

Scammers flood US class action settlements with fraudulent claims

 [reuters.com/legal/us-class-action-settlements-flooded-with-fraudulent-claims-by-scammers-2024-05-02](https://www.reuters.com/legal/us-class-action-settlements-flooded-with-fraudulent-claims-by-scammers-2024-05-02)

Diana Jones

REUTERS/Gary Cameron/Files Purchase Licensing Rights , opens new tab

May 2 (Reuters) - Artsana, a maker of child car booster seats, last year agreed to settle claims that it had misled customers about how to use its products, offering \$50 to people who had bought Chicco-brand seats.

The company, which did not admit wrongdoing in the settlement, knew it sold roughly 875,000 such seats, yet court records show that by the end of October it had received more than 3.3 million claims for payment.

Faced with a wave of questionable claims, Artsana reversed itself and urged the court not to approve the settlement it had negotiated to end the litigation.

"Criminals targeted the claims process in this case using sophisticated methods to generate large numbers of fraudulent claims," Artsana's attorneys told the federal court in Manhattan.

The court sided with Artsana and put the settlement on hold, telling lawyers to return after they had sorted out the fraud issue. The case is still pending, so no claims have been paid, records show.

Fraudulent claims have exploded in the last year, siphoning money out of settlements and threatening the class action system itself, said lawyers and claims administrators interviewed by Reuters.

More than 80 million claims submitted in 2023 showed "significant" signs of fraud, up more than 19,000% since 2021, according to a report , opens new tab expected to be released on Thursday by digital payment processor Digital Disbursements, which works with class action claims administrators.

"It's an existential threat to the whole process," said Chris Chorba, a partner at Gibson, Dunn & Crutcher who represents Artsana.

In settlements where a company agrees to pay a set amount, fraudulent claims can reduce the pool of money available for consumers actually entitled to a recovery, the experts said. In cases where companies agree to pay each claimant individually, fraud can blow up the cost of settling.

Exactly how much money is stolen from settlements through fraud is hard to quantify, said Steve Weisbrot, president and CEO of claims administrator Angeion Group, because successful fraudsters evade those trying to stop them. He said it is reasonable to think millions of dollars have been siphoned out of settlements in recent years.

“Someone is making money off of it, or it would stop,” Weisbrot said.

Plaintiffs' attorney Don Beshada, whose software company Claimscore evaluates settlement claims for fraud, said he has identified at least eight settlements in federal and state courts that have been attacked by a similar wave of fraudulent claims since last year.

Among the cases Beshada and other administrators flagged was a class action against Grande Cosmetics over claims that its eyelash growth serum contained a chemical that required regulatory approval. The company settled the case without admitting liability for a little over \$6 million. By April, 6.5 million claims had been filed, with just over 110,000 ultimately deemed valid by Claimscore and claims administrator Angeion Group, [court records show](#), [opens new tab](#) records [show](#), [opens new tab](#) show.

Neither Grande nor its lawyers responded to requests for comment. The company and attorneys for the class have urged the judge to approve the settlement, with plaintiffs' attorneys noting the number of claims deemed valid represented a significant portion of the 1 million customers the company had estimated were affected. The judge has yet to issue a ruling.

About 80% of the 14 million claims were likely fraudulent in a \$45.5 million settlement in a class action accusing tobacco giant Altria with misleading consumers about the addictiveness of its Juul products, administrators from Epiq Global told [Reuters](#), [opens new tab](#) the California federal court. Altria settled without admitting liability.

Neither Altria nor its lawyers responded to requests for comment. The settlement, approved in March, will be divided among all claims the administrators deem valid.

Fraud is generally more common in cases involving allegations of false advertising or defective products that yield small payouts and may not require proof of purchase, lawyers and claims administrators say. Companies settling such cases are generally released from liability for essentially all allegations, so even class members who get little or no payout cannot sue again.

This is not a new problem. In 2018, Reuters reported on scammers using automated bots to submit fake claims in class actions. But experts say fraudulent claims now are increasingly submitted not by bots but by groups of people using stolen identities and addresses, collecting payouts via check or digital payment. Some claims administrators suspect fraudsters use masked or stolen IP addresses to hide their locations.

In the short-term, weeding through all those claims can mean more money for administrators who charge defendant companies more to review a higher number of claims, Weisbrot said.

But in the long run, companies may become less willing to settle cases if they believe their money will go to fraudsters, said Chorba, the defense attorney who has represented several companies whose settlements have been targeted.

Plaintiffs' attorneys, including Eli Wade-Scott, the head of the class action practice at plaintiffs' firm Edelson, told Reuters fake claims are undermining efforts to improve the rate of claims by people who actually are entitled to part of the settlement. The attorneys said overly stringent tactics by administrators to crack down on fraud could make things harder for real claimants.

"Claims rates have to be excellent and those claims have to be real," Wade-Scott said.

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Reporting by Diana Jones; Editing by Leigh Jones and David Gregorio

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Diana Novak Jones
Thomson Reuters

Co-author of the Daily Docket, Reuters' daily legal industry newsletter. Diana reports on litigation, mass torts and the plaintiffs' bar. She previously worked at Law360 and the Chicago Sun-Times.

Deep Dive

- However, coming up with a joint plan before appointing class counsel in a class action MDL would be difficult, forcing dozens of lawyers around the country to negotiate, and causing delays and confusion, attorneys say.

"What is written here is not applicable almost at all to the class action practice," said Pamela Gilbert, a lobbyist and partner with Cuneo Gilbert & LaDuca LLP. She represents the Committee to Support the Antitrust Laws, a Washington-based group advocating for strong antitrust laws that wrote to the advisory committee to express concerns about the rule.

The proposal is set to be heard at a June meeting of the Committee on Rules of Practice and Procedure, and could take effect next year. But class action attorneys face a high bar to changing the rule, given that a six-month public comment period ended in February.

Read More: Proposed Multidistrict Litigation Case Management Rule Advances

Mass Tort Versus Class Action

Mass torts involve hundreds or thousands of individual lawsuits from parties harmed by a product or event. Such lawsuits remain separate even after consolidation and can be difficult for a court to manage due to the multitude of parties involved.

The new rule aims to help judges with initial direction in overseeing such cases. If applied, it would make parties and their counsel complete a number of tasks before the court appoints class counsel, including preparing a joint report that addresses scheduling, discovery, and administrative issues, Kenney said.

In contrast, class action MDLs—lawsuits brought by plaintiffs in different districts around a similar issue—are consolidated into a single action through a lead complaint that supersedes all the previously filed suits. The first step in a typical class action MDL is for the court to appoint one or two counsel to speak for the entire class.

As an example of how the typical class action MDL functions, the Committee to Support the Antitrust Laws pointed to pending multidistrict litigation accusing airline companies of fixing the price of domestic airline tickets. The MDL, which began in 2015, involved consolidating numerous complaints into one class action on behalf of a class of direct purchasers. The court also appointed class counsel before addressing pretrial management issues.

The draft rule is geared more toward mass tort MDL litigation that requires far more planning in advance, said Elizabeth Chamblee Burch, professor at the University of Georgia School of Law and an expert in both class actions and mass torts.

Mass tort cases don't have the same stringent commonality requirements of class actions, where plaintiffs must have common issues that predominate over individual ones, Burch said.

"You just have to have a common question of fact, which means you have a whole different bunch of people who are harmed in a whole bunch of different ways," Burch said of mass torts.

MDL Road Map

Proponents say the rule will help courts take a more active role in the initial proceedings of MDLs, and provide judges with uniform standards. That's especially important as such cases come to more judges who lack experience in multidistrict litigation.

The rule must still go through several stages, underscoring the difficulty of making any changes to the judicial process. If the Committee on Rules of Practice and Procedure, also known as the Standing Committee, approves the rule in June, it will advance to the Judicial Conference, then to the Supreme Court. The earliest it could take effect is December 2025.

The rule addresses problems that have affected MDLs in recent years, including how initial management decisions are made, said Alex Dahl, general counsel to Lawyers for Civil Justice, a group with members including companies and defense bar organizations that advocates for reform of procedural litigation rules.

"There has been a sense in many MDLs that the parties and the judge didn't know how the case was going to proceed until well into the proceedings," Dahl said. "This will provide needed structure for that discussion."

Some mass tort MDLs have swept in numerous uninjured plaintiffs who didn't use a specific product or sustain an injury, a problem that could be addressed by a judge early on in a case, he said.

Dahl pointed to the mass tort MDL in which former military personnel allege that 3M's earplugs failed to protect them from dangerous noise levels during combat or military training. As of late last year, the judge in the case was still working to determine whether particular claims belonged in the litigation many years into the proceedings.

Read More: 3M Agrees to Pay More Than \$5.5 Billion Over Combat Earplugs

The proposal also makes clear that Rule 23, which governs the appointment of counsel in class actions, applies to MDLs, Dahl said. "Class action lawyers who are concerned will have an opportunity to raise whatever their concerns are with the case early on," he said.

The Multidistrict Litigation Subcommittee and the advisory committee have been mulling the rule since 2017, and have already incorporated extensive commentary, according to US District Judge Robin Rosenberg, who chairs the advisory committee.

Robert Johnston, partner at Hollingsworth LLP and litigator in complex civil matters, said the rule is suggestive as opposed to prescriptive.

"The fact of the matter is, most of the stuff in this rule is done by judges," he said. "This is an effort to perhaps standardize a little more."

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Globe Life Sued by Investor Citing Report of Fraud, Misconduct

By Martina Barash

- **COURT:** E.D. Tex.
- **TRACK DOCKET:** [No. 4:24-cv-00376](#)

Bloomberg Law News 2024-05-02T10:59:10613894418-04:00

Globe Life Sued by Investor Citing Report of Fraud, Misconduct

By Martina Barash 2024-05-01T15:27:16000-04:00

- **COURT:** E.D. Tex.
- **TRACK DOCKET:** [No. 4:24-cv-00376](#)

Globe Life Inc.'s stock price was inflated until a recent short-seller's report claiming the insurance company carried out widespread account fraud and allowed workplace sexual harassment, an investor says in a proposed class action.

The April 11 report by Fuzzy Panda Research sent Globe Life's stock price down 53%, a Miami government employees' retirement fund says in its complaint, filed Tuesday in the US District Court for the Eastern District of Texas.



Globe Life and its executives attributed account growth to a greater number of agents and increased productivity, the fund says. But Fuzzy Panda reported that the company and its subsidiaries created fictitious customers and added policies to existing customers' accounts without their consent, the fund says.

"The article also revealed that Globe Life also maintained a hostile workplace where sexual harassment, drug use, and sexual assault went unchecked," it says.

A second short-seller, Viceroy Research, targeted the company Tuesday.

Globe Life said after the selloff that it was disappointed to see "self-motivated short sellers push inflammatory allegations" in order to drive its stock price down, and that the company would look at all means of legal recourse.

"We reviewed the report and found it to be wildly misleading, mixing anonymous allegations with recycled points pushed by plaintiff law firms to coerce Globe Life into settlements," the company said in a statement.

Globe Life didn't immediately respond to an email Wednesday requesting comment on the investor lawsuit.

Hundreds or thousands of investors are in the proposed class of those who purchased Globe Life stock from May 8, 2019, through April 10, 2024, according to the complaint.

The Miami retirement fund seeks damages and equitable relief on its securities fraud claims.

Siebman Law LLP; Bernstein Litowitz Berger & Grossman LLP; and Klausner, Kaufman, Jensen & Levinson represent the fund.

The case is City of Mia. Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Globe Life Inc. , E.D. Tex., No. 4:24-cv-00376, complaint 4/30/24 .

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May 2, 2024, 6:08AM PDT
Qatar World Cup Labor Deaths Blamed on Jacobs Board in Lawsuit
By [Mike Leonard](#)
Documents

-  [Complaint](#)
-  [Docket](#)
-  [Judge: Chancellor Kathaleen St. J. McCormick](#)
-  [Company: Jacobs Solutions Inc.](#)

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0431](#)

Bloomberg Law News 2024-05-02T13:01:48408300149-04:00
Qatar World Cup Labor Deaths Blamed on Jacobs Board in Lawsuit

By Mike Leonard 2024-05-02T09:08:19000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0431](#)

Jacobs Solutions Inc. board members looked the other way while thousands of workers building FIFA World Cup facilities in Qatar died on the company's watch before the 2022 event, a newly unsealed lawsuit says.

The engineering giant's directors had ample notice of the exploitive Qatari migrant labor system—characterized by rampant trafficking, abusive conditions, and other human rights violations—yet ignored their duty to monitor the safety of workers who spent years building multibillion-dollar stadiums, according to the shareholder complaint filed by a pension fund.

"All this information about the horrors of the World Cup project was public knowledge," the suit says. "Tragedy unsurprisingly ensued."

Jacobs didn't immediately respond to a request for comment Thursday.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X3KL59PS000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93...>

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'Horrendous Conditions'

The lawsuit in Delaware's Chancery Court concerns the "kafala" labor used throughout the Middle East, including in Qatar, where migrants make up around 94% of the workforce. The system, which relies on private businesses to sponsor and house foreign workers, gives those employers an inhumane level of control over their lives, the suit says.

Workers allegedly require permission from their sponsor to quit their jobs or leave the country, which can involve repaying a "recruitment fee" or other debts. They're often paid less than they were promised, hit with arbitrary wage deductions, forced to work long hours in temperatures well over 100 degrees, and housed in shacks, according to the complaint.

"The country's kafala system is government-sanctioned indentured servitude" involving "horrendous conditions," the lawsuit says. "Observers estimate that hundreds, if not thousands, of workers die each year as a result of the working conditions."

Board members at Jacobs, which has offices throughout the region, must have been familiar with the system when the company acquired CH2M Hill Inc.—which had a contract overseeing World Cup construction—in one of the largest ever deals in the engineering sector, according to the complaint.

"These abuses were widely covered by the media, the US government, and NGOs," the suit says.

Not One Meeting

Despite paying lip service to human rights protections, the Jacobs board allegedly turned over documents indicating it never held a single meeting about the issue. "Indeed, it appears that the board still does not receive any reports on the company's compliance with human rights laws and norms," according to the complaint.

At least 6,500 migrant workers had died building World Cup facilities by 2021, the year before the event, according to media reports at the time. Given the presence on the ground of Jacobs employees, it's likely they witnessed some of the abuses firsthand, the suit says.

The company now faces a federal lawsuit brought by former migrant workers who say it violated human trafficking laws. The case could lead to "severe financial consequences" and "untold reputational harm," according to the complaint.

The lawsuit was made public April 29 after being filed under seal April 24 by the Wirral Borough Council as Administering Authority of Merseyside Pension Fund.

The fund is represented by Bernstein Litowitz Berger & Grossmann LLP. Jacobs and its board members haven't yet made court appearances.

The case is Wirral Bor. Council as Admin. Auth. of Merseyside Pension Fund v. Abani , Del. Ch., No. 2024-0431, complaint unsealed 4/29/24 .

