Cir. 2022); *Wildes v. BitConnect Int'l PLC* , 25 F.4th 1341, 1345–46 (11th Cir. 2022).

[21] *Capri v. Murphy* , 856 F.2d 473, 478 (2d Cir. 1988) ("plaintiffs must show that [defendant] actually solicited their investment").

[22] *In re Westinghouse Sec. Litig.* , 90 F.3d 696, n. 19 (3d Cir.1996) (Alito, J.) (direct and active participation in solicitation is necessary for solicitation liability).

[23] *Rosenzweig v. Azurix Corp.* , 332 F.3d 854, 871 (5th Cir. 2003) ("To count as a 'solicitation,' the seller must, at a minimum, directly communicate with the buyer.").

[24] *Houghton v. Leshner* , 2023 WL 6826814 (N.D. Cal. Sept. 20, 2023).

[25] Id. at *3, n.1.

[26] 2023 WL 5609200, at *18–19 (S.D.N.Y. Aug. 29, 2023).

[27] *Holsworth v. BProtocol Found* , 2021 WL 706549, at *3 (S.D.N.Y. Feb. 22, 2021).

[28] 2023 WL 6826814 at *4.

[29] *Combs v. SafeMoon, LLC* , 2024 WL 1347409, at *21–22 (D. Utah Mar. 29, 2024).



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Excess Insurer Seeks Inclusion In OpenText Merger Row

By **Jennifer Mandato**

Law360 (April 29, 2024, 4:05 PM EDT) -- Allied World National Assurance asked a Michigan federal court to allow it to join a coverage dispute against its excess insured OpenText, maintaining that the software company's primary insurer will soon reach its limits on defense costs in the underlying class action over OpenText's merger with Covisint.

In a **motion to intervene** filed Friday, Allied World said it should be involved in the coverage dispute brought by OpenText Corp.'s primary insurer, Wesco Insurance Co., after a class of Covisint Corp. shareholders alleged they got a bad deal when it merged with OpenText in 2017. Allied World told the court that its stance is largely the same as Wesco's — that it has no obligation to indemnify OpenText for the proposed \$9 million underlying settlement based on a bump-up exclusion.

Allied World argued that as Wesco's limits are exhausted, Wesco will have less interest in "vigorously litigating" the exclusion, which precludes coverage for a claim alleging that the price paid for a merger or acquisition of stock is unfair, leaving Allied World vulnerable.

The underlying shareholder action was first filed in 2017, shortly after Covisint Corp. announced that OpenText agreed to acquire it at \$2.45 per share. The suit **alleged** that Covisint's cash-out merger was unfair to shareholders and was "significantly below the indications of interest the company received from other bidders between February 2016 and February 2017, which ranged as high as \$3.75 per share."

A proposed \$9 million settlement was reached in the underlying action on April 17, according to court records.

The present coverage fight began in July 2023 when Wesco asked the court to agree that the directors and officers and public company liability policy it issued to Covisint does not provide coverage for the underlying lawsuit because the damages it sought are excluded from the policy's definition of "loss" under the bump-up exclusion.

Following the settlement, Allied World told the court that the funding entity for the deal has stated that it will pursue recovery from Allied World under its first-layer excess policy, despite the insurer's stance that the same bump-up exclusion eliminates any obligation to indemnity coverage.

Allied World maintained that it meets the elements for intervention, citing its timeliness in filing, that prejudice will not arise because Allied World is raising an identical coverage issue to that of Wesco's, and its substantial legal interest in the outcome of the case.

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

Allied World is represented by Andrew J. Kolozsvary and Brent H. Olson of Dykema Gossett PLLC.

Wesco is represented by Nicole E. Wilinski of Collins Einhorn Farrell PC and April H. Gassler of Sperduto Thompson & Gassler PLC.

OpenText is represented by Nick Gorga and Jewel Haji Boelstler of Honigman LLP and Edwin M. Baum of Perkins Coie LLP.

The directors and officers are represented by William H. Horton and John R. Fleming of Giarmarco Mullins & Horton PC.

The case is Wesco Insurance Co. v. OpenText Corp. et al., case number 2:23-cv-11816, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Carolyn Muyskens. Editing by Nick Petruncio.

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Zillow Fights Investor Cert. In Home Pricing Program Suit

By **Grace Dixon**

Law360 (April 29, 2024, 8:07 PM EDT) -- Zillow urged a Washington federal court not to certify a class of shareholders amid an investor's suit alleging he was misled about the performance of its home-flipping program, arguing that the alleged misstatements had no bearing on stock prices.

The real estate marketplace weighed in Friday, **rebutting** plaintiff Jeremy Jaeger's claims that he's entitled to certification of a securities suit alleging executives hid the fact that Zillow Offers' pricing model failed to keep up with fluctuations in the 2021 housing market when making offers for homes it would renovate and resell.

In order to secure class certification of Securities and Exchange Act claims, plaintiffs must prove they relied on alleged misstatements when deciding to purchase or sell a security. But alleged misstatements made by executives in August and September 2021 and cited by Jaeger did not lead to a jump in stock prices, Zillow argued.

"Rather than increase, as one would expect if a misleading statement impacted stock price, Zillow's stock price actually declined following the alleged misstatements on August 5, 2021," Zillow argued.

Rising stock prices in September came early in the day, before Zillow executives made the statements in question at a global technology conference, the company argued.

Jaeger's suit zeroed in on executives' statements touting the "Zestimate" algorithm used to shape the company's offers on homes across the country.