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Apollo Denies Illegal Life-Insurance Practices Alleged in Suit

By Mike Leonard

Documents

 [Docket](#)

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- Private equity giant denies life insurance scheme claims
 - Affiliate acquired pooled policies legally, Apollo says

Bloomberg Law News 2024-05-02T10:57:48345988655-04:00

Apollo Denies Illegal Life-Insurance Practices Alleged in Suit

By Mike Leonard 2024-05-01T11:31:53000-04:00

- Private equity giant denies life insurance scheme claims
- Affiliate acquired pooled policies legally, Apollo says

Apollo Global Management Inc. fired back Wednesday at claims it uses illegal life insurance policies to bet on the longevity of senior citizens, calling the allegations “disingenuous and flat out wrong.”

The fund targeted by the April 26 lawsuit never participated in originating life insurance policies, instead acquiring pools of insurance-linked securities before it was wound down in 2019 “in an orderly and common process,” Apollo said in an emailed statement.

Read More: [Apollo Accused in Lawsuit of Illegal Human Life Wagering Scheme](#)

“We believe these claims to be baseless and the suit’s description of Apollo’s historic activities within the life settlements market to be a gross mischaracterization,” the statement said.

The lawsuit, filed by the estate of Martha Barotz, says Apollo is “carrying out a widespread fraudulent human life wagering conspiracy” while funneling the proceeds of illegal life insurance policies through a web of shell entities run by a secretive affiliate, Financial Credit Investment.

The Barotz policy paid out \$5 million after she died in 2018, according to the court 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. LATIII sold the policy to FCI in 2011, the suit says.

Read More: Matt Levine's Money Stuff: Apollo Had Some Death Bets

The case in Delaware's Chancery Court 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 April 26 complaint.

Apollo stressed Wednesday that the earlier lawsuit, filed in 2020, didn't allege any wrongdoing on the asset manager's part and that the presiding judge didn't find any. The judge ruled only that the original issuance of the policy in 2006 was improper, Apollo said.

One of the law firms leading the litigation "has a cottage-industry practice of challenging life settlements all over the United States," including some in which FCI has an interest, according to the statement. "The defendants in those cases have largely been successful in defeating this law firm's claims," Apollo said.

The lawsuit also targets affiliates of Wells Fargo Bank NA and Wilmington Savings Fund Society FSB over their administrative connections to FCI. They haven't responded to requests for comment.

The Barotz estate is represented by Donald L. Gouge Jr. of Wilmington, Del., and Cozen O'Connor. Apollo, Wells Fargo, and Wilmington Savings haven't yet made court appearances.

The case is Estate of Martha Barotz v. Wilmington Savs. Fund Soc. FSB , Del. Ch., No. 2024-0447, 5/1/24 .

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Data Breaches, ADA Compliance Drive Class Action Increase, Report Finds

The inaugural Class Action Litigation Report found class action filings steadily increased from 2014 to 2020, dipped 10% in 2021, then started rising again in 2022. Last year, class action filings jumped 4% to 9,705.

May 02, 2024 at 11:00 AM

Class Actions

By Amanda Bronstad | May 02, 2024 at 11:00 AM

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

Class action filings are rising, particularly for consumers, employees and those suing for violations of the Americans with Disabilities Act, according to a class action litigation report released Thursday by Lex Machina, a division of LexisNexis.

Lex Machina analyzed class action filings in federal district courts and appellate courts, finding that they have steadily increased from 2014 to 2020, dipped 10% in 2021, then started rising again in 2022. Last year, class action filings jumped 4% to 9,705.

[falcon-embed src="embed_1"]

The report divided up class actions by their types of claims, noting a 14% rise from 2022 in the largest group, consumer protection, with 4,460 lawsuits, spurred by the filing of data breach litigation.

“The expansion in class actions that we are seeing is driven in significant part on two trends: (1) The plaintiffs’ bar’s focus on alleged misleading advertising or related claimed unfair/deceptive business practices, across all industries, including ‘greenwashing’ and ESG related claims, and (2) a significant increase in putative class actions focused on privacy, data usage and/or data security,” said Sandra Hauser, head of the U.S. commercial litigation practice at Dentons.

The report ranked Dentons first in the number of class actions it defended in 2021 to 2023, with 589 cases. “We expect both trends to continue in 2024,” Hauser added.

The uptick was particularly noticeable in the area of civil rights, which skyrocketed from 655 in 2017 to 2,080 in 2018 and continued to rise until 2023, when it dropped from 13% to 2,413.

“The great majority of cases were ADA cases,” said Laura Hopkins, class action legal data expert at Lex Machina, and editor of the report, referring to the Americans with Disabilities Act.

In fact, many of the report’s top plaintiffs firms in a number of filed class actions from 2021 to 2023 specialized in ADA cases: [Stein Saks](#), in Hackensack, New Jersey, ranked first with 1,668 class actions from 2021 to 2023, and New York’s [Mizrahi Kroub](#), ranked second, with 1,665 cases. The top venue was the [Southern District of New York](#), where 80% of the 6,730 class actions filed from 2021 to 2023 were civil rights cases and, of those, 99% were ADA actions.

The report also calculated total damages from class action settlements. In 2023, the total damages were \$10.9 billion, up from \$7.7 billion in 2019.

“The number of cases really hasn’t changed, but the amount of damages has gone up year after year,” Hopkins said.

Meanwhile, attorney fees totaled \$7.6 billion from 2021 to 2023, about 25% of the \$30.4 billion in class action settlements approved during those years.

“It doesn’t surprise me that the total dollar amount bounces up and down a lot because that’s going to be highly sensitive to a very big settlement happening in a particular year,” said Brian Fitzpatrick of Vanderbilt Law School. “On the fee percentage, that is perfectly consistent with every other empirical study, so that’s a good sign of the validation of their data.”

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J&J's \$6.5B talc settlement comes as plaintiff lawyers fear losing their experts

 legalnewsline.com/stories/658208861-j-j-s-6-5b-talc-settlement-comes-as-plaintiff-lawyers-fear-losing-their-experts

May 2, 2024

Asbestos

NEW BRUNSWICK, N.J. (Legal Newsline) - An offshoot of Johnson & Johnson is paying nearly \$6.5 billion to settle almost all lawsuits alleging its talcum powder contained asbestos and caused certain cancers - two months before the company could question the findings of highly paid experts who drove tens of thousands of lawsuits.

The \$6.475 billion agreement resolves 99.75% of all claims, the company said May 1. Through the years and in many different courthouses, J&J and plaintiff lawyers battled to both massive paydays for plaintiffs and defense wins.

The litigation came down often to whether expert testimony that supported the idea talc used for Baby Powder contained asbestos was allowed to be presented. Those experts were finding decades-old products on eBay.

Plaintiff lawyers were in jeopardy of losing that testimony in the multi-district litigation containing 93% of ovarian cancer claims. The judge there had agreed to reconsider whether their methodologies met the *Daubert* standard for experts.

"The talc claims asserted against the company exemplify the egregious impact on U.S. businesses from meritless litigation and extreme judgments obtained by the plaintiffs' bar through forum-shopping, the distortion of scientific literature with junk science, and the unregulated and surreptitious financing of product litigation by financial institutions, including private equity and sovereign wealth funds," said Erik Haas, J&J's worldwide vice president of litigation.

The final figure represents a downgrade for plaintiffs from the \$8.9 billion J&J's LTL Management offered in the bankruptcy system - a move fought by plaintiff lawyers who wanted their cases in courtrooms instead.

Their mesothelioma claims, which usually lead to the biggest verdicts and settlements, are not affected by the settlement. In one instance in New York, a mesothelioma plaintiff won \$325 million but saw it overturned by an appeals court who ruled her experts couldn't show she was exposed to enough fibers to cause the disease.

Previous *Legal Newsline* coverage showed how the mass tort was created on what some scientists called a basic misunderstanding.

Talc is often found in the same rock formations as asbestos and manufacturers like J&J had periodically been accused of selling cosmetic talc contaminated with asbestos fibers, although the manufacturers denied it.

Plaintiff experts initially downplayed the idea talc could cause cancer because defendants could cite the ubiquitous product as an alternate cause of disease. Dr. William Longo, another prominent talc expert, called the idea cosmetic talc contained asbestos “an urban legend” in 2002 testimony.

By 2019, Longo had made \$30 million offering mostly pro-plaintiff testimony through the years.

Since there is no known safe level of exposure to asbestos, plaintiff experts are free to say any exposure at all can cause disease, even though numerous studies have shown people breathe in a significant amount of asbestos every day and don't contract cancer from it.

Dozens of epidemiological studies reveal no higher risk of asbestos-related cancers among talc miners and a study of mesothelioma rates in women undermined the theory that breathing a small amount of asbestos can cause cancer.

J&J accused another expert, Dr. Jacqueline Moline, of lying on the stand and sued her in 2022. Dr. Moline was criticized by a federal judge for undermining the credibility of her conclusions by failing to acknowledge she had reason to suspect her study subjects had other sources of asbestos exposure, since all 33 were involved in asbestos litigation and some had made claims against other defendants.

In December 2023, a change to the Federal Rules of Evidence targeted unscientific theories. The amendment spells out the “preponderance of evidence” standard that many judges already followed, requiring judges to issue a finding that a proposed expert opinion more likely than not reflects scientific methods, not speculation. The amendment also strengthens the requirement that expert opinions reflect “a reliable application of the principles and methods to the facts of the case.”

On March 27, New Jersey federal judge Michael Shipp ordered a new review of the testimony of plaintiffs experts. J&J had until July 23 to make new arguments against them but settled before doing so.

ORGANIZATIONS IN THIS STORY

U.S. District Court for the District of New Jersey

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<https://www.law.com/2024/05/01/johnson-johnson-launches-6-48b-bankruptcy-plan-to-resolve-talc-lawsuits/>



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NEWS

Johnson & Johnson Launches \$6.48B Bankruptcy Plan to Resolve Talc Lawsuits

Wednesday's proposed plan immediately got pushback from lawyers representing ovarian cancer victims: "This is not a done deal," Beasley Allen's Andy Birchfield told Law.com. "There is substantial opposition to this."

May 01, 2024 at 02:45 PM

Bankruptcy



Amanda Bronstad
staff reporter



What You Need to Know

- Johnson & Johnson said the plan could garner the support of more than 75% of talc victims and, if approved, would resolve 99.75% of all pending talc lawsuits.
- Unlike Johnson & Johnson's prior bankruptcies, talc claimants would have three months to consider the plan, which excludes cases brought by victims of mesothelioma.
- The announcement comes after a federal judge in the talc multidistrict litigation set the first bellwether trial for Dec. 3.

Johnson & Johnson announced plans for a subsidiary to file a third bankruptcy to resolve thousands of talcum powder lawsuits as part of a “prepackaged” reorganization plan that would provide nearly \$6.48 billion to cancer victims.

In Wednesday’s announcement, Johnson & Johnson said its proposed bankruptcy plan could garner the support of more than 75% of talc victims, noting various differences from two prior Chapter 11 cases that judges dismissed last year. Johnson & Johnson said its plan, if approved, would resolve 99.75% of all pending talc lawsuits.

“The plan is the culmination of our consensual resolution strategy that we announced last October,” said Erik Haas, worldwide vice president of litigation at Johnson & Johnson, in a statement. “Since then, the company has worked with counsel representing the overwhelming majority of talc claimants to bring this litigation to a close, which we expect to do through this plan.”

Unlike its prior bankruptcies, talc claimants would have three months to consider the plan, which excludes cases brought by victims of mesothelioma, a deadly lung cancer, 95% of which Johnson & Johnson said have already been resolved. The \$6.475 billion would be paid over 25 years.

“Unlike the prior cases, it is the vote of the claimants—and not the conflicting financial incentives of the small minority of plaintiff lawyers who stand to receive excessive legal fees outside of a reorganization—that decides whether the plan may proceed,” Haas said.

Lawyers with ovarian cancer clients immediately criticized Johnson & Johnson’s announcement. Many likened Johnson & Johnson’s efforts to stuffing the ballot box to get enough votes for its plan.

“We view this as another example of the abusive and underhanded tactics J&J has been using for years,” Mike Papantonio, of Pensacola, Florida’s Levin Papantonio Rafferty Proctor Buchanan O’Brien Barr Mougey, said in a statement. “J&J is covertly soliciting law firms to accept their deal, promising a swift payday for some opportunistic lawyers.”

Andy Birchfield, of Beasley Allen in Montgomery, Alabama, told Law.com there was “no material difference” between the new plan and a prior offer from Johnson & Johnson to resolve ovarian cancer claims for \$6.5 billion.

“This is not a done deal,” he said. “There is substantial opposition to this. And J&J has misrepresented and overstated the support that they have for this bankruptcy plan. And they have understated the number of claimants, and the lawyers that represent them who are opposed to these low-value settlements that are proposed in this plan.”

“Courts have rejected twice their efforts to claim bankruptcy protection at the expense of cancer victims,” he added, “and I think they will do it again.”

Birchfield opposed Johnson & Johnson’s prior bankruptcies, including a proposed \$8.9 billion reorganization plan in the second Chapter 11 filing last year that would have included the settlement of not just ovarian cancer claims but those involving mesothelioma.

Johnson & Johnson has moved to disqualify Birchfield from the talc litigation, citing a partnership he struck with one of its former lawyers to float a \$19 billion talc settlement. New Jersey’s Atlantic County Superior Court John Porto and U.S. Magistrate Judge Rukhsanah Singh, in the talc multidistrict litigation, held a disqualification hearing on [March 26](#) and [April 10](#). A third day is scheduled for this Friday.

Third Bankruptcy Would Be in Texas

Johnson & Johnson’s third bankruptcy, should it move ahead, would be filed by an entity called Red River Talc LLC, formed through a reorganization of LTL Management, now called LLT Management LLC, the subsidiary that filed the first to Chapter 11 cases. The filing would be in Texas, not in New Jersey, where the prior two bankruptcies were filed.

Since its second bankruptcy was dismissed last year, Johnson & Johnson has faced three talc trials in state courts in Florida and Illinois. On March 5, jurors in Miami-Dade Circuit Court were [deadlocked](#) in the first post-bankruptcy ovarian cancer trial. But, on April 19, a jury in Sarasota Circuit Court gave Johnson & Johnson a [defense verdict](#) in an ovarian cancer case, while a jury in Chicago’s Cook County Circuit Court [awarded \\$45 million](#) to a mesothelioma victim.

The bankruptcy announcement comes after U.S. District Judge Michael Shipp of the District of New Jersey refused to reconsider his March 27 order allowing [a “full refiling”](#) of scientific expert testimony in the talc multidistrict litigation.

In his April 30 decision, Shipp clarified that Johnson & Johnson could challenge a 2020 ruling by U.S. District Judge Freda Wolfson, the former judge in the talc multidistrict litigation, who is now retired, allowing five of the plaintiffs’ general causation experts to testify in upcoming bellwether trials under the U.S. Supreme Court’s 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals*.

5/2/24, 11:04 AM

Johnson & Johnson Launches \$6.48B Bankruptcy Plan to Resolve Talc Lawsuits | Law.com

“He makes it clear he was not looking at throwing out Judge Wolfson’s prior *Daubert* decision and starting all over,” Birchfield told Law.com. “That’s not what he envisioned. He just said if the parties think that the science has changed on a particular issue, they’re free to file and point that out for reconsideration.”