In late 2020 and early 2021, Zillow realized its algorithm had priced offers too low to keep pace with a hot housing market and made internal tweaks raising offer prices by as much as 7 or 8% while cutting contractor payments and narrowing the scope of renovations done at properties, the shareholder alleged.

Instead of disclosing this shift, dubbed Project Ketchup, executives touted improvements to the Zestimate algorithm and "durable operational improvements" made by the company. It wasn't until November that it started to become clear the overcorrection had landed Zillow with thousands of homes worth less than the company had paid, incurring millions of dollars in losses for the company, Jaeger alleged.

He added Friday that the August and September statements also did not artificially buoy stocks, known as a "back-end impact," the company argued. According to Jaeger, four back-to-back revelations in the fall had shed light on the truthfulness of the company's earlier statements.

Zillow executives' misleading statements came to light when an October 2021 report from RBC Investment Bank disclosed it had slashed asking prices in Phoenix and warned the company likely had significant inventory it had overpaid for. Outlets reported Zillow had stopped all new purchases that same month, Jaeger said.

A KeyBanc Capital Markets report at the end of the month revealed that Zillow homes were for sale at a steep discount and the company unveiled plans to wind down Zillow Offers in November. Stock prices dropped following each new development.

But in order to prove a back-end impact on stock prices, the later "corrective disclosures" must prove the initial statements to be false.

"Here, none of the four corrective disclosures said anything about, let alone corrected, the alleged misstatements," Zillow said. "They did not disclose the alleged facts about pricing nor the reductions in scope of renovations that plaintiff claims rendered Zillow's statements misleading."

In December 2022, the court **declined** Zillow's request to dismiss the claims outright.

Counsel for both parties did not return requests for comment on Monday.

Jaeger is represented by Steve W. Berman, Catherine Y.N. Gannon, Reed R. Kathrein and Lucas E. Gilmore of Hagens Berman Sobol Shapiro LLP and Stacey M. Kaplan, Helen Bass, Gregory M. Castaldo and Evan R. Hoey of Kessler Topaz Meltzer & Check LLP.

Zillow and its executives are represented by Sean C. Knowles of Perkins Coie LLP and Peter B. Morrison, Virginia F. Milstead, Winston Hsiao and Raza Rasheed of Skadden Arps Slate Meagher & Flom LLP.

The case is Jaeger v. Zillow Group Inc. et al, case number 2:21-cv-01551, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Katryna Perera. Editing by Alex Hubbard.

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DCG Gets To Face Combined Crypto Actions In Conn.

By **Emilie Ruscoe**

Law360 (April 29, 2024, 8:51 PM EDT) -- Cryptocurrency venture capital company Digital Currency Group Inc. has won its bid to move an investor action from Manhattan to Connecticut, where it faces similar claims over alleged losses during the so-called "crypto winter."

In a Monday order, U.S. District Judge Lewis Liman granted DCG's motion to transfer the New York suit, finding that moving the case is "warranted for the convenience of the parties and the witnesses and in the interest of justice."

The judge noted that the Connecticut action "is the first-filed complaint, and it alleges near-identical claims on the basis of near-identical allegations against DCG on behalf of a class that is identical to the putative class here."

The judge also noted that DCG is based out of Connecticut, whereas Tobias Moeller-Bertram, the plaintiff in the New York action, lives in California and would be traveling "a substantial distance" to court whether the action was in New York or Connecticut.

DCG sought to move the action in June 2023, arguing that the cases involve the "same facts, present overlapping legal issues and propose nearly identical class definitions."

Moeller-Bertram opposed the transfer, arguing that the Connecticut case did not qualify as the first filed because another, earlier case had been filed in New York making claims "based on the same underlying allegations" even though DCG was not party to that earlier filed New York case. The other New York case has been stayed, as have Moeller-Bertram's claims against cryptocurrency exchange Gemini Trust Company LLC, though his claims against DCG remain pending.

When it sought the transfer, DCG said that if the cases were moved, it would request consolidation.

In his suit, which launched in New York state court, Moeller-Bertram alleged DCG was part of the unregistered offer and sale of securities in connection with a program called Gemini Earn, which involved the tender of digital assets to DCG subsidiary Genesis Global Capital LLC, which is now bankrupt.

Moeller-Bertram pointed to the November 2022 announcement that Genesis was barring retail investors from taking assets out of the Gemini Earn program, telling them that "withdrawal requests which have exceeded our current liquidity" as the digital asset market saw extraordinary volatility.

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

Tobias Moeller-Bertram is represented by Hung G. Ta and JooYun Kim of HGT Law.

DCG is represented by Jonathan D. Polkes, Caroline Hickey Zalka and Stefania D. Venezia of Weil Gotshal & Manges LLP, and Thomas D. Goldberg of Day Pitney LLP.

The case is Moeller-Bertram v. Gemini Trust Company LLC, case number 1:23-cv-02027, in the U.S. District Court for the Southern District of New York. The Connecticut case is McGreevy et al. v. Digital Currency Group Inc. et al., case number 3:23-cv-00082, in the U.S. District Court for the District of Connecticut.

--Editing by Vaqas Asghar.



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Target, Grubhub Say Visa, Mastercard Fee Deal Is A Scam

By **Nadia Dreid**

Law360 (April 29, 2024, 8:18 PM EDT) -- Visa and Mastercard's settlement to slash their merchant fees by some \$30 billion over the next several years has no fans in Target and Grubhub, who told the judge overseeing the long-running antitrust litigation that the deal isn't fair to anyone except the credit titans.

Target and Grubhub filed their objections separately Friday, each making their case for why U.S. District Judge Margo K. Brodie should refuse to grant the credit companies preliminary approval of their class action settlement or at least allow them to opt out.

"Every aspect of this settlement undermines the normal purpose of class certification — allowing small groups to band together to assert claims against a powerful defendant," Target said in its filing. "This class has instead allowed itself to be used as a tool by powerful defendants to expand and insulate their supracompetitive price-fixing scheme, earning class counsel a potential \$170 million fee in the process."

Now the class is asking the court to sign off on an illegal price-fixing scheme that would allow the companies to continue to force unfair fees on merchants "through a court order that insulates the defendants from any and all attempts to enjoin their unlawful practices for a period of five years," Target told the court.

What Mastercard and Visa are asking the court to approve is a settlement that would force parties "on the verge of trial" to give up their claims "in exchange for valueless 'relief' they did not fashion and do not want," the retailer said.

The settlement doesn't fix the illegal price-fixing, it just blocks merchants from challenging it for the next half-decade, Target said.

"No part of Rule 23 permits this, so the settlement should be rejected by this court," it argued.

Grubhub told the court that it co-signed everything Target had to say, but added that it also wants out of the class and to move forward with its "trial-ready damages claims." They are also the only plaintiffs that have asked the court to remand their case to the federal court it started in, which the food delivery app told the court it still wants.

But the proposed order includes provisions specifically blocking the Grubhub plaintiffs — which opted out of the class — from proceeding with their claims, they told the court, something that "indicates that the true purpose of those provisions is to punish the Grubhub plaintiffs for exercising their rights to opt out of the Rule 23(b)(3) class and preserving, and pursuing, their claims."

"That result obviously reflects inequitable treatment and inadequate representation," Grubhub argued.

The general idea behind the claims is that Visa, Mastercard and several banks — including Barclays and JPMorgan Chase & Co. — worked together to maintain a set of rules that allowed the credit card companies to overcharge merchants whenever customers used their card.

Mastercard and Visa have been battling the MDL claims since 2005, and it has cost them. In 2012,

the credit companies and a handful of banks agreed to shell out \$6 billion in order to end a similar set of claims over interchange fees, but the legal fallout over the settlement has lasted years.

That deal was kiboshed by the Second Circuit in 2016 after it ruled that a class seeking damages for overcharges shouldn't have been represented by the same counsel as a class seeking to change the rules.

But merchants inked a new deal with the credit companies in late 2018 for about \$5.6 billion, an agreement that was approved by Judge Brodie in 2019 and later upheld by the Second Circuit.

That deal was between the merchants seeking damages for their losses. The one that Target and Grubhub are contesting is between Visa and Mastercard and the class that wanted to see the rules around merchant fees changed.

The settling merchants are represented by Steve Shadowen of Hilliard & Shadowen LLP, Robert Eisler of Grant & Eisenhofer PA, Linda Nussbaum of Nussbaum Law Group PC, and Michael Freed of Freed Kanner London & Millen LLC.

Visa is represented by Arnold & Porter, and Holwell Shuster & Goldberg LLP.

Mastercard is represented by Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, case number 1:05-md-01720, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Matthew Perlman. Editing by Kelly Duncan.



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OpenAI Case Not Ready For Lead Counsel Pick, Judge Says

By **Hailey Konnath**

Law360 (April 29, 2024, 11:48 PM EDT) -- A California federal judge has rejected authors' pick for interim lead counsel in a case accusing OpenAI of copyright infringement, ruling that the request was made too early and must wait until class certification has been decided.

U.S. District Judge Araceli Martínez-Olguín refused to appoint Joseph Saveri Law Firm LLP to lead the proposed class action, which was filed by a group of writers that includes comedian Sarah Silverman and "The Cabin at the End of the World" author Paul G. Tremblay.

Judge Martínez-Olguín said that the authors haven't explained why the court should "depart from the norm and appoint class counsel prior to class certification." In particular, she noted that there's no rivalry between the firms representing them — Saveri's request was unopposed.

In fact, Saveri's firm has said it has the support of other counsel in the case and "does not contend that "appointment is necessary at this juncture to ensure coordination or cooperation among various counsel," according to the short order.

Without a "compelling reason" to appoint interim lead counsel, the judge said she found that it's a premature request and denied the motion without prejudice.

She said that the request could be made again "if there is a change of circumstance or other reason why there is an immediate need" for the firm or another firm to be appointed class counsel before a "fully briefed motion for class certification."

In the case, the authors allege that OpenAI ripped off the writers' works to train ChatGPT without permission or compensation. Tremblay **first filed** suit in June 2023, and that action was consolidated with Silverman's case.

Earlier this year, Judge Martínez-Olguín tossed the bulk of the copyright case while giving the putative class a chance to cure deficiencies in their pleadings in some instances.

And last month, the judge held that the authors **cannot bar** OpenAI from defending itself against a similar suit lodged in New York federal court, rejecting their argument that OpenAI engaged in forum shopping.

The New York suit **was filed** in September 2023 and is led by writers' trade group the Authors Guild, as well as novelists including John Grisham, Jonathan Franzen, Mary Bly, Jodi Picoult, David Baldacci and George R. R. Martin.

In her March ruling, Judge Martínez-Olguín said the authors hadn't pointed to any authority that would allow the court to step in and block OpenAI from defending itself in the other case.

Saveri didn't immediately respond to a request for comment late Monday.