Shipp also scheduled the first bellwether trial in the talc multidistrict litigation for Dec. 3.

“In that order,” Birchfield said, “he left open the possibility of that being a multi-plaintiff trial. That’s significant, too.”

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May 2, 2024, 6:05 AM PDT

Philips CPAP Deal Leaves Opening for Future Cancer Claims (1)

By Jef Feeley and Cagan Koc

- \$1.1 billion deal covers current US suits over flawed devices
- Philips says high threshold for future claims by individuals

Bloomberg Law News 2024-05-02T12:31:51800284873-04:00

Philips CPAP Deal Leaves Opening for Future Cancer Claims (1)

By Jef Feeley and Cagan Koc2024-05-02T09:05:14870-04:00

- \$1.1 billion deal covers current US suits over flawed devices
- Philips says high threshold for future claims by individuals

Royal Philips NV's \$1.1 billion settlement of US lawsuits targeting 5.5 million recalled sleep-apnea devices resolves only current cases and doesn't set aside funds for potential future cancer claims over the machines.

The Dutch company has [set aside](#) €982 million (\$1.1 billion) to fund a settlement of allegations that the faulty sleep-aiding machines pose a cancer risk because of deteriorating sound-dampening foam. The deal also provides money to cover doctors' bills as users monitor their future health.

The accord seeks to resolve about 60,000 US suits over so-called continuous positive airway pressure, or CPAP, devices, which were targeted by [US regulators](#) in 2021. But it sets aside no funds for future illnesses allegedly caused by the recalled machines, Philips officials acknowledged.

Cancers some researchers have linked to the degraded polyurethane can take many years to develop. Philips officials deny that the machines pose "any appreciable harm" to users.

"Philips is confident that the agreement to resolve the personal injury litigation and the medical monitoring class action in the US will end the uncertainty associated with litigation in the US," said Philips spokesperson **Steve Klink** in response to Bloomberg's question about possible future cases.

Bigger Estimate

Philips touted the deal as corralling the US CPAP litigation. It amounts to about 22% of the nearly \$5 billion in exposure stock analysts estimated that the company could face. Its shares soared when it was announced, sending them to the highest level in two years. They were down 1% in late-afternoon trading Thursday in Amsterdam.

"What can happen is that an individual can still come forward," Philips CEO **Roy Jakobs** said in response to Bloomberg's questions about whether the company may still face cases after a six-month opt-in period for plaintiffs. But that "individual would have to meet quite high thresholds before he can put in a claim," he said.



Philips' DreamStation sleep apnea device.

Source: Royal Philips NV

Legal experts predict the Dutch manufacturer could be dealing with CPAP suits well beyond that time frame. "This litigation is not over by a long shot," said Carl Tobias, a University of Richmond law professor. "Anyone who thinks Philips can wash their hands of this case with a \$1.1 billion settlement is fooling themselves."

The US Food and Drug Administration ordered Philips to pull the CPAPs with the crumbling foam off the market after ordering the most serious recall the agency can demand. FDA officials said in January that they received 561 reports of deaths possibly linked to malfunctioning machines. Earlier this year, Philips was also ordered to suspend sales of the devices in the US after an agreement with the FDA.

In court filings, injured CPAP users allege Philips executives – both in the Netherlands and in the US – knew about problems with noise-dampening foam at least three years before issuing a safety recall for the devices.

No Cases Heard

The settlement of the cases, consolidated in federal court in Pittsburgh, comes before any were heard by US juries. That raises questions about how individual injury claims will be properly valued, said Elizabeth Burch, a University of Georgia law professor who specializes in mass-tort law.

The health-monitoring part of the accord, which is structured as a class-action case, remains subject to approval by US District Judge Joy Flowers Conti. The rest of the settlement covers individual personal-injury suits. Conti already has approved a separate \$479 million class-action settlement of cases brought by CPAP users who bought or rented one of the 16 lines of recalled machines.

"I worry about mass-tort cases like this that settle without vetting the merits through" test trials, Burch said. "Given the number of death claims and the low settlement value relative to what financial analysts predicted, one wonders if plaintiffs' counsel settled on the cheap."

Under the deal's terms, plaintiffs' lawyers leading consolidated CPAP suits will decide how much injured users get.

"The math is harsh," Ronald Miller, a Baltimore lawyer representing consumers, said on his website Thursday. Assuming 59,000 claims are submitted, that would provide an average per-claim recovery of about \$18,000, Miller noted. "There will be cases that go far above the average, and there will be cases where the victim receives nothing or close to nothing."

Plaintiffs' lawyers backing the settlement counter the CPAP cases faced serious procedural hurdles and Philips – or one of its units – could have potentially been forced into bankruptcy by the overwhelming financial exposure to the suits. Other companies facing mass litigation have taken such a step.

Conti was weighing whether one of Philips' US units, Pennsylvania-based Respireonics Inc. , was the only company that could be legally held liable for the malfunctioning machines when the accord was announced. That would limit the pot of money injured consumers could target to the assets of Respireonics, estimated to be more than \$500 million.

Perry Weitz, a veteran plaintiffs' lawyer based in New York who wasn't part of the CPAP settlement negotiations, said sometimes MDL attorneys are forced to seek settlements before early trials can test the value of alleged claims. "Sometimes, you have to get what you can get," Weitz said.

Six Months

Public disclosures about the accord show injured consumers have six months to accept Philips' offer, take their case to trial before Flowers or refile the suit in US state courts. Philips can walk away from the deal if 95% of all CPAP users with current claims don't sign on, according to the disclosures. Consumers who opt for trial must shoulder the costs of investigating the case rather than rely on information gathered by MDL lawyers.

Klink said the number of recalled CPAP devices and injured consumers "is finite" even if there are future claims. The company says some claims will be knocked out by state laws governing how long injured consumers can wait before suing.

The company also said in the disclosures that it faces suits outside the US in places such as Australia, Canada, Israel and Chile. "The complaints variously allege economic loss, personal injury and, in some cases, the need for medical monitoring," according to the documents. Philips hasn't disclosed how many cases are pending in other countries.

"It's very hard to close a case like this when you're talking about possible long-term consequences," said Mark de Hek, a Netherlands-based lawyer focused on personal injury claims. De Hek, who represents a little over 1,000 Dutch patients affected by the sleep apnea recall, said he expects "to deal with the case for many years to come, as long as these consequences remain unclear."

The case is IN RE Philips Recalled CPAP, Bi-Level PAP and Mechanical Ventilator Products Liability Litigation, 21-MD-3014, US District Court, Western District of Pennsylvania (Pittsburgh).

(Updates with shares in second section and Miller's remarks in third.)

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Ninth Circuit dismisses youth-led climate case in Oregon

 [courthousenews.com/ninth-circuit-dismisses-youth-led-climate-case-in-oregon](https://www.courthousenews.com/ninth-circuit-dismisses-youth-led-climate-case-in-oregon)

Alanna Mayham

The May Day order came from a panel of Donald Trump appointees who found that an Oregon judge violated the Ninth Circuit's mandate to dismiss the climate case in 2020.

PORTLAND, Ore. (CN) — A landmark youth-led climate change lawsuit in Oregon came to a halt on Wednesday when a Ninth Circuit panel granted the federal government's petition to dismiss the case without an opportunity to amend.

In their 2015 lawsuit, 21 young climate activists — initially between the ages of 8 and 19 — accuse the federal government of contributing to climate change through fossil fuel production, thus harming them and violating their constitutional rights to life, liberty and property while failing to protect public trust resources.

The lawsuit narrowly escaped dismissal in 2023. U.S. District Judge Ann Aiken allowed the plaintiffs to file a second amended complaint following a divided ruling from the Ninth Circuit in 2020 with instructions to dismiss the case for lack of standing.

Later that year, Aiken, a Clinton appointee, denied the government's motion to dismiss again, prompting the federal government to request a stay on proceedings as the Ninth Circuit decides whether to grant its seventh writ of mandamus seeking the case's dismissal.

But while the Ninth Circuit agreed on Feb. 29 to review the feds' petition, Aiken denied the government's request to stay on April 19, saying it would further delay the nine-year-old case.

"This court cannot discern any public interest in such delay," Aiken wrote.

Aiken also filed a supplemental order to the Ninth Circuit on why it should deny the government's writ of mandamus, emphasizing that the case belongs in trial court, not with the Ninth Circuit.

"Defendants therefore have other means, such as a direct appeal, to obtain the desired relief," Aiken wrote. "This court recommends denying defendants' petition for writ of mandamus."

On May Day, of all days, the Ninth Circuit disagreed.

U.S. Circuit Judges Mark J. Bennett, Ryan D. Nelson and Eric D. Miller, all appointees of former President Donald Trump, explained their rejection of Aiken's reasoning that allowed the young plaintiffs to amend — a ruling that relied in part on the judge's conclusion that

amendment was not expressly precluded in the Ninth Circuit's 2020 order.

"Neither the mandate's letter nor its spirit left room for amendment," the panel wrote in the order.

Aiken also relied on the U.S. Supreme Court's 2021 ruling in *Uzuegbunam v. Preczewski*, which she interpreted as an intervening change in the law, the panel noted. That case asked "whether an award of nominal damages by itself can redress a past injury."

"Thus, *Uzuegbunam* was a damages case which says nothing about the redressability of declaratory judgments," the judges concluded.

"Damages are a form of retrospective relief. Declaratory relief is prospective. The *Juliana* plaintiffs do not seek damages but seek only prospective relief. Nothing in *Uzuegbunam* changed the law with respect to prospective relief."

Attorneys for the *Juliana* plaintiffs did not immediately respond to a request for an interview or comment.

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US appeals court says kids' climate lawsuit must be dismissed

 [reuters.com/legal/us-appeals-court-says-kids-climate-lawsuit-must-be-dismissed-2024-05-01](https://www.reuters.com/legal/us-appeals-court-says-kids-climate-lawsuit-must-be-dismissed-2024-05-01)

Clark Mindock

People take part in a climate change rally in Denver, Colorado, U.S. October 11, 2019.
REUTERS/Rick Wilking/File Photo Purchase Licensing Rights , opens new tab

May 1 (Reuters) - A U.S. appeals court on Wednesday said a lawsuit filed by 21 young people claiming the U.S. government's energy policies violate their rights to be protected from climate change must be dismissed, this time for good.

A three-judge panel of the San Francisco-based 9th U.S. Circuit Court of Appeals said in a five-page order that the case should have been dismissed after the court first weighed in on the matter in 2020, when it said courts could not mandate broad policy changes that are better left to Congress and the executive branch.

While the young plaintiffs have since trimmed the lawsuit to seek only a declaration that their rights have been violated, the 9th Circuit said lawsuits must address harms that can be remedied by courts and such a declaration would not directly help the plaintiffs. The lower court overseeing the case dismissed the lawsuit shortly after receiving the panel's order.

The plaintiffs are considering asking an 11-judge "en banc" panel of the 9th Circuit to reconsider the decision, Julia Olson, an attorney for the plaintiffs at the non-profit law firm Our Children's Trust, said. A similar request after the 2020 ruling was denied.

"This is a tragic and unjust ruling, but it is not over," Olson said. "A declaration of our constitutional rights is one of the few things that has moved our nation to greater justice and equality throughout history."

The U.S. Department of Justice declined to comment.

The plaintiffs had argued in their 2015 lawsuit that the government has permitted, authorized and subsidized fossil fuel extraction and consumption despite knowing those actions cause catastrophic global warming.

They said climate change exacerbates things like wildfires, drought and flooding, which in turn jeopardizes their health and property. By contributing to climate change, the plaintiffs said U.S. energy policies violate their rights to due process and equal protection under the U.S. Constitution.

The young people were between the ages of 8 and 19 when they filed their lawsuit, Juliana v. USA.

After the 9th Circuit's 2020 order dismissing the case, a federal judge in Eugene, Oregon, allowed the youth to amend their lawsuit.

The U.S. government opposed the plaintiffs' bid, saying it was "substantially identical" to issues the parties already litigated.

Numerous other youth-led climate lawsuits have been filed in recent years by Our Children's Trust, similarly arguing state and federal policies promoting fossil fuels violate the rights of young people.

While several of those have been dismissed, a Montana state judge last year ruled in favor of a group of young people who said the state's permitting of fossil fuel projects violates a 1972 amendment to the Montana constitution requiring the state to protect and improve the environment.

A similar lawsuit by a group of young Hawaiians based on that state's constitution is due to go to trial in June.

The U.S. Constitution contains no such explicit provision. A group of young people have also filed a lawsuit against the U.S. Environmental Protection [EPA](#), opens new tab accusing the agency of "intentionally" discriminating against U.S. children by allowing the release of dangerous levels of climate change-causing greenhouse gas pollution in California federal court.

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Reporting by Clark Mindock, Editing by Alexia Garamfalvi and Michael Erman

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ANALYSIS

So You Think Courts Can Handle Questions of AI-Enhanced Evidence?

Hold on to your hats.

May 01, 2024 at 07:30 AM

**Ross Todd**
Editor/columnist

Judge Scott Schlegel of Louisiana's Fifth Circuit Court of Appeal speaks in a video posted on [sch]Legal Tech substack, created using artificial intelligence. Image from web videoHold on to your hats here for a second.

I'm going to point you to [a video](#) that **Judge Scott Schlegel** of Louisiana's Fifth Circuit Court of Appeal posted to his must-follow [sch]Legal Tech substack. Schlegel, who spent a decade on [the state's trial bench](#) before being elected to the appellate court last year, has long been a proponent of [embracing technology](#) to make the courts more user-friendly. But he's also been forthcoming [with his worries](#) about how he and his colleagues on the bench will deal with deepfakes and other tech-related evidentiary issues as they come up in court proceedings.

So back to that video: In it, you see Schelgel talking about having read an article about a federal judicial panel's [discussion last month](#) about whether or not the current rules on authenticity and admissibility are adequate to deal with AI-generated evidence.

"Some judges thought that the current rules provide us everything we need right now. The landscape of AI-generated evidence like deepfakes is becoming more ubiquitous by the day, though, so I hope they will continue their efforts in earnest," said Schlegel.

Or did he?

The video continues: "The time to adopt new rules may be here before we know it. This video clip, for instance, was created using AI in less than five minutes, which demonstrates how easily AI can be utilized to manipulate reality."

Aside from a couple of odd hand gestures and a relatively flat tone toward the end of the 37-second clip, Schlegel's video is a pretty convincing replica of what it's like to watch him speak in [a digital forum](#). I imagine as technology advances, videos such as the one he produced will only become more convincing and will take even less time to put together.

So, godspeed to the Federal Judicial Conference's Advisory Committee on Evidence Rules, of whom Schlegel was speaking. It seems like they have their work cut out for them, even if some on the panel think the current Federal Rules are up for the challenge.

On a related note, my colleague Cassandra Coyer at Legaltech News has [a comprehensive breakdown](#) of a decision from a trial court judge in Washington state in what appears to be the first decision barring the use of videos enhanced by AI as evidence.

King County Superior Court Judge Leroy McCulloch in late March [declined to allow](#) lawyers for a criminal defendant to introduce cellphone video enhanced by “machine learning software” in a case involving a 2021 shooting outside a bar in the Seattle area. McCulloch found the video evidence, produced using the Topaz Video AI enhancement, didn’t satisfy the state’s definition of “relevant evidence” since it “does not show with integrity what actually happened but uses opaque methods to represent what the AI model ‘thinks’ should be shown.”

Professor **Brandon Garrett**, director of Wilson Center for Science and Justice at Duke University School of Law, told Cassandra that the expert in the case used off-the-shelf software and couldn’t explain how it worked to make grainy, shaky cellphone footage more clear. “It might have been that if the defense witness knew how the software was designed, the expert could have reassured the court that this wasn’t unreliable, that it didn’t alter the video in any way that might mislead the jury,” he said.

Garrett also noted that the Washington judge was making his admissibility decision under the *Frye* “general acceptance” standard rather than under *Daubert* as would be the case in federal court and many other venues.

“That’s part of why the opinion may read oddly to people that aren’t familiar with that standard,” Garrett said. “Most courts in the country follow the federal standards, which asks more specific questions about how reliable experts’ methods and application of methods are.”

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Your Guide To Dark Money from FirstEnergy in Ohio Politics

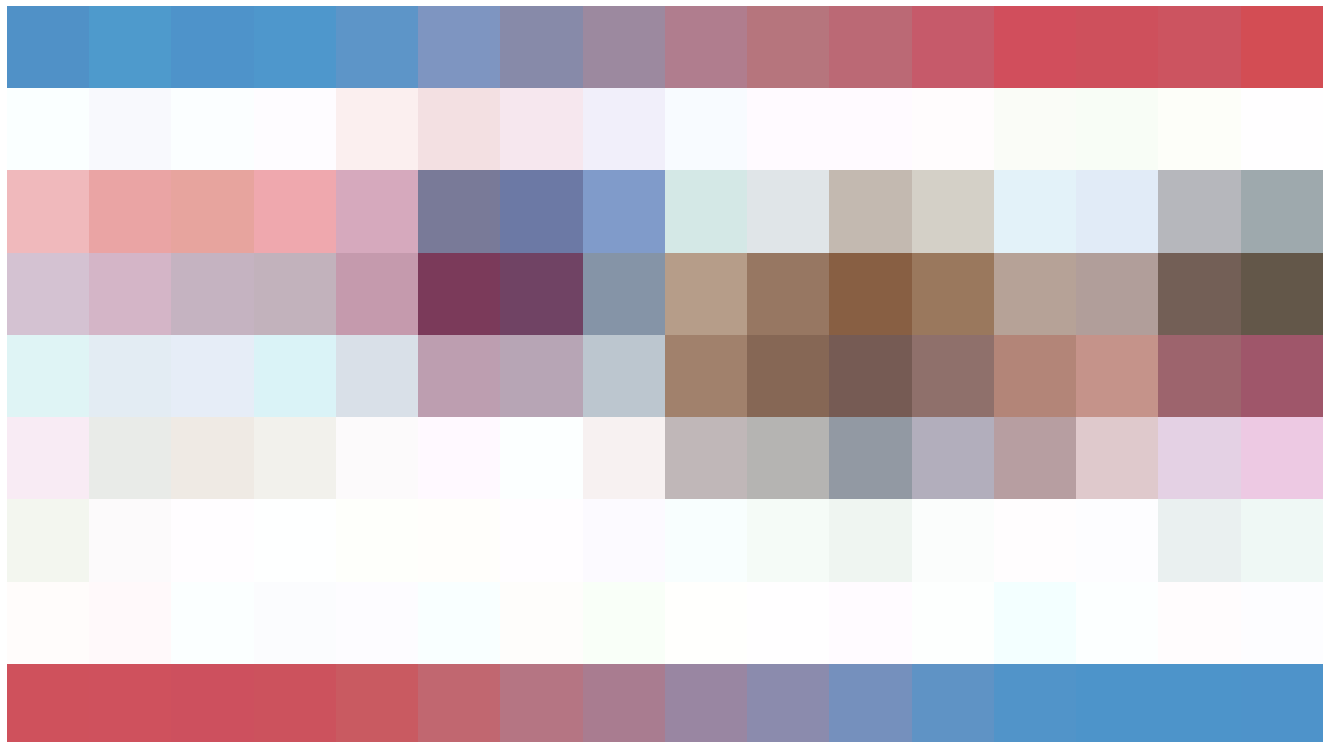
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WKYC Staff

Elections

Your Guide To Dark Money from FirstEnergy in Ohio Politics: Ohio Has Issues with Stephanie Haney and Mike Polk Jr.

Mike Polk Jr. and Stephanie Haney dig into the details of FirstEnergy payments to dark money groups supporting Gov. DeWine, Lt. Gov. Husted a Senate Pres. Huffman





Credit: wkyc studios

Digging into the details of FirstEnergy payments to dark money organizations that supported Ohio's current leaders, on Ohio Has Issues on May 1, 2024

Author: WKYC Staff

Published: 7:24 PM EDT May 1, 2024

Updated: 7:28 PM EDT May 1, 2024



CLEVELAND — As new documents have become available related to FirstEnergy's bribery scandal, we're learning about payments the company made that benefited the current holders of the highest political offices in the state.

On the May 1 episode of Ohio Has Issues, Mike Polk Jr. and Stephanie Haney dig into the details of FirstEnergy payments to dark money organizations supporting Governor Mike DeWine, Lt. Governor Jon Husted and Ohio Senate President Matt Huffman.

To explain what we've learned thanks to a shareholder lawsuit against FirstEnergy, Stephanie and Mike talk with Cleveland.com political reporter Jake Zuckerman. University of Cincinnati political reporter David Niven shares his perspective on why these campaign contributions are concerning, and how it seems unlikely to him that our state's leaders didn't

know they were being made for their benefits. Plus, they talk with government watchdog Common Cause Ohio Executive Director Catherine Turcer about what she'd like to see when it comes to campaign finance transparency in the state.

We also get the latest update on what's happening in the Ohio General Assembly related to two anti-LGBTQ+ bills and the long overdue closure of Ohio's marital rape prosecution exemption.

Watch Ohio Has Issues here:



Watch Video At: <https://youtu.be/L7xAX1G0NH4>

"Ohio Has Issues" is recorded in Cleveland, out of WKYC Studios. New episodes typically stream live every Wednesday night at 7:30 PM on the WKYC YouTube page and the WKYC+ streaming app. "Ohio Has Issues" is also available wherever you listen to podcasts, with episodes dropping after the livestreamed recording sessions end.

Stephanie is the digital anchor and legal analyst at WKYC. She is licensed to practice law in both Ohio and California.

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FirstEnergy no 'victim,' charged former executives claim

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Jim Provance

The Blade

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May 2, 2024

8:33 AM

COLUMBUS — FirstEnergy Corp. is no victim, its former executives argue in a case in which they are accused of conspiring against the state of Ohio and their former employer in a bribery scheme involving the state's former top utilities regulator.

Attorneys for Charles (Chuck) Jones, former CEO of the Akron-based utility giant, and Michael Dowling, a former senior vice president, argue in a motion filed Wednesday that the corporation can't admit to being a conspirator in federal court and be charged as such in civil court, and then be considered a victim in state criminal court.

They also claim that the utility's victim status in the state case filed in Summit County Common Pleas Court flies in the face of Attorney General Dave Yost's own characterization of FirstEnergy as a "perpetrator."

The former executives are accused of paying a \$4.3 million bribe to attorney and consultant Samuel Randazzo just as Gov. Mike DeWine was about to appoint him chairman of the powerful Public Utilities Commission of Ohio.

They are also also accused of working to help Mr. Randazzo skim off the top of settlements coming from the company that were meant for his clients at the time, heavy industrial energy-users.

Mr. Randazzo committed suicide last month while corruption charges were pending against him in state and federal courts, with Mr. Jones and Mr. Dowling as co-defendants in the state case.

The cases against the three men are related to the \$61 million bribery scheme in which FirstEnergy has admitted to being the primary "dark money" benefactor. The scheme led state Rep. Larry Householder's return as Speaker of the House so that he could then usher through a law containing a \$1.3 billion, customer-financed bailout of two struggling nuclear power plants then owned by a FirstEnergy subsidiary.

Householder is a year into a 20-year federal prison sentence after his racketeering conspiracy conviction. He is appealing his federal conviction while simultaneously faced new state charges in Cuyahoga County Common Pleas Court.

But this case goes beyond that, also delving into an alleged \$4.3 million payment by the utility to Mr. Randazzo in 2019 that FirstEnergy later admitted in a federal deferred-prosecution agreement was a bribe in exchange for future favors to boost utility profits. FirstEnergy paid a \$230 million fine as part of that agreement with federal prosecutors.

This week's court filing claims the state has offered immunity or non-prosecution deals with several FirstEnergy executives in exchange for evidence against Mr. Jones and Mr. Dowling.

The defendants also argue that FirstEnergy's "victim" status could complicate their defense. Marsy's Law, added to the Ohio Constitution by voters in 2017, guarantees certain rights to crime victims, including the right to "refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused."

"The state should not be permitted to gain unfair tactical advantages in a criminal prosecution by improperly designating FirstEnergy as a 'victim,' especially when that designation contradicts FirstEnergy's own admissions and the position the state has taken consistently and stridently in the case and elsewhere," the filing reads.

The indictment contends that the amount of the \$4.3 million bribe was stolen from FirstEnergy and used for an illegal purpose, although that illegal purpose was ultimately seen as benefitting the utility.

But actions allegedly carried out by FirstEnergy executives on behalf of the utility should be seen as actions of the utility itself, the filing argues.

“The indictment hardly portrays FirstEnergy as a victim,” it reads. “To the contrary, it alleges that ‘[FirstEnergy] set out to buy the part of Ohio government that it cared about the most’ and that ‘FirstEnergy saw the opportunity to put its loyally corrupt agent inside the new government.’”

It notes that separate civil litigation filed by Mr. Yost in Franklin County Common Pleas Court seeks billions in monetary damages against Mr. Randazzo, Mr. Jones, Mr. Dowling, and the utility itself, proposing the possibility dissolution the corporation.

It says Mr. Yost has described FirstEnergy as a “perpetrator” in news releases promoting his office’s actions.

“Yet the state has refused to withdraw FirstEnergy’s ‘victim’ designation, asserting the untenable position that FirstEnergy can simultaneously be a ‘victim’ under Marsy’s Law, on one hand, and on the other hand, and admitted co-conspirator and perpetrator, vicariously culpable corporate entity, target (or subject) of the state’s ongoing criminal investigation, and potential criminal defendant in this case,” the motion reads.

First Published May 2, 2024, 7:23am



Jim Provance

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NEWS

'Stall and Duck': Software Salesman Says CEO Told Him to Lie

Former Autonomy VP of OEM sales Harald Collet said CEO Michael Lynch gave him misleading "talking points" on what to say to investors.

May 01, 2024 at 08:47 AM

White Collar Crime



Maria Dinzeo



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

Faced with probing questions from a hedge fund over his company’s sales structure, software salesman Harald Collet turned to his boss, Autonomy CEO Michael Lynch, for advice on how to respond.

Lynch had straightforward advice: “Stall and duck.”

Such was the one-line email he sent to Collet, which was shown in court Tuesday by prosecutors who claim Lynch, a British tech tycoon, was the architect of an \$11 billion fraud orchestrated on the buyer of his company, the Silicon Valley giant Hewlett-Packard.

Lynch and his vice president of finance, Stephen Chamberlain, are standing trial in San Francisco federal court, charged with masking Autonomy’s true financial condition through a range of tactics, including padding its revenues and issuing false and misleading annual reports.

Prosecutors say Lynch’s financial chicanery lured HP into buying his company for \$11 billion in 2011, a deal that ranks as one of the most disastrous in tech history, with HP eventually writing down \$8.8 billion of Autonomy’s value.

Attorneys for Lynch and Chamberlain assert that HP is pointing fingers at them to cover for its own lack of vigilance during the due diligence process. (Read earlier Law.com here: [trial setup](#), [opening arguments](#), [ex-Autonomy GC’s testimony](#), [ex-HP CEO Leo Apotheker’s testimony](#)).

Collet was granted immunity by the government and testified under subpoena. He joined U.K.-based Autonomy in November 2007 as vice president of business development and by May 2008 had become head of sales for its lucrative original equipment manufacturer, or OEM, business. Under the deals Collet’s team struck, the OEMs would integrate Autonomy’s software into their own products.

Autonomy’s signature software—and what most attracted HP into making the purchase—was a search engine and data management platform called IDOL that was capable of extracting meaning from vast amounts of unstructured data.

Collet said he spent two days shadowing Lynch at a 2008 tech conference sponsored by Goldman Sachs, where Lynch touted Autonomy's OEM model to investors as an "index fund" for software, capable of generating revenue from the big-name companies that used IDOL.

"The OEM model included an upfront payment, and two years later you would collect royalties on their revenues. So it became an index fund of those software companies. You would collect a percent of their revenues for their use of the IDOL companies," Collet said on the stand, adding that it only counted as an "index" fund if royalties were paid out over time, not up front.

Investors including Lone Pine Capital raised questions about the structure of the OEM deals. They were concerned about whether Autonomy was doing pre-paid licensing agreements, which would mean the investment wasn't analogous to an index fund.

Collet said Lynch gave him some "talking points" on what to say and what not to say to investors.

"The talking points described the OEM deal structure as a \$200,000 prepaid amount development license and that two years later there would be a royalty collected anywhere from 2-4%," Collet said. "I was not supposed to say there were any pre-paid royalties collected."

Assistant U.S. Attorney Adam Reeves inquired about the accuracy of the talking points during his direct examination:

"Were you doing prepaid deals?" he asked.

"We were doing prepaid deals," Collet answered.

"So was he advising you to say something inconsistent with how you were doing prepaid sales?"

"Yes."

"Did that worry you?"

"It did."

In July 2009, Collet forwarded Lynch an email from Lone Pine employee Leonie Foong asking about the prepaid royalties.

Lynch replied: "Harald, Pls take attached doc, read it and CUT AND PASTE JUST the TEXT into a text email reply to them."

Lynch's answer to Lone Pine said in part, "It is not normal for customers to pay upfront royalties," and "We aim to maximize the royalty stream not the upfront."

Displaying the email to the jury, Reeves asked, "Is Dr. Lynch asking you to lie?"

"I would consider this a lie," Collet said.

"Did that make you feel uncomfortable?"

"Very uncomfortable."

Collet did as instructed, noting later in his testimony that it was "very difficult to say no" to Lynch's directives. Foong replied via email, "We have some follow up questions which is probably faster to just speak on the phone."

Collet immediately forwarded this to Lynch, who responded with “stall and duck.” The email also said, “Suggest avoid ... say you are away.”

Collet said that email exchange spurred him to consider leaving Autonomy. “It was a very uncomfortable request, and it was paramount in my decision to leave,” he said.