Silverman and the Tremblay plaintiffs are represented by Joseph R. Saveri, Cadio Zirpoli, Christopher K.L. Young, Holden Benon and Aaron Cera of Joseph Saveri Law Firm LLP, and Matthew Butterick.

OpenAI is represented by Joseph C. Gratz, Allyson R. Bennett, Tiffany Cheung, Rose S. Lee, Joyce C.

Li, Melody E. Wong and Alexandra M. Ward of Morrison Foerster LLP, and Andrew M. Gass, Joseph R. Wetzel, Sarang V. Damle and Allison L. Stillman of Latham & Watkins LLP.

The case is In re OpenAI ChatGPT Litigation, case number 3:23-cv-03223, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger, Lauren Berg, Ivan Moreno, Andrew Karpan and Kelly Lienhard. Editing by Kristen Becker.

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High Court Won't Revisit Class Cert. In Chili's Data Breach Row

By **Allison Grande**

Law360 (April 29, 2024, 11:09 PM EDT) -- The U.S. Supreme Court on Monday refused to review an Eleventh Circuit ruling that kept alive a class action claiming Chili's restaurants failed to protect customer data in a 2018 data breach that revealed millions of credit card records, which class counsel said "enshrines a path" toward compensation for consumers against companies that mishandle their data.

In its latest **order list**, the high court denied a petition filed in December by Chili's parent company, Brinker International Inc., keeping in place the Eleventh Circuit's split July decision that refused to reverse a lower court ruling that **certified classes** of those "who had their data accessed by cybercriminals" as a result of the incident.

Brinker had argued that the appellate court was "attempting to circumvent the predominance requirement" for certifying a class in federal court and "threatening to undermine the very core of class action law" by backing the district court's plan to ignore individualized injuries among class members and instead endorse a structure where every class member would be awarded an "average" dollar amount set out for categories of alleged injuries.

The company argued that it was imperative for the Supreme Court to take up this dispute to resolve the issue of whether courts can propose awarding every class member the same "average" amount for alleged injuries even if they hadn't suffered those harms at all, an opportunity that the justices declined Monday. The dispute now returns to the Middle District of Florida for further proceedings.

Morgan & Morgan attorneys Jean Martin and John Morgan, who are among the attorneys representing the plaintiffs, said in a statement Monday that it was "a historic day for consumer privacy rights in the United States."

"This ruling means that plaintiffs are entitled to compensation because of the damages arising from data breaches, which has huge implications for consumers," the attorneys said. "This ruling enshrines in federal case law a path toward justice for everyday people when corporations mishandle their sensitive information."

Martin and Morgan added that they were "proud" of their clients for continuing to press the case "through overwhelming opposition from business interests that tried to overturn this decision to protect their bottom lines," adding that the high court's denial also means that "for the first time, federal law will recognize a property interest in data privacy, which is one of the most exploited human rights in today's world."

A representative for Brinker couldn't be reached for comment Monday.

The parties' dispute dates back to May 2018, when three Chili's customers sued less than two weeks after the company announced that a cyberattack on its point-of-sale systems had affected some of its roughly 1,600 restaurants. From March to April of that year, the hackers stole both customer payment card data and personally identifiable information.

The data was posted on Joker's Stash, an online marketplace for stolen credit card information. The plaintiffs claim that information for 4.5 million cards could be found online, and they sought compensation for class members' inability to use payment cards, lost time, and other out-of-pocket

expenses associated with the breach

U.S. District Judge Timothy J. Corrigan **certified** nationwide and California-only classes on the plaintiffs' negligence claim in 2021, establishing the first-ever consumer damages classes in a payment card data breach case.

The judge's endorsement was based on a "narrowed" class definition he put forth that encompassed only those who had their data "accessed by cybercriminals" and had "incurred reasonable expenses or time spent in mitigation of the consequences of the data breach. He claimed these revisions would help to "avoid later predominance issues regarding standing and the inclusion of uninjured individuals because now individuals are not in the class unless they have had their data 'misused,' either through experiencing fraudulent charges or it being posted on the dark web."

Judge Corrigan also found that the plaintiffs had shown that there are several "common methods of calculating damages" among class members, including a proposal put forth by the plaintiffs' expert that all class members receive "a standard dollar amount" for lost opportunities to accrue rewards points, the value of their time and out-of-pocket losses, and a method that would use a relative reduction in damages for every class member that has been subjected to other data breaches.

On appeal, Brinker argued that the proposed class of up to 4.5 million customers is overbroad and does not meet the commonality requirements for certification, and that the district court erred by finding that a common damages methodology existed for the class.

But in July 2023, the Eleventh Circuit issued a 2-1 decision that found the plaintiffs only had to show that a reliable damages methodology existed at the class certification stage. The majority held that the district court had correctly found that the plaintiffs' expert presented a sufficient damages model and that "it would be a 'matter for the jury' to decide actual damages at trial."

While preserving the class certification, the ruling also found that only one of the three named plaintiffs had sufficient Article III standing to press forward with the claims and, on remand, directed the lower court to revisit its class definition to refine what's meant by class members needing to have their data "accessed by cybercriminals."

In her dissent, U.S. Circuit Judge Elizabeth L. Branch objected to the approval of the damages model that would award a standard amount to all class members even if they didn't use their rewards cards, spend time addressing the breach or incur out-of-pocket damages, finding that this methodology "impermissibly permits plaintiffs to receive an award based on damages that they did not suffer — i.e., an award that a plaintiff could not establish in an individual action."