During his cross-examination of Collet, Chris Morvillo, a defense attorney for Lynch, raised the possibility that Lynch was concerned he would be running afoul of securities rules prohibiting the selective disclosure of material, nonpublic information if he shared details of the payment arrangements with Lone Pine.

“You understood in your conversations with Lone Pine that you had to be careful not to disclose inside information,” Morvillo asked.

“I got talking points on what to say, so I proceeded with care,” Collet said. “But at the same time I wasn’t told not to talk to the investors. I expected it to be a conversation about our business practices.”

Morvillo also pointed out that Collet deleted the talking points he claimed Lynch had provided him.

“The only evidence of Dr. Lynch encouraging you to mislead LP you deleted,” Morvillo said,

Collet responded that while he deleted the original talking points, he kept the follow-up emails instructing him to cut and paste the misrepresentations to Lone Pine.

“You are misremembering that he sent you talking points,” Morvillo probed.

“No, I’m not,” Collet said.

“So you got them and you deleted them?”

“I deleted them shortly after,” Collet said. “I felt uncomfortable about the whole situation and felt like the talking points were an email I didn’t want to keep around.”

The subject of emails from Lynch also came up earlier in the day on Tuesday during testimony from Leo Apotheker, who was CEO of HP when it agreed to buy Autonomy and championed the deal.

He said he was enticed that Autonomy’s focus on software would help orient HP away from selling computer hardware, which had become a commodity business, and shift it into the innovation-driven software field. Apotheker said his enthusiasm was stoked by the company’s representations of rapid sales growth contained in its 2010 annual report.

Defense attorney Brian Heberlig asked Apotheker Tuesday about the battering HP stock took when the companies unveiled the deal on Aug. 18, 2011. Within hours, HP shares had fallen 20%. Apotheker testified the drop was not a surprise and that it was a known risk to the board and had been discussed during strategy meetings leading up to the deal.

“The strategy was to weather that hit, but prevail in the long run?” asked defense attorney Heberlig asked.

“Yes,” Apotheker said.

Heberlig asked Apotheker about a “note of encouragement” he received from Lynch a few days later with the subject line “Personal—a few thoughts.”

Lynch opened by noting that he and Apotheker were on the same page about the powerful synergies that would result when the companies combined. “When I saw the extent of the plan it made sense to me, but it was clear it will be a bit bumpy for a bit until people gain the clarity to understand it,” Lynch wrote.

Then came this personal anecdote: “When I first became CEO of a public company, a retired CEO friend, sadly now no longer with us, took me aside and said being CEO of a public company is like being the captain of a cruise ship. When the sea is calm and the sun beating down and there is little to do, the passengers praise you. But in the teeth of a terrible storm, when you’re fighting the elements with all the skill of a seasoned sailor, they will wail and cry. But it’s in the storm they need the true seafarer.”

He closed with this: “Anyway, to put a shaft of sunlight through the storm, my team is so excited to take this all to the next level. We can see the amazing opportunity here and can’t wait to get on with it. We see this as the moment of compete [sic] change for the industry.”

Apotheker replied: “I look forward to our journey together. This captain has been screamed and yelled at and I’m more determined than ever to prove the naysayers wrong. I’m excited to meet you and your team tomorrow and eager to get going to build the future of our industry.”

After meeting with the Autonomy team, Apotheker sent an email to HP Chairman Ray Lane. “Meeting with the Autonomy leadership team in Cambridge was good: highly motivated, smart and excited team, eager to realize the synergies asap. Once we get to know them better, they might actually add DNA to HP’s leadership pool.”

But Lane had already started to lose his nerve about the acquisition. In early September, just weeks before the purchase was scheduled to close, he asked Apotheker to explore if there there was a way to kill the deal.

In a Sept. 4 email, he wrote, “I am still haunted by Autonomy itself. I don’t think it’s the panacea we think it is. I read the analysis you provided of their organic growth, and I see them as a roll up. I would like to ask you and our advisors to analyze for the board whether there is any way to get out of the Autonomy deal.”

Apotheker replied that he was “99%” sure the deal was irreversible. He added that “if Autonomy and more software isn’t the solution, what is the alternative?”

In a subsequent email to Lane, Apotheker wrote: “It is important that we remind ourselves what we presented to the board and what the board ultimately decided. ... We always presented to the board our full business case: a case hinging more on the synergies that the combined companies can generate than on Autonomy’s stand alone capabilities.”

Two weeks later, Lane asked Apotheker to resign, and he did so. Apotheker said he saw it coming. “After this email, I started to have some suspicions,” he said.

On Tuesday, Zachary Abrahamson, a trial attorney for the Department of Justice, asked Apotheker about the analysis of Autonomy that had been presented to HP’s board, noting that it had been based on Autonomy’s own financial statements.

“If those statements contained misrepresentations, would those misstatements have been baked into the synergies number?” Abrahamson asked.

“It would have been baked into the stand-alone value and everything else that flows from it,” Apotheker said.

“At the time this [analysis] was created, were you aware of any naked hardware sales by Autonomy? Abrahamson asked, referring to HP’s eventual discovery that hardware was a substantial piece of Autonomy’s business.

“No,” Apotheker answered.

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Matt Levine's Money Stuff: How Could the Death Bets Make Money?

By Matt Levine

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By Matt Levine 2024-05-02T13:02:42411-04:00

Who is selling all this underpriced life insurance?

We talked on Tuesday about a weird trade. The trade is: A person, usually an older person – call her Alice – takes out a \$5 million life insurance policy, naming an investor – call him Bob – as the beneficiary. Bob pays Alice a fee for doing this – say 3% of the face value of the policy – and also pays the premiums on the policy. Eventually Alice dies, the insurance pays out, and Bob gets the money. If the death benefit is higher than the premiums that Bob has paid over time – for instance, because Alice dies a week after taking out the policy – then Bob makes a profit. If the death benefit is lower than the premiums – for instance, because Alice lives to be 125 – then Bob loses money.

The thing that most people find weird about this trade is the general ickiness of the investor betting on Alice's death. In fact, this trade – it is called STOLI, for stranger-originated life insurance – is not allowed in many places; we talked about it Tuesday because the estate of an Alice (Martha Barotz) was suing a Bob (Apollo Global Management Inc.) to get the \$5 million back.

But I don't mind ickiness, and the thing that I found weird about the trade was different. The thing that I found weird is: How can Bob expect to make money on this trade? He is betting on Alice's life span, with the life insurance company on the other side; why should he expect to win that bet? Presumably Alice is a stranger to him and to the insurance company, and both of them can ask her for her medical history and do physical exams. What is Bob's informational advantage? I wrote:

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?

Several readers wrote in to answer this question, and the answer is illuminating. Here's how one reader put it:

Some large fraction of life insurance policies are not optimally exercised. So traditionally life insurance companies sold insurance that was significantly underpriced if the recipient was going to optimally exercise it, and yet profitable because some reasonable fraction of their clients let their policies lapse sub-optimally.

"Optimal exercise" is a term from options markets and I suppose it is a little icky to apply it to life insurance. (You "exercise" life insurance by dying, and it is generally optimal to die as late as possible.) But the point is that a lot of people take out life insurance policies, and then their circumstances change, they *stop paying the premiums* and the policy is canceled.

If you take out a 20-year term life insurance policy, pay premiums for eight years, stop paying premiums, and then die in Year 10, you will get no death benefit and the insurance company will keep your eight years of premiums. This is “suboptimal,” for you, as a technical financial matter. But it might have been a perfectly rational decision for you to let the insurance lapse: You took out the insurance thinking your heirs needed money when you died more than you needed the premiums while you were alive, and then your circumstances changed. Maybe you thought you needed 20 years of insurance to provide for your minor children, but then they got child acting gigs and don’t need the insurance money, and you’d rather spend the premiums while you’re alive.

But the *insurance company* doesn’t care about any of that; from the insurance company’s perspective what happened is that it got eight years of premiums and didn’t have to pay out when you died. You did not exercise optimally. The insurance company is in an actuarial business; it can predict what percentage of its customers will let their policies lapse. The percentage is large. And in a competitive market, it can price this, and does. The amount you pay for a 20-year term life policy is calculated based on:

1. The insurance company’s well-informed prediction of when you are likely to die, *and*
2. The insurance company’s well-informed prediction of when you are likely to stop paying premiums.

Bob, in our example, is no better at predicting Alice’s death than the insurance company is. But there is an information asymmetry: The insurance company thinks that Alice has, say, a 40% chance of letting the policy lapse before she dies, and Bob knows that the actual chance is 0%. He’s paying the premiums, he’s a financial investor, he bought this policy as a bet, his circumstances are not going to change, he’s going to keep paying until he gets the death benefit. The insurance company priced the policy at, intuitively, a 40% discount to its purely mortality-risk-based value, because it figured there was a 40% chance of suboptimal lapse. That 40% discount is – in expectation, over hundreds of policies that he buys – profit to Bob.

A few points about this. One: It’s a big part of why STOLI is often illegal. Courts say that insurance contracts are valid only if they are taken out for “a legitimate insurance purpose, such as estate planning.” Insurance companies price insurance based on the assumption that real people are doing estate planning, and their circumstances might change in ways that lead to suboptimal exercise. Insurance priced based on a *pure bet* would be more expensive.

In fact, there seems to have been a boom in STOLI in the mid-2000s, as the secondary market for life insurance was ramping up, but it died out by 2008. The trade we talked about Tuesday was originated in 2006; it’s cleaning up an old STOLI policy, not an active trade. Part of the reason for this ramp-up was that, for insurance carriers and brokers, STOLI *looked* like a good trade at the time: They got to write all these big insurance policies! Those policies looked profitable, based on historical data. Then they realized they were all underpriced and shut it down.

Two: This problem is not *solely* a feature of STOLI insurance. We talked on Tuesday about the broader business of investors buying life insurance policies; Apollo, for instance, manages billions of dollars’ worth of policies. Most of those policies are *not* STOLI policies; they were taken out by real people for real insurance purposes, and then, when those peoples’ needs changed, they sold the policies to investors. STOLI is frowned upon and often illegal and hard to collect on, but the broader secondary market for insurance policies is fine and legitimate and does pay out.

But it’s the same problem. Insurance companies bet that X% of their policies will lapse suboptimally. If there is a robust and well-advertised secondary market for the policies, then this estimate will be much too high: Everyone who takes out an insurance policy and decides to stop paying the premiums will *sell* the policy to an investor, for cash, rather than letting it lapse for nothing. And so not just STOLI policies, but *all* policies, will be underpriced. On Tuesday I quoted (in a footnote) a 2011 paper by Susan Lorde Martin on “Betting on the Lives of Strangers: Life Settlements, STOLI, and Securitization,” making this point:

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. Life settlement arrangements mean that policies will not lapse, so insurance carriers will pay death benefits on many more policies than they would be paying otherwise. This will result in higher premiums for everyone, including those who want only the death risk coverage.

The point is that insurance is priced as an individual product sold to *people*, who are constrained by their circumstances and their access to capital, and who will sometimes make decisions that create a financial windfall for the insurance companies. But if those people have access to deep liquid capital markets, then they won't. And all that insurance will be mispriced.

But that mostly hasn't happened. There are trillions of dollars of life insurance in the US, of which tens of billions of dollars of policies are owned by secondary-market investors. Lots of people still let their life insurance policies lapse; virtually none of them instead resell them in the secondary market. The Life Insurance Settlement Association – a trade organization for the secondary market in life insurance – says that its members bought \$4.35 billion face amount of policies in 2022 in 3,079 transactions, which “represent just a tiny fraction of the 9.28 million policies valued at \$624 billion that are lapsed or surrendered annually by life insurance consumers.”

So the insurance isn't mispriced, from the insurance companies' perspective: They charge a price that accurately reflects the expected behavior of their customers. But it *is* mispriced, for a financial buyer. The buyer (the investor) and the seller (the insurer) can both make money on their zero-sum bet, as long as lots of other non-financial buyers subsidize them.

Third: This is all reminiscent of mortgages? We have talked a few times, as rates have gone up, about assumable mortgages. A few months ago, I wrote :

The normal US mortgage is a 30-year fixed-rate loan that is prepayable without penalty. If a bank lends you money at 5% and then rates go down to 3%, you will go refinance at 3% and pay back the original 5% loan: The bank won't get to keep its original, now-above-market loan. But if instead rates go up to 7%, you don't have to pay the bank back for 30 years: The bank is stuck with its original, now-below-market loan. You have an option to reprice when rates go down; the bank does not have an option to reprice when rates go up.

This is a bummer for the bank, but it is mitigated by the fact that you probably *won't* wait 30 years to pay back the loan: You'll probably *sell your house*, for some non-financial reason (you have kids and need a bigger house; your kids grow up and you don't need such a big house), and then you'll have to pay back the loan. The bank is stuck with its below-market loan, but not forever; even now, when mortgage rates are 7%, some people still go and pay off their 3% mortgages. If they didn't, things would be rough for the bank.

If mortgages were always automatically assumable, then when you sold your house you'd let the buyer assume your mortgage, and that 3% mortgage would remain outstanding for 30 years, and the bank would be stuck with it, and that would be worse for the bank, so it would have to charge you more for your mortgage to begin with.

The entire US mortgage system is priced off the fact that people suboptimally exercise their mortgage prepayment option: People are *constantly* prepaying 3% mortgages when mortgage rates are 7%, an insane financial decision *in isolation* but possibly perfectly rational for them *in real life*. (If you have to move, for a new job or a new relationship or just a nicer house, you will probably have to prepay your mortgage.) The average 30-year mortgage actually lasts less than 10 years, meaning that there are a lot of suboptimal prepayments.

If you could move without prepaying your mortgage – if you could just transfer your mortgage to whoever is buying your house – then you would, and all cheap mortgages would remain outstanding for 30 years, and the whole mortgage market would be mispriced. Which is why you can't.

OPEC++

The oil industry is unusual because it is, historically, largely run by a cartel. Two nested cartels, now: OPEC, the Organization of Petroleum Exporting Countries, a group of 12 oil exporting nations that coordinate on petroleum output, and OPEC+, consisting of OPEC and 10 other countries. OPEC has a website, where it announces its production and quotas and penalties for companies that exceed the quotas.

In any other context this would all be an obvious violation of US antitrust laws : If a dozen US companies got together to agree on output, penalized each other for exceeding output quotas, and announced all of this on a website, they would probably all go to jail. But these are sovereign nations and they can do what they want.

Still you should not expect US antitrust regulators to be happy about any of it. Also, the US is a big petroleum exporting country, but it is not part of OPEC. US oil companies do not go to OPEC+ meetings to coordinate their production with OPEC+ members. But they do operate in an industry that is *largely* run by a cartel, one that holds meetings that *do* set production quotas.

Might they sometimes get confused? Envious? Might that lead them to do things that make US antitrust regulators mad? Oh sure:

Former Pioneer Natural Resources Chief Executive Scott Sheffield attempted to collude with representatives of the Organization of the Petroleum Exporting Countries to coordinate production and raise oil prices, U.S. antitrust enforcers said.

The allegations, unveiled by the Federal Trade Commission on Thursday, come as ExxonMobil struck an agreement with antitrust enforcers not to add Sheffield to its board of directors. The agreement allows Exxon to close a \$60 billion stock deal to acquire rival Pioneer as early as this week. ...

"Mr. Sheffield's past conduct makes it crystal clear that he should be nowhere near Exxon's boardroom. American consumers shouldn't pay unfair prices at the pump simply to pad a corporate executive's pocketbook," said Kyle Mach, deputy director of the FTC's Bureau of Competition.

Here are the FTC's announcement and complaint. The complaint suggests that US oil companies *do* sometimes go to meetings with OPEC officials. You simply could not pay me enough to go to this dinner:

In March 2017, then-OPEC General Secretary Mohammed Barkindo organized a private dinner for U.S. shale producers, including Mr. Sheffield. Mr. Sheffield commented at the time, "I'm seeing a series of meetings where OPEC is reaching out and spending more time with US independents than I have seen over my entire career."

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices," said Adam Smith, and probably the FTC would be interested in any private dinner for CEOs of competing software or media or ball bearings companies. But a private dinner for CEOs of competing oil companies with the head of a foreign cartel ... I mean, what are the chances that they were there to discuss sports? Low, suggests the FTC, though the dinner was in 2017 and they're just acting against Sheffield now.

That paragraph is followed by about a page and a half of mostly blacked-out details of Sheffield's alleged dealings with OPEC, which is exciting. But there's also this:

One move in Mr. Sheffield's playbook has involved publicly threatening U.S. shale producers who might deviate from a coordinated output reduction scheme. For example, in 2021, Mr. Sheffield said "Everybody's going to be disciplined, regardless of whether it's \$75 Brent, \$80 Brent, or \$100 Brent." He added that "All the shareholders that I've talked to said that if anybody goes back to growth, they will punish those companies."

"All the shareholders that I've talked to." This has nothing to do with OPEC+. This is just, Pioneer is a publicly traded US company (until the Exxon deal closes), and it has shareholders, and its CEO talks to the shareholders. And the shareholders he talks to are mostly big institutional investors who don't *just* own Pioneer. They are also big shareholders of *other* US oil companies. They talk to those companies' CEOs too.

Well! You know the theory. If you were *only* a shareholder in Pioneer, and you were meeting with its CEO, and oil prices were at \$100 a barrel, you might say "hey, you can drill oil for less than \$100 a barrel, maybe you should increase production to take advantage of these prices while you can?" And the CEO might say "yes but then everyone else will increase production and prices will fall." And you might say "sure but they'll probably do that anyway, so you might as well be first, so you can sell some at \$100." And the CEO might do it.

But if you are a shareholder of *all* the US shale oil companies, what would be the point of that? They all increase production, the price falls, they all make less money than they would by keeping production low and prices high. You might instead go to *all* of the CEOs, in turn, and say "hey, keep production low, so prices stay high and all of our portfolio companies make money." And all the other diversified shareholders might do the same, and the CEOs might all say "well, we work for the shareholders, and the shareholders want us to keep production low and will punish us if we don't." Sort of like OPEC!

Anyway that is a theory that people sometimes have, though it is controversial. Sheffield seems to believe it though.

Private credit

Today Bloomberg's Dawn Lim and Silas Brown report on Blackstone Inc.'s push to invest tens of billions of dollars of insurance companies' money in private credit, "proof of how a small band of private firms is usurping Wall Street as the real power in global capital markets, and why financial regulators are increasingly anxious about how best to police them." There is this discussion of the regulatory implications:

Wall Street banks used to be the chief providers of company loans, but post-crisis capital rules have made this harder, letting "nonbanks" like Blackstone muscle in. Defenders of the private markets say it's safer to fund lengthy loans by using long-term cash from insurers and pension schemes, rather than from institutions such as regional banks who rely on customer deposits, "which in today's technological world, can go 'poof,'" according to [Blackstone President Jon] Gray.

"The growth in private credit is super helpful to enhancing the resilience of the financial system," he adds.

Nevertheless, the market's untested in a crisis. Regulators fret about how investors could sell private loans in an emergency, and whether they're being valued correctly. The International Monetary Fund has warned of stability risks from "entities with particularly high exposure to private credit markets, such as insurers influenced by private equity firms." Stung by the loss of lucrative lending work, Wall Street bosses such as JPMorgan Chase & Co.'s Jamie Dimon want tougher oversight of what they've called their shadow bank rivals.

I always find this controversy puzzling. To me it just seems like Gray is straightforwardly right. This is what we discussed yesterday : The traditional method of using short-term bank deposits to fund long-term loans is structurally risky and leads to banking crises, while the method of using long-term locked-up insurance money to fund long-term loans is intuitively much safer. It is true that banks are subject to more oversight than private credit, but that's because banks are (1) centrally important to lots of the financial system and (2) structurally risky as a funding model. Banks are heavily regulated not because regulation is good, or because lending is dangerous, but because *taking bank deposits is dangerous*. If you just lend insurance money you really do need less regulation. Not none – you don't want to lose the insurance money! – but less.

That said, I also wrote yesterday that banking seems to spring up naturally everywhere. People – in securitization markets before the 2008 crisis, in crypto leading up to the 2022 crypto winter – are endlessly tempted to build "shadow banks" that act like banks (issue short-term money-like liabilities to buy long-term risky assets) but are not as well regulated or capitalized as banks. To the extent "private credit" is "insurance companies make and hold long-term loans" it seems strictly safer than banking, and that seems to be mostly what it is. Now. But in five years will someone be building commercial paper conduits to fund private credit investments? Ehh, I mean, how could they not be tempted?

Indian options

We talked the other day about two traders who were pushed out of Société Générale SA's Hong Kong delta one trading desk for allegedly doing unauthorized trades in Indian options. One of them went on LinkedIn to say, well, what does "unauthorized" mean really? From his post:

If the risk management team and their risk system would have identified the trades on day one and would have informed me that the trades are not in your mandate I wouldnt have traded that strategy and wouldnt have lost my job. Just mentioning technical glitch or mentioning they were not aware of the trades done by me is completely incorrect. The trades were auto booked (No manual intervention) on daily basis into the system into separate strategy. ...

Strategy was traded almost over 4 months and it made almost more than 2mn Euros during the same period.

I would like to ask during all this time there was no one to check what has been happening on the desk?

Why would i risk my Job to trade the same? ...

I accept I did trades options on Indian Indices and according to me it was in my mandate and well within the trading limits as this strategy was one of the different strategies which i use to run on Indian indices. There were some overnight positions as well on Index options as well as Single stock options on Indian Indices on which risk reporting was done on daily basis. This clearly tells you that they knew options were traded on the desk & this was not completely new on the desk.

I HAD NO INTENTION OF HIDING THESE TRADES FROM ANYONE.

That's kind of fair? If your job is trading an Indian stock index, and you put on an options trade on that index, and you book it normally and it's in all of the bank's systems, and the next day it makes money and you close it out, and a week later you do the same thing, and then your boss taps you on the shoulder and says "actually you're not allowed to trade options," then you'll say "oops sorry I thought I was," and she'll say "no you're not," and you'll say "well then I'll stop," and you will. (Or you will say "but I really want to, and other people on the desk have traded options," and then presumably the question will be escalated and you'll either get the authority to trade options or you'll stop.) She won't fire you over this minor misunderstanding.

But if your boss never taps you on the shoulder and you do this for four months, making money and never hiding the trades, and then you get fired for roguish trading, that does seem unfair! "According to me it was in my mandate": He thought he was allowed to trade options, so he did, and they kept letting him trade options, so he assumed he was right. And then later they did a backtest of the risk he was running and decided actually he wasn't allowed to trade options.

By the way, "you made us 2 million euros on trades that could have lost hundreds of millions of dollars" *could* be a perfectly sensible reason to fire a trader? Never mind what was in his mandate, if the risk/reward ratio of his trades was bad, then that would be bad trading, and banks should fire bad traders. (I do not have enough information to know if this was true; "the trades could have cost the Paris-based lender hundreds of millions of dollars had an intense market downturn occurred," Bloomberg reported , but I don't know if that's a realistic near-miss or an extreme tail scenario.) But "we fired you because you achieved poor risk-adjusted returns," while not great, is probably less harsh than "we fired you because you did unauthorized trades."

Things happen

Can Forests Be More Profitable Than Beef? Why Banks These Days Are So Excited About Being Boring . Companies Begin Cutting Debt Due to High Interest Rates. Japan Likely Spent About \$23 Billion in Latest Yen Intervention . BlackRock's Plan for Your Retirement: A 401(k) With a Monthly Check. Blue Owl targets infrastructure investors in hunt for acquisitions. How BlackRock Is Winning in Crypto. Huawei Secretly Backs US Research, Awarding Millions in Prizes. Dubai Billionaire's Children Plan to Revive Troubled World Islands . What we know about WA's missing zebra.

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1. Actually the insurance company normally pays the agent, but the economic point stands: There are a lot of mouths to feed here out of what is essentially a zero-sum bet between the insurance company and the investor.
2. That is the normal result in a term life policy. Other insurance products (universal life) have a savings component, and you can stop paying premiums and cash out the savings component (the "surrender value" of the policy). In either case though you are effectively losing the actuarial value of your death benefit. I talk about term policies in the text because they are simpler to understand, but in reality most of the activity here is in universal life.
3. Below, I quote a published estimate of 38%, but I have informally heard much higher numbers. Here is a 2016 study by Daniel Gottlieb and Kent Smetters finding lapse rates of 2.5% to 7% per year.

4. "There is substantial anecdotal evidence that insurers take subsequent profits from lapses into account when setting their premiums," wrote Gottlieb and Smetters. They provide some numbers: "The Society of Actuaries 2006 Annual Meetings held a session on lapse-supported pricing that included presentations from actuaries employed by several leading insurance companies and consultants. Kevin Howard, Vice President of Protective Life Insurance Company, for example, demonstrated the impact of lapses on profit margins for a representative male client who bought a level-premium secondary guarantee universal life policy, with the premium set equal to the average amount paid by such males in August 2006 in the company's sample. Assuming a zero lapse rate, the insurer projected a substantial negative profit margin, equal to -12.8%. However, at a typical four percent lapse rate, the insurer's projected profit margin was 13.6%, or a 26.4% increase relative to no lapsing." That is, the policy is priced at a level that would lose money for the insurer, if every customer kept paying the premiums. But it makes money for the insurer, because many of them don't.

5. He's also not much *worse*, because he's a price taker on the policy, and in a competitive market the insurance company is going to price the policy based on its best estimate of her mortality risk.

6. Realistically Bob is a fund, and even if he runs into financial problems and can't keep paying the premiums, he'll sell the policy to someone else for its market value.

7. At least in many cases, the investor will pay some nonzero amount of money for it, because it is underpriced, because it was priced assuming suboptimal exercise. But there are exceptions: If you took out a term life policy when you were sickly and smoking and then got incredibly fit, an investor might not pay you to take over the premiums.

8. See footnote 2. Lorde Martin also notes that "The life insurance industry contributed to the emergence of the life settlement industry by offering very low surrender value payments to people. One life settlement company claims that, on average, it has paid policy owners about ten times the surrender value offered by the issuing insurance company when the policy owner wanted to stop paying premiums. One trade association reports that the average settlement is four to six times the surrender value."

9. From today's FTC complaint: "OPEC was created in 1960 with the stated purpose to 'coordinate and unify the petroleum policies of its Member Countries and ensure the stabilization of oil markets.' OPEC has twelve member nations: Saudi Arabia, Iran, Iraq, Kuwait, Venezuela, Indonesia, Libya, UAE, Algeria, Nigeria, Equatorial Guinea, and Congo. Ten additional countries—including Russia—affiliated with OPEC in 2016 to create what is now known as OPEC . OPEC and OPEC countries agree on crude oil production levels at a country-level basis to coordinate and limit their collective output. OPEC and OPEC account for over 50% of global crude oil production."

10. Not literally *any* other context; there are, like, sports leagues.

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<https://www.wsj.com/business/autos/tesla-robotaxi-elon-musk-vision-b82d0662>

BUSINESS | AUTOS

Musk Has a Vision for Tesla's Robotaxi. Others Can't See It.

Carmaker plans to show off its automated vehicle this summer, but tech and regulatory hurdles remain before it can become reality

By [Ryan Felton](#) [Follow](#)

May 2, 2024 5:30 am ET



Tesla's share price has slumped 26% this year amid a darkening outlook for electric-vehicle sales growth. PHOTO: JUSTIN SULLIVAN/GETTY IMAGES

Tesla TSLA **-0.17%** ▼ Chief Executive Elon Musk has made clear that he is making robotaxis a centerpiece of his long-term strategy. The hard part will come next.

This summer Tesla plans to show a future model—which is expected to have no steering wheel and pedals—that the automaker can deploy in its own, Uber-like ride-hailing service. Musk last week floated the idea of allowing owners to rent out their robotic Teslas, comparing it to Airbnb.

The strategy amounts to a sizable bet on a yet-to-be-built car underpinned by technology that remains under development. A combination of regulatory

ambiguity and technology hurdles make widespread deployment of driverless taxis any time soon a long shot, analysts say.

“Robotaxis are likely years away from mass-market adoption,” said RBC Capital analyst Tom Narayan.

It is also a concept that is years beyond its deliverable date: Musk and many tech and auto executives once predicted that robotaxis would be ubiquitous on U.S. roadways by now. But Musk—a self-described optimist who has missed deadlines in the past—is leaning into the autonomy story. And investors are cheering him on.

Today, a complicated, evolving patchwork of rules govern autonomous vehicles. Musk’s plan to deploy self-driving cars on public roads is expected to set up a face-off with federal regulators, which already are looking into the automaker’s advanced driver-assistance technology and how it has been rolled out to customers.

Technological hurdles will take years to overcome, many experts say. Today’s most sophisticated robotaxis require remote human operators to step in when the vehicles encounter situations they cannot handle.



Tesla Model 3 vehicles at a Tesla facility in Fremont, Calif. PHOTO: CARLOS BARRIA/REUTERS

Musk’s robotaxi focus during Tesla’s first-quarter earnings call came amid stagnating sales and price deterioration that had hammered the automaker’s stock so far this year. Investors bid up shares as Musk outlined a tantalizing

vision of future revenue growth, at profit margins a regular carmaker could only dream of.

“If somebody doesn’t believe Tesla is going to solve autonomy, I think they should not be an investor in the company,” he said. The company didn’t respond to a request for comment for this article.

On Monday, the stock rallied again after Musk won approval from China’s government to roll out Tesla’s most advanced driving technology available, called Full Self-Driving.

Few dispute the growth potential for robotaxis deployed on a broad scale. In 2019, UBS pegged the potential revenue opportunity for robotic cars that can be beckoned like an Uber or cab at \$2 trillion globally by 2030, far exceeding that of the entire U.S. auto market.

Tesla last week teased what its ride-hailing app could look like. Musk said an owner could deploy their robotaxi—he referred to Tesla’s planned model as “Cybercab”—to ferry passengers around when it isn’t in use. Musk has said Tesla could split fare revenue with owners.