After the full Eleventh Circuit **declined to revisit** that decision, Brinker appealed to the Supreme Court, arguing that review was warranted to ensure that plaintiffs couldn't use the novel certification of the damages class to "clog" lower courts with both data breach cases and any other dispute where plaintiffs could employ the appellate panel's "'averaging' tactic to avoid almost any individualized issue and thereby compensate class members collectively without having to adjudicate their actual, individual and particularized claims."

"Under the Eleventh Circuit's analysis, disparately situated plaintiffs can be treated identically — and compensated for injuries 'whether or not' they actually suffered them — to certify class actions that do not satisfy Rule 23," Brinker argued in its Dec. 13 petition. "The decision below misconstrues this court's precedents, fundamentally departs from the holdings of eight other circuits, and threatens to result in a vast and potentially limitless expansion of the class action device."

Brinker won backing from the Restaurant Law Center, a public policy organization affiliated with the National Restaurant Association, which contended in a January brief that "aggregate litigation based on 'average' damage amounts being awarded to putative class members who concededly did not suffer any corresponding injury corrupts the class action device and lacks social value."

"Such class actions are pursued to exert pressure on defendants to settle or risk massive aggregate exposure notwithstanding the realities of and defenses to the individual claims against them," the group argued. "If left undisturbed, the Eleventh Circuit's decision will encourage the filing of additional such improper actions, which already unduly burden the district courts in that Circuit, in

the data breach and many other contexts."

Shenika Theus, the plaintiff that the Eleventh Circuit found to have standing in the dispute, hit back in a March reply brief, asserting that Brinker's petition "mischaracterizes the decision below as holding that class members may be compensated for injuries 'even if they did not suffer those injuries at all,'" and that the appellate court had "already answered the question presented favorably to Brinker" by emphasizing that the proposed damages model wouldn't give class members a recovery for an injury that they couldn't show in an individual action.

"Brinker's actual gripe is not with the court of appeals' answer to the question presented but rather with how the decision below applied accepted legal principles to the facts of this case," Theus said, adding that Eleventh Circuit's directive for the lower court to "conduct a new predominance analysis, potentially using a new class definition" could "substantially affect the resolution" of the "case-specific damages issues" that the high court had been asked to consider.

The plaintiffs are represented by Jean Martin and John Morgan of Morgan & Morgan PA, William B. Federman of Federman & Sherwood, and Nicolas A. Sansone and Allison M. Zieve of Public Citizen Litigation Group.

Brinker is represented by Jonathan S. Franklin, Jason K. Fagelman, Barton W. Cox and Peter B. Siegal of Norton Rose Fulbright.

The case is Brinker International Inc. v. Steinmetz et al., case number 23-648, before the Supreme Court of the United States.

--Editing by Adam LoBelia.

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Philips Inks \$1.1B Deal To Resolve CPAP Injury Claims

By **Matthew Santoni**

Law360 (April 29, 2024, 9:52 AM EDT) -- The plaintiffs' attorneys leading a multidistrict litigation against Koninklijke Philips NV and some of its American subsidiaries announced Monday that they had reached a \$1.1 billion settlement agreement for plaintiffs claiming that degraded foam in their breathing machines caused them personal injuries or will require long-term medical monitoring.



As part of a \$1.1 billion settlement over Koninklijke Philips NV's breathing machines, the company will pay \$1.075 billion to settle personal injury claims and \$25 million for medical monitoring claims. (AP Photo/Peter Dejong, File)

The company will pay \$1.075 billion to settle the personal injury claims and \$25 million for medical monitoring claims. Together with a **recently approved**, uncapped settlement for economic loss claims starting at \$506.3 million, the deals would end all three tracks of the multidistrict litigation against Philips stemming from its recalled CPAP, BiPAP and ventilator machines.

"Ultimately, these combined agreements accomplish what we sought to achieve when this litigation began — holding Philips accountable by obtaining care for those with physical injuries and compensation for those needing new respiratory devices," said a combined statement early Monday from the co-lead counsel for the plaintiffs, Sandra L. Duggan of Levin Sedran & Berman LLP, Kelly K. Iverson of Lynch Carpenter LLP, Christopher A. Seeger of Seeger Weiss LLP, and Steven A. Schwartz of Chemicles Schwartz Kriner & Donaldson-Smith LLP.

"We extend our thanks to the court-appointed mediator, Judge Diane Welsh, for her invaluable guidance which led to this resolution, and we will provide more information to eligible claimants and their legal

counsel once the agreements are finalized and filed," the statement continued.

Details of the settlement have not yet been added to the docket for the MDL, which has been proceeding in Pennsylvania's Western District, where Philips Respironics manufactured many of the recalled devices.

Philips' CEO, Roy Jacobs, addressed the settlement in the company's first-quarter earnings statement to investors Monday, saying that insurers will pay the company €540 million (\$579 million) this year to help it cover the recall-related claims, and calling the settlements part of the company's "path forward."

"Patient safety and quality is our highest priority, and we have taken important steps in further resolving the consequences of the Respironics recall," Jacobs said in the statement. "The remediation of the sleep therapy devices for patients is almost complete, and the test results to date show the use of these devices is not expected to result in appreciable harm to health. We do regret the concern that patients may have experienced. The approved consent decree and economic loss settlement, and now the resolution of the personal injury and medical monitoring litigation in the U.S., are significant milestones and provide further clarity on the way forward for Philips."

Philips had faced hundreds of lawsuits after it issued a 2021 recall of 10.8 million breathing machines used to treat conditions such as sleep apnea. The company said it had used the wrong kind of sound-insulating foam in the machines, which could break down under certain conditions and release chemicals and particles that plaintiffs said they inhaled while using the machines.