“The economics of the system are just insanely positive,” the CEO said last fall.

‘Safety harness’

No automaker sells a self-driving car that requires zero input from passengers inside. Tesla’s Full Self-Driving controls speed and steering in certain situations, but it still requires drivers to pay attention at all times and doesn’t make cars autonomous.

Tesla relies on data gathered from owners’ use of the system to help develop driverless tech. In 2016, Musk said the company would need to log 6 billion miles of autonomous driving to secure approval from regulators worldwide. Today, Tesla says that owners have driven more than 1 billion miles using its Full Self-Driving feature.

“There’s a huge difference between mountain climbing with a safety harness and mountain climbing without one, and human drivers are currently Tesla’s safety

harness,” said Bryant Walker Smith, a University of South Carolina law-school associate professor who studies autonomous driving.

Waymo and a few other players are further along than Tesla at deploying Uber-like driverless car fleets in a few U.S. cities. But those services are limited in coverage area, and regulatory pushback has limited their expansion more broadly for now.

Congress has yet to pass a law that would create rules for deployment of autonomous vehicles. That void has left developers to shoehorn their plans into existing motor-safety laws and subjected them to a jumble of state and local rules.

Autonomous-vehicle companies have tried to get a federal nod to put driverless cars on the road and faced setbacks. General Motors’ Cruise division for years tried unsuccessfully to get special approval to deploy vehicles without a steering wheel or other manual controls.



A Cruise self-driving car is seen stalled in a San Francisco intersection last July. PHOTO: POPPY LYNCH FOR THE WALL STREET JOURNAL

Many states, meanwhile, have adopted a hands-off approach to driverless cars. Tesla executives suggested last week that they would focus on launching Full Self-Driving that doesn’t require driver supervision in limited U.S. areas to start.

Still, both state and federal regulators have cracked down on companies when their vehicles have wound up in serious incidents.

In October, California regulators yanked the autonomous-vehicle permit from Cruise after a single incident in San Francisco. A Cruise car struck a pedestrian who had landed in its path after being hit by another vehicle, and then dragged the person at slow speed as it pulled to the curb. The company later suspended its driverless-car operations.

Federal auto-safety regulators last week tied Tesla's Autopilot assisted-driving system to crashes that resulted in more than a dozen fatalities and said they were investigating the adequacy of a recall Tesla conducted in December to address safety concerns.

Camera debate

To make its technology a reality, Tesla has bucked industry norms by deploying a system that primarily relies on cameras and artificial intelligence to see and drive on the road. Other driverless-car companies use expensive radars and laser-based sensors that many in the industry consider crucial to help driverless cars navigate.

Some researchers have questioned Musk's approach. While camera-based systems are cheaper, they can be prone to false negatives that can't necessarily be addressed through software fixes, said Raj Rajkumar, a professor at Carnegie Mellon who specializes in autonomous vehicle driving.

Musk disagrees. "It is obvious that our solution with a relatively low-cost inference computer and standard cameras can achieve self-driving," he said recently.

Write to Ryan Felton at ryan.felton@wsj.com

Videos

Not Even Elon Musk and Tesla Can Doom the US EV Charger Network

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By Mark Gongloff

(Bloomberg Opinion) --



Tesla's share of the nation's fast chargers has fallen from more than 90% a decade ago to about 60%.

Photographer: Justin Sullivan/Getty Images

Elon Musk may not like to talk about this, but Tesla Inc. probably wouldn't be one of the world's biggest automakers today if not for a \$465 million US government loan at a make-or-break phase in the company's development. Tesla went on to repay the loan nine years early on the way to briefly having a market value of more than \$1 trillion.

The lesson here is that sometimes a new enterprise needs a helping hand from a bigger player but can eventually thrive on its own. Musk is about to play a role in another demonstration of that lesson, but this time as the bigger player: Tesla has been necessary for kick-starting electric-vehicle adoption in the US. But the company is not necessary for its future success.

Tesla recently gutted the team managing its fleet of fast-charging Superchargers, and Musk said on his personal-grievance platform X that the company would grow the network “at a slower pace,” with “more focus on 100% uptime and expansion of existing locations.”

If you think fighting climate change is the same thing as wanting communism, then you could do worse for capitalism’s cause than driving a Cybertuck-sized hole in President Joe Biden’s plans to install 500,000 new EV chargers by 2030. If you are the CEO of an EV maker, on the other hand, then such a move is simply confusing.

Maybe Musk rethought the wisdom of sharing his charging infrastructure with other automakers, a commitment that drew praise from Biden, who broke his alleged personal taboo against publicly saying “Tesla.” Maybe Musk doubts BloombergNEF’s estimate that Tesla could turn an annual Supercharger profit of \$740 million by 2030. Maybe he doesn’t have time to wait to cut costs, given how bad the company’s results are and how EV sales growth is cooling. Maybe he wants to sacrifice huge slabs of Tesla’s car business at the altar of the sacred robotaxi. Maybe he was just mad at (now former) Supercharger chief Rebecca Tinucci.

But there’s never much percentage in guessing what’s going on between Musk’s ears. The important thing for the world’s hopes of keeping global heating to merely disastrous levels is what his action means for the future of EV charging.

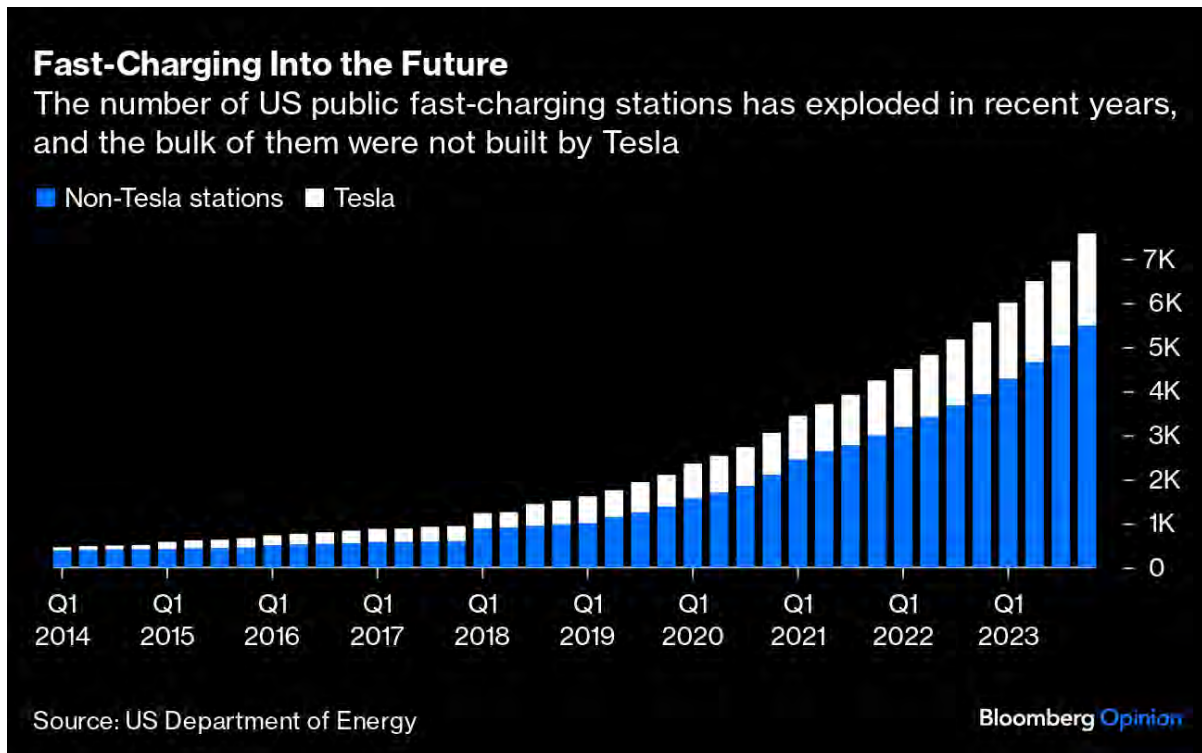
Make no mistake: It’s not great. Thanks in part to Tinucci’s efforts, Tesla is really good at making and installing EV chargers. Its extensive and reliable network has been a huge selling point for the company, helping customers overcome range anxiety. There’s no better proof of its dominance than the willingness of rivals to adopt its proprietary North American Charging Standard. Those automakers, including Ford Motor Co. and General Motors Co., now have fresh uncertainty about their own EV operations.

Tesla’s charger expertise also made it a potentially useful partner in Biden’s plans. The company has won \$17 million in 2021 infrastructure-law grants to build stations, or 13% of the total, Politico reported. It’s also more efficient than other builders: That \$17 million will theoretically build 41 stations, while another contractor will need \$30 million to build 37 stations, according to Politico.

Losing any of that acumen won’t help a charger rollout that is already off to a sluggish start. The Washington Post reported last month that you could count the number of stations built under Biden’s \$7.5 billion charger plan on two hands, with plenty of fingers to spare.

But as I noted last month, that plan will take years to bear fruit while we wait for states to get around to adopting it. Meanwhile, people are still building chargers anyway — and most of them are not employed by Tesla. Since 2021, the country has added thousands of publicly

available fast-charging stations, the kind you want when you're on a road trip or if you can't yet charge at home. And the bulk of those were not Tesla's.

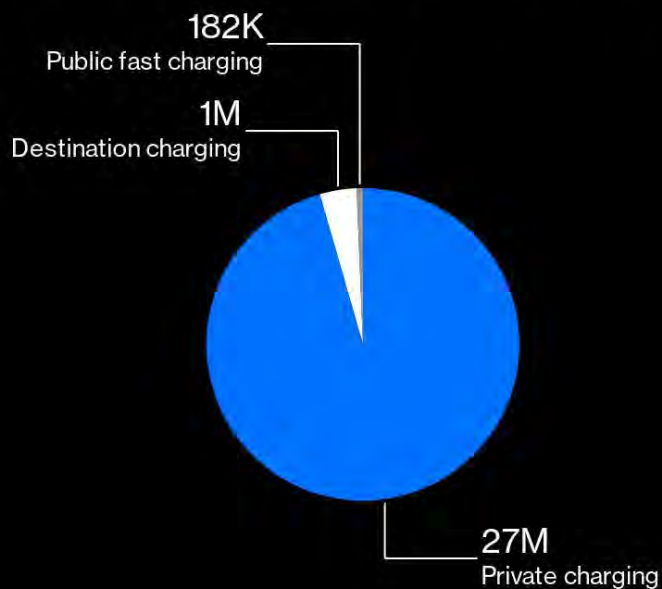


Given its long head start, Tesla still owns most of the country's fast chargers, but that percentage has fallen from more than 90% a decade ago to about 60% today. You might want to check my math, but the fact that Tesla won 13% of the infrastructure law grants suggests non-Tesla companies won 87%.

And to fully electrify the country's auto fleet — something I guess Americans absolutely have to do because public transportation frightens and confuses them — the lion's share of chargers will be owned not by Tesla but by drivers: 27 million chargers out of the 28 million necessary, by the National Renewable Energy Laboratory's estimate, will be at private homes and businesses.

Home Is Where the Charge Is

The vast majority of EV chargers in the US by 2030 will be at private homes and workplaces. Only a relative few will be publicly available.



Source: Source: National Renewable Energy Laboratory forecast

Note: Destination chargers are publicly available in dense neighborhoods or near places of shopping and work.

Bloomberg Opinion

Knowing Elon Musk as we do (or don't), he may wake up tomorrow and decide he wants every member of his Supercharger team to come back to work. But if he doesn't, then that's a lot of prime EV-charger talent available for the hiring by Detroit automakers or (more likely) rival charger producers that want to stop being second fiddle. And Tesla's standards will still be ubiquitous in the nation's chargers, even if Tesla isn't building them anymore.

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- Tesla Can't Duck the US-China Silicon Curtain: David Fickling
- Musk Sells Tesla Dream, But Don't Ask for Details: Liam Denning
- Sorry, But Joe Biden Can't Build Your EV Charger: Mark Gongloff

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Peloton Interactive Inc

Peloton chief Barry McCarthy steps down

Exercise-bike maker will cut about 400 jobs as part of restructuring plan



Peloton's market capitalisation has fallen to about \$1.2bn from an early-2021 peak of almost \$50bn

Alexandra White in New York 3 HOURS AGO



Peloton chief executive Barry McCarthy is stepping down from his role as the exercise-bike maker launches a restructuring plan that will cut 15 per cent of its workforce.

The former Netflix and Spotify executive succeeded former chief and founder [John Foley in 2022](#). McCarthy, who was lured out of retirement with a pay package [initially valued at \\$168mn](#), was tasked with turning around the connected-fitness company after it had burnt through cash, leaving it “thinly capitalised” for its size.

[Peloton](#)’s share price never regained its pandemic-era highs, leaving the equity awards that made up most of McCarthy’s pay package worth a fraction of its initial valuation. Just months into his role as chief, McCarthy faced pressure from activist investors over corporate governance.

Despite a series of earlier job losses and cost cuts in recent years, Peloton's market capitalisation has fallen to about \$1.2bn from an early-2021 peak of almost \$50bn. The group was valued at \$8.1bn at the time of its initial public offering in September 2019.

Sales at the New York-based company surged during Covid-19 lockdowns, but it subsequently struggled as easing pandemic restrictions allowed people to resume in-person activities at gyms and fitness studios.

"We are still dealing with the whiplash, the normalising that occurred post-Covid," said interim co-chief Chris Bruzzo on a call with investors on Thursday as the company reported its latest results.

Peloton's total revenue in the three months to March fell 4 per cent from a year ago to \$717.7mn, while sales of its connected fitness products such as bikes and treadmills sank 14 per cent.

Subscription revenue, which now represents 61 per cent of total revenue, increased 3 per cent in its fiscal third quarter from a year ago, but the results showed signs that customer engagement is flagging. The number of paid app subscriptions plunged 21 per cent from the same period last year.

Chief financial officer Elizabeth Coddington said the Peloton for business channel, which operates in locations such as hotels, had underperformed, while trial demand for its paid app subscription had been soft.

The company's projected range for year-end paid app subscriptions now implies a decline of about 27 per cent in fiscal 2024, compared with previous expectations of a 9 per cent decline. Total revenue is forecast to decline 4 per cent compared with previous estimates of a 3 per cent decline.

Peloton's net loss narrowed to \$167mn in the third quarter, but still missed analysts' expectations for a loss of \$130mn. The company said it generated positive cash flow for the first time in more than three years, of \$8.6mn, a reversal from cash burn of \$55.3mn in the same quarter a year earlier.

The company said generating "sustained and meaningful" positive free cash flow was a "top priority", and announced on Thursday plans to cut about 400 jobs, continue cutting its retail showroom footprint and reduce spending on marketing and software in an effort to lower costs.

Peloton said the plan would result in annual cost savings of more than \$200mn by the end of its 2025 fiscal year.

Group chair Karen Boone will serve with Bruzzo as interim co-chiefs until the company has found a permanent replacement for McCarthy, who will become a strategic adviser to Peloton until the end of the year.

“Under Barry’s leadership, we achieved one of his primary goals, which was generating positive free cash flow this quarter,” Boone said on a call with investors, adding that the company expected positive free cash flow for the final quarter and in fiscal year 2025.

“With the business more stable, the board decided to pivot to a leader who’s going to architect and lead the next phase of growth for the company.”

Peloton shares jumped more than 15 per cent right after Wall Street’s opening bell on Thursday, but reversed course to be almost 15 per cent lower in morning trading.

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May 2, 2024, 6:35 AM PDT

Adani Flagship's Profit Drops, Gets Queried by Indian Regulator

By Satviki Sanjay and Advait Palepu

- Profit fell due to a one-time charge on Mumbai airport dues
- Revenue climbed 0.8% to 291.8 billion rupees, costs up 2%

Bloomberg Law News 2024-05-02T13:15:50472719255-04:00

Adani Flagship's Profit Drops, Gets Queried by Indian Regulator

By Satviki Sanjay and Advait Palepu2024-05-02T09:35:28383-04:00

- Profit fell due to a one-time charge on Mumbai airport dues
- Revenue climbed 0.8% to 291.8 billion rupees, costs up 2%

Adani Enterprises Ltd., which posted a 38% fall in quarterly profit, said India's markets regulator has queried it about possible violations.

In the quarter ended March 31, the flagship of billionaire Gautam Adani empire received two so-called show-cause notices from the Securities and Exchange Board of India, or Sebi, about allegations of non-compliance of rules on stock exchange listing, related party transactions and validity of auditor certificates in the past, according to an exchange filing Thursday. No material impact is expected from these regulatory queries, it added.

Other firms in the ports-to-power conglomerate have also received such communication. Adani Ports & Special Economic Zone Ltd., Adani Power Ltd., Adani Wilmar Ltd., Adani Energy Solutions Ltd. and Adani Total Gas Ltd. informed bourses this week about Sebi's show-cause notices but reiterated that this was unlikely to have an impact based on the legal advice they have got. Auditors for these firms, except Adani Total and Adani Wilmar, have issued a qualified opinion, implying that it might affect financial statements in the future.



Gautam Adani, billionaire and chairman of Adani Group.

Photographer: Hollie Adams/Bloomberg

The Sebi queries are part of a top court-led probe after short seller Hindenburg Research made wideranging allegations of corporate fraud and stock price manipulation on the Adani conglomerate in January 2023. Despite Adani's denial, it triggered a stock rout that wiped out over \$100 billion of group's market value.

The conclusion of the ongoing Sebi probe is set to draw a line under the short seller episode after the Supreme Court of India said earlier this year that [no further investigations](#) were needed. Sebi is also asking a clutch of global funds about allegations of improper disclosures and market manipulation in Adani Group stocks, Bloomberg News [reported](#) last month.

Read More: [India Watchdog Queries Global Funds on Adani Stocks Manipulation](#)

The Ahmedabad-based Adani Enterprises posted net income of 4.51 billion rupees (\$54 million) for the quarter ended March 31, compared with 7.2 billion rupees a year ago, hurt by a one-time charge to provide for Covid-era airport dues. Shares fell 0.5% after the earnings were announced.

'Force Majeure'

Its unit Mumbai International Airport Ltd., or MIAL, recognized an exceptional expense of 6.27 billion rupees to make up for past payments. MIAL invoked the "force majeure provision" during the Covid-19 pandemic when a nationwide hard lockdown had grounded all air travel in India.

It sought a waiver of fees due to the Airports Authority of India, which led to arbitration proceedings. The company has now provided for a part of those dues, triggering this one-time expense. Revenue, meanwhile, [climbed 0.8%](#) to 291.8 billion rupees while total costs rose 2% to 283.1 billion rupees, the filing said.

The tepid earnings as well as the show-cause notices show that the ports-to-power conglomerate still has to navigate a few hurdles as it mounts ambitious plans to invest [\\$100 billion](#) in green energy transition and [scale up](#) other businesses.

Adani Enterprises, known as the group's incubator for new units that are later spun off, oversees a motley mix of businesses ranging from airports to data centers and green hydrogen to metals. Its also [building a second airport](#) on the city's outskirts.



A building under construction at the Navi Mumbai International Airport in Navi Mumbai, India, on Feb. 23, 2024.

Photographer: Dhiraj Singh/Bloomberg

Revenue at the firm's Integrated Resource Management unit, which mostly consists of coal trading, slipped 1.7% to 185.21 billion rupees in the March quarter. The airport business rose 27% to 21.56 billion rupees as air passenger traffic climbed 9%. Revenue at the new energy ecosystem, which includes solar, wind and green hydrogen business, tripled to 27.06 billion rupees.

Copper Project

Adani Enterprises [kickstarted](#) the first unit of a \$1.2 billion copper smelter at Mundra – the tycoon's first foray into metals refining – in the end of March to tap rising demand for the metal amid an infrastructure boom in India.

It also shows that the tycoon is back to diversifying his conglomerate that was built on coal trading, into newer lines of business – a growth trajectory that was derailed after Hindenburg Research's bombshell allegations.

Shares of Adani Enterprises rose 12.2% in the March quarter and about 58% in the past year but they haven't touched its pre-Hindenburg levels yet. That's true for most other group companies too.



While Adani Green Energy Ltd. is yet to announce its earnings, here's a snapshot of how other Adani Group firms have done in this quarter:

(Updates with details on show cause notices from SEBI in the first paragraph.)

--With assistance from **P R Sanjai**.

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Bhuma Shrivastava, Anirban Nag

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May 1, 2024, 1:56 PM PDT

JPMorgan to Pay \$100 Million More for Trade-Monitoring Gaps (1)

By Hannah Levitt and Austin Weinstein

Bloomberg Law News 2024-05-02T10:57:05909645388-04:00

JPMorgan to Pay \$100 Million More for Trade-Monitoring Gaps (1)

By Hannah Levitt and Austin Weinstein2024-05-01T16:56:18436-04:00

JPMorgan Chase & Co., fresh off settling complaints from two regulators over gaps in its trade-surveillance program, expects to pay an additional \$100 million to settle a related inquiry from another watchdog.

The firm disclosed the expected agreement in a filing Wednesday without identifying the regulator. The agency is the Commodity Futures Trading Commission, according to a person familiar the matter.

The biggest US bank agreed in March to pay \$250 million to the Office of the Comptroller of the Currency and \$98 million to the Federal Reserve to settle their complaints. The OCC faulted JPMorgan's surveillance program for gaps in its monitoring of venues and data controls.

The deficiencies meant the firm failed to "surveil billions of instances of trading activity on at least 30 global trading venues," the regulator said at the time.

JPMorgan didn't admit or deny those findings.

The bank expects to pay \$100 million in its anticipated settlement after "offsets" for amounts paid to the OCC and Fed. A representative for the CFTC declined to comment.

Read more: JPMorgan Fined \$348 Million for Gaps in Trading Surveillance

"The identified gaps represent a fraction of the overall activity" conducted by JPMorgan's Wall Street operations, but the data gap for one venue was "significant," the bank wrote in its filing. "The firm is dedicated to maintaining rigorous controls and continuously enhancing the reliability of its trade infrastructure."

The company doesn't expect the settlements to disrupt any services to clients.

(Updates with background on prior sanctions, response from CFTC and quote from bank's filing from the third paragraph.)

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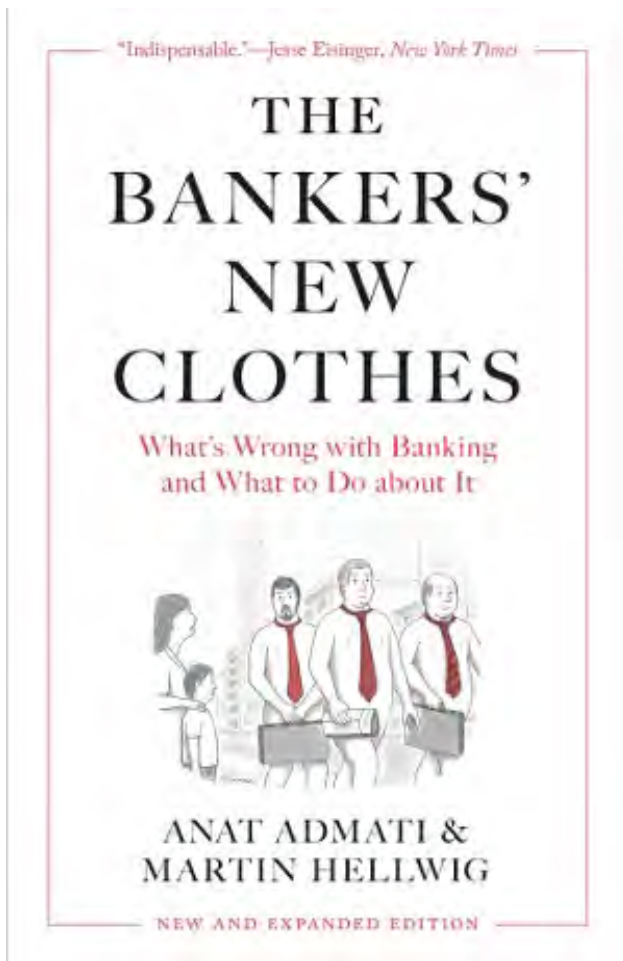
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Wall Street's Megabanks Have Trillions of Dollars Off-Balance Sheet, in a Replay of Accounting Hubris that Led to the 2008 Wall Street Collapse

 wallstreetonparade.com/2024/05/wall-streets-megabanks-have-trillions-of-dollars-off-balance-sheet-in-a-replay-of-accounting-hubris-that-led-to-the-2008-wall-street-collapse

By Pam Martens and Russ Martens: May 2, 2024 ~



When the Financial Crisis Inquiry Commission released their final forensic report on the causes of the 2008 financial collapse on Wall Street – the worst collapse since the 1929-1932 collapse – it pointed to hidden leverage in off-balance sheet entities at the megabanks on Wall Street as a key driver of the crisis. It wrote:

“From 2000 to 2007, large banks and thrifts generally had \$16 to \$22 in assets for each dollar of capital, for leverage ratios between 16:1 and 22:1. For some banks, leverage remained roughly constant. JP Morgan’s reported leverage was between 20:1 and 22:1. Wells Fargo’s generally ranged between 16:1 and 17:1. Other banks upped their leverage. Bank of America’s rose from 18:1 in 2000 to 27:1 in 2007. Citigroup’s increased from 18:1 to

22:1, then shot up to 32:1 by the end of 2007, when Citi brought off-balance sheet assets onto the balance sheet. More than other banks, Citigroup held assets off of its balance sheet, in part to hold down capital requirements. In 2007, even after bringing \$80 billion worth of assets on balance sheet, substantial assets remained off. If those had been included, leverage in 2007 would have been 48:1, or about 53% higher. In comparison, at Wells Fargo and Bank of America, including off-balance-sheet assets would have raised the 2007 leverage ratios 17% and 28%, respectively.”

Citigroup, of course, blew itself up in 2008 and received the largest bailouts in global banking history. By March of 2009, its stock was trading at 99 cents.

The crash of 1929-1932 had two key similarities to today's banking structure: so-called universal banks that took deposits as well as operated giant trading casinos that took huge risks by speculating in stocks and manipulating markets; and the lack of competent regulation.

The Banking Act of 1933, known also as the Glass-Steagall Act, effectively dealt with that crisis for the next 66 years by barring deposit-taking banks from merging with Wall Street trading houses. The Bill Clinton administration repealed that legislation in 1999 at the urging of Sandy Weill, John Reed (and their sycophants in his administration) in order for the two men to recreate the disastrous 1929 universal bank model via the creation of Citigroup. The other big players on Wall Street followed in lockstep in short order.

In January of this year, Anat Admati, Professor of Finance and Economics at Stanford Graduate School of Business, and German economist Martin Hellwig, released an updated and expanded version of their 2013 book *The Bankers' New Clothes: What's Wrong with Banking and What to Do about It*. In it, the authors write:

“Some of the risks that make JPMorgan Chase dangerous cannot actually be seen by looking at its balance sheet because the positions that give rise to them are not included there. These are risks from business units that JPMorgan Chase might own in part or that it sponsors, and to which it has provided guarantees to serve as a backstop if they should have funding problems. These units might be full-blown subsidiaries, or they might be mere ‘letterhead firms,’ vehicles without any drivers, that are established for legal or tax reasons only. The bank's commitments to these units amount to almost a trillion dollars, but these potential liabilities of the bank are left off the bank's balance sheet. Yet they are quite relevant to the financial health of JPMorgan Chase.”

JPMorgan Chase explains why it doesn't consolidate its tax credit vehicles on its balance sheet as follows in its most recent annual report:

“The Firm holds investments in unconsolidated tax credit vehicles, which are limited partnerships and similar entities that own and operate affordable housing, energy, and other projects. These entities are primarily considered VIEs [Variable Interest Entities]. A third party is typically the general partner or managing member and has control over the significant activities of the tax credit vehicles, and accordingly the Firm does not consolidate tax credit vehicles....”

But that's just the tip of the iceberg. According to financial data at the Federal Financial Institutions Examination Council (FFIEC), as of December 31, 2023, JPMorgan Chase held *\$3.227 trillion* off-balance sheet, of which \$528.5 billion is undefined and marked as “other.” To put that in perspective, \$528.5 billion is the size of the assets of the seventh largest bank in the United States and yet the public has no idea what the \$528.5 billion off-balance sheet at JPMorgan Chase is made up of or what kind of risks it presents.

In JPMorgan Chase's 10-K public filing with the Securities and Exchange Commission for the period ending December 31, 2023, it reported total assets on its balance sheet of \$3.875 trillion. (See page 46 at this link.) That's versus the FFIEC data showing it has another *\$3.227 trillion off-balance sheet*. Now ask yourself this: have you ever read in any mainstream media news outlet that the U.S. is harboring a \$7.1 trillion bank that has admitted to five criminal felony counts since 2014?

JPMorgan Chase's off-balance sheet hubris goes a long way in explaining why the bank's federal regulators are demanding that it increase its capital by 25 percent. The bank's Chairman and CEO, Jamie Dimon, is huffing and puffing against a capital increase and holding all of those private meetings with bigwigs in Washington.

Raising additional concerns, for the first time ever Jamie Dimon dumped a large amount of his own stock in JPMorgan Chase this year, selling \$150 million in February and another \$32.8 million in April. If the bank is forced by its regulators to announce a big equity capital raise via a secondary offering of common stock, that could cause a plunge in its share price – raising more questions about the timing of Dimon's unprecedented stock sales while sitting on inside information gleaned from what his bank regulators are telling him about its demands for an increase in capital.

JPMorgan Chase, of course, is not the only Wall Street megabank showing giant sums off-balance sheet. As of December 31, 2023 Bank of America shows \$1.6 trillion off-balance sheet; and Citigroup's Citibank, the “universal” bank that blew itself up in 2008, shows a mind-boggling \$2.6 trillion off-balance sheet versus \$1.7 trillion on its balance sheet. That data also comes courtesy of FFIEC.

Below is the mind-numbing breakdown