Cases against Philips were consolidated in the U.S. District Court for the Western District of Pennsylvania **in October 2021**, and cases against a separate company, SoClean, whose products were allegedly blamed for exacerbating the foam problems, were also consolidated there **in February 2022**.

The suits against Philips were eventually divided into three tracks, each with its own "master complaint": customers who only suffered economic losses from having to replace a recalled device, customers who claimed physical injuries from allegedly breathing in the degraded foam and its byproducts, and customers who wanted long-term monitoring of their health for problems that might arise later due to their alleged exposure.

Philips and the plaintiffs' lead attorneys reached a deal for the economic loss group in September, with terms that paid customers extra to return their recalled devices rather than keeping them or just trashing them. Philips agreed to establish a settlement fund that **started out being** worth at least \$467.5 million, and that could go up to \$1 billion depending on how many customers file claims. The attorneys **sought fees** of \$94.4 million for the economic loss class settlement, which the court approved.

There were disputes with Philips and **the case's special master** over whether the medical monitoring claims could be brought in all states, since not every jurisdiction allowed medical monitoring as a standalone claim, and others required there to be some "manifest physical injury."

The U.S. Food and Drug Administration **signed off on a consent decree** early in April that bars Philips from resuming production of the devices at three U.S. facilities until it hires an independent monitor, undergoes FDA inspections and has an outside expert verify that the replacement foam has been adequately tested.

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

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

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

--Additional reporting by P.J. D'Annunzio, Lauren Berg and Mike Curley. Editing by Daniel King.

Update: This article has been updated with additional information and a statement from Philips.



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Judge Rejects Class Certification Of Seizure Drug Customers

By **Jared Foretek**

Law360 (April 29, 2024, 4:13 PM EDT) -- An Illinois federal judge has rejected a class certification bid in a suit against drugmaker Mallinckrodt and prescription delivery platform Express Scripts, ruling that the plaintiffs were unable to meet their predominance burden as a class.

MSP Recovery Claims, the assigned recovery rights-holders for Medicare plans that allegedly overpaid for the anti-seizure medication Acthar, had offered two damages models from economist Russell Mangum III, who proposed basing damages on prices that the drug would have sold for if not for the alleged anticompetitive conduct by Express Scripts — or the "but-for price."

By one of the suggested models, the prices would have been calculated based on an 8% yearly increase from Acthar's wholesale cost through 2022.

U.S. District Judge Iain D. Johnston ruled that neither formula for determining the would-be price of the drug was reliable. The 8% figure that Mangum used came from internal yearly-increase forecasts put together by Mallinckrodt in 2006, just before the drug company purchased Questcor Pharmaceuticals and entered into a contract that gave Express Scripts exclusive distribution rights for Acthar.

But according to Judge Johnston, Express Scripts was correct in **arguing** that the models Mangum suggested lacked "empirical validation."

"The 2006 planning document was conditional and predictive; this is evident from the fact that it also mooted other possible pricing strategies," Judge Johnston wrote. "Mangum fails to identify any of the conditional assumptions underlying the 8% plan, which obviously precludes any assessment ... [of] whether a but-for price increase of 8% each year is a reliable estimate."

The 2006 planning document — which was a five-year plan to start with — also included another potential pricing strategy that would have increased Acthar's initial price by four or five times, but Mangum dismissed it as unlikely because it relied on Food and Drug Administration approval of the drug for infantile spasms that never occurred.

Judge Johnston wrote that the underlying assumptions of the 8% figure were not similarly scrutinized.

"Unless the assumptions undergirding the projected 8% price increase are similarly grappled with, there is no way of knowing whether that projection represents a reliable counterfactual for Mallinckrodt's behavior, and thus a reliable estimate of but-for damages on the facts of this case," the judge wrote.

Mangum's second proposed model — deemed the "benchmark" approach — found the would-be price of Acthar by inflating the pre-conspiracy wholesale price at the same rate as a similar proxy market using the pharmaceutical producer price index, or PPI.

He argued that the entire pharmaceutical industry could be used as a benchmarking proxy because of Acthar's "lack of novelty as a therapy" and its small number of users. The Bureau of Labor Statistics' PPI for a broad swath of drugs — not just treatments competing with Acthar — was thus an appropriate comparison, Mangum claimed.

But Judge Johnston called that approach "fundamentally unreasoned."

"Mangum asserts that 'demand and the availability and cost of therapeutic substitutes' are the prime determinants of pharmaceutical prices," the judge wrote. "If that is so, he must establish that the characteristics of the drugs composing the PPI bear a rough similarity to Acthar No such analysis was carried out."

As a result, he said, the court would have to grant Express Scripts' Daubert motion to exclude Mangum's testimony, the only evidence addressing damages common to the class.

Without the models in play, Judge Johnston ruled, individual damages calculations would "overwhelm questions common to the class."

Meghan McCaffrey, an attorney for Express Scripts told Law360 in an email that she was "pleased with the decision."

Neither Mallinckrodt nor its attorneys immediately responded to Law360's requests for comments. Attorneys for the plaintiffs could not immediately be reached as well.

The recovery companies are represented by Robert A. Wallner, Peggy J. Wedgworth, Gary M. Klinger and Michael Acciavatti of Milberg Coleman Bryson Phillips Grossman PLLC.

Mallinckrodt is represented by D. Eric Shapland, Matthew M. Wolf, Laura S. Shores, Sonia K. Pfaffenroth and Ryan Z. Watts of Arnold & Porter Kaye Scholer LLP, and Joel Huotari of Williams McCarthy LLP.

Express Scripts is represented by Eric C. Lyttle, Michael J. Lyle, Meghan A. McCaffrey, Michael D. Bonanno, J. Matthew Hamann and Ryan T. Andrews of Quinn Emanuel Urquhart & Sullivan LLP, and Jan H. Ohlander of Reno & Zahm LLP.

The case is MSP Recovery Claims Series LLC et al. v. Mallinckrodt Ard Inc. et al., case number 3:20-cv-50056, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Celeste Bott. Editing by Amy French.

Update: This article has been updated with comment from Express Scripts' counsel.



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'I Don't Want To Try That Case,' Judge Tells Mike Lynch's Atty

By **Bonnie Eslinger**

Law360 (April 29, 2024, 11:59 PM EDT) -- The California federal judge overseeing Autonomy founder Michael Lynch's fraud trial over claims he duped HP into paying an inflated \$11.7 billion for his company pushed back Monday against an attempt by Lynch's lawyer to introduce evidence of events that took place after the acquisition, saying, "I don't want to try that case."

Former CEO Lynch and Autonomy's former vice president of finance, Stephen Chamberlain, are facing conspiracy and fraud charges over HP Inc.'s October 2011 acquisition of the U.K.-based technology company. Lynch, who reaped about \$804 million from the sale of Autonomy to HP, is also charged with securities fraud. The trial **began on March 18** and is expected to run through June.

In November, before the trial's start, U.S. District Judge Charles Breyer ruled that post-acquisition evidence is off-limits, since the fraud is alleged to have occurred before HP bought Autonomy. The deal was announced on Aug. 18, 2011, and closed Oct. 3, 2011.

On Monday, former HP CEO Leo Apotheker testified as a witness for the government, with his cross-examination starting in the afternoon.

Judge Breyer's comment was sparked when a lawyer for Lynch asked Apotheker about his resignation on Sept. 22, 2011 — but before the former HP CEO could answer, the judge sent the jury home.

The judge then asked the lawyer, Brian Heberlig of Steptoe LLP, the relevance of his inquiry, saying it was post-acquisition. Heberlig reminded the judge that both sides have been presenting the case under the court's Oct. 3, 2011, cut-off.

"I think it's relevant because the government left the misleading impression he was fired because of the Autonomy acquisition, which is not the case," Heberlig said. "And I have a right to bring that out."

The government also asked Apotheker about emails that were sent to analysts and the press under the pseudonym "Joe Bloggs," questioning Autonomy's financials and technology. Those were sent after the acquisition was announced, Lynch's lawyer said.

A lawyer for the government, Robert Leach of the U.S. Attorney's Office for the Northern District of California, told the court that the Joe Bloggs emails were relevant to show Lynch's scheme to defraud HP.

"It comes before many of the wires alleged in the indictment," Leach said.

Judge Breyer told Heberlig that he would be able to continue with his line of questioning on that point.

Shortly after, however, the judge told Lynch's lawyer that he was against the defense presenting post-acquisition evidence that they say shows that HP was aware of hardware sales that Apotheker and others say were not fully disclosed before the deal was done.

In a written filing with the court, Lynch said the defense intends to establish that HP executives received information about Autonomy's hardware sales — which one witness has **called bizarre** —

after the acquisition and took no action, "demonstrating that the information did not come as a surprise to HP."

Judge Breyer said there could be a multitude of reasons for HP's response, in addition to those suggested by Lynch.

"That introduces a whole series of issues that I have felt should not be litigated in this proceeding," the judge said, later adding, "I'm not saying it's not relevant at some level. But the problem is there may be any number of reasons why they reacted a particular way."

Lynch also argued in his written filing to the court that he should be permitted to present post-acquisition evidence of HP's valuations of Autonomy, saying the information would show that the hardware sales had no material impact on Autonomy's value.

Judge Breyer said Lynch wants the post-acquisition evidence to show that HP's actions resulted in the failure of Autonomy.

"I don't know," the judge said. "But I know one thing. I don't want to try that case. Because it seems to be an inappropriate case to try for fraud."

The discussion surrounding Apotheker's testimony Monday spotlighted the predicament both sides have in probing the government's allegations without introducing post-acquisition evidence.

For example, since Apotheker was booted before HP took action over the alleged fraud, Leach was unable to ask the company's CEO about what he might have learned about Autonomy's business after the deal closed. As a result, some of the prosecutor's questions were asked as hypotheticals.

"Prior to Aug. 18, 2011, if Autonomy's 2009 and 2010 financial statements were materially false and misleading, would that have been relevant to you?" Leach asked Apotheker toward the end of his direct examination.

HP's former CEO said it would have been significantly relevant.

"I would have had no trust in management, because management is not supposed to issue false and misleading statements," Apotheker said. "[Also] it would have meant that the whole picture that we had in our minds and all the financial assumptions that we have made on Autonomy would have been wrong."

During his cross-examination of Apotheker, Heberlig asked about Leach's question.

"All of those hypotheticals that were posed to you, you had no knowledge of any of those facts before you departed from HP ... to the extent that they are facts," Lynch's lawyer asked. "You answered the questions based on the assumed facts given, right?"

Apotheker agreed.

Heberlig later focused his questions on HP's financial performance in the year leading up to its purchase of Autonomy, noting that the Silicon Valley giant had missed its earning targets for three quarters in a row and was planning to make the acquisition announcement at the same time it revealed bad news for the latest quarter.

He asked Apotheker about an analogy he had used at that time, comparing HP to a "burning platform" in the ocean.

"That was a communication I made internally not externally," Apotheker said. "I was trying to make sure that people inside the company understood that missing a quarter or missing three quarters in a row is unacceptable."

The trial continues Tuesday.

The executives' trial follows ex-Autonomy Chief Financial Officer Sushovan Hussain's **April 2018**

conviction on related charges. He was subsequently sentenced to five years in prison and ordered to pay \$4 million in fines.

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 Abrahamson of the U.S. Department of Justice's Antitrust Division.

Michael Lynch is represented by Christopher J. Morvillo, Celeste 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 Dooks & Nessim LLP.

The case is U.S. v. Mike Lynch et al., case number 3:18-cr-00577, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins, Richard Crump and Christopher Crosby. Editing by Michael Watanabe.

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Terraform Says SEC's \$5.4B Sanction Bid Fails Under Morrison

By **Aislinn Keely**

Law360 (April 29, 2024, 8:57 PM EDT) -- Crypto firm Terraform Labs and its founder Do Kwon struck back at the U.S. Securities and Exchange Commission's \$5.4 billion sanctions request following its trial win, filing dual briefs Monday that argued the regulator has only shown that "a small number" of allegedly illegal token sales took place in the U.S. and under its jurisdiction as outlined in the U.S. Supreme Court's Morrison decision.

Terraform and Kwon said in their briefs that they shouldn't have to disgorge the requested \$4.2 billion since the agency hasn't shown that the buyers of Terraform tokens were in the U.S. at the time of their purchase. Rather than a \$420 million civil penalty, Terraform Labs suggested at most a \$1 million penalty "would be far more appropriate than the SEC's request."

A Manhattan federal jury **found** Terraform Labs and Kwon liable for securities fraud earlier this month, determining that the firm and its founder lied to investors about the stability of their algorithmic stablecoin UST and the rate of the Terra ecosystem's adoption. The network suffered a stunning collapse in May 2022, when its UST stablecoin lost its peg and took the value of other affiliated tokens down with it.

In their **initial remedies brief**, Terraform — sometimes called TFL — and Kwon argued that precedent from **Morrison v. National Australia Bank Ltd.** maintains that if a securities transaction occurs outside the U.S., it doesn't violate the federal securities laws and therefore can't be the basis for a sanction. According to the pair, only few sales of the LUNA, MIR and UST tokens, which were found at trial to be securities, have been shown to be domestic transactions.

The latest briefs opposing the SEC request leaned heavily on Morrison, saying the fact that the agency didn't touch on the case in its request "is no mere oversight."

"The trial record suggests that at most only a small number of token purchases may qualify as domestic under Morrison," said Terraform's brief. "Otherwise, the SEC has not proved that any TFL token sales satisfy Morrison."

According to Terraform, the SEC hasn't shown that the firm listed the tokens on a U.S. exchange or that liability or a title related to the tokens was transferred within the U.S., which could be demonstrated by showing a buyer's physical location.

The firm argued that if the transactions weren't domestic, they can't be subject to disgorgement since they're not violations of federal securities laws under Morrison and the buyers haven't suffered "pecuniary harm." Terraform Labs also argued that the Luna Foundation Guard, a nonprofit that helped maintain the stability of the Terraform ecosystem until its collapse, shouldn't be subject to disgorgement since it was not a party in the proceedings.

"The SEC may not circumvent its failure to comply with these well-established processes through a disgorgement claim in the remedies phase based on the theory that LFG is an alter ego of TFL," said the brief.

The pair also argued that they shouldn't face conduct-based injunctions requested by the SEC since token holders could be harmed depending on the scope of the order.

The SEC had argued that the firm is likely to reoffend given that it is continuing to build the Terra ecosystem by distributing a new version of one of its collapsed tokens found to be a security, known as LUNA 2.0. As a result, the SEC requested that Terraform and Kwon be enjoined from further violations and that Kwon be barred from serving as an officer or director of publicly traded companies.

But Terraform argued that there's no evidence showing the new token is a security or that the activities violate securities laws. The SEC's arguments are based on "overheated and empty rhetoric," rather than evidence, the firm argued.

An injunction could also harm investors and others, it said.

"[A] conduct-based injunction should also be denied to avoid potential harm to third parties — Terra token holders, other Terra community members, and TFL employees — who could suffer financial harm and/or lose their jobs if the injunction were deemed to curtail TFL's lawful activities undertaken to benefit the Terra community at the community's request," said the brief.

Any injunction that is entered should be clearly narrowed to address only domestic transactions in the three tokens deemed to be securities at trial. If the court orders an injunction that goes beyond that scope, Terraform requested a month to come into compliance or make an emergency appeal of the order.

Counsel for Terraform Labs and Kwon declined to comment beyond the filings on Monday. The SEC did not immediately respond to a request for comment.

The SEC is represented by Carina Cuellar, Christopher Carney, Devon Staren, Laura Meehan, Michael Welsh, Roger Landsman and James Connor.

Kwon is represented by David Patton, Michael Ferrara, Andrew Chesley, Christopher Morel and Sean Hecker of Kaplan Hecker & Fink LLP.

Terraform is represented by Douglas Henkin, David L. Kornblau and Mark G. Califano of Dentons.

The case is SEC v. Terraform Labs Pte. Ltd. et al., case number 1:23-cv-01346, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Elliot Weld and Pete Brush. Editing by Rich Mills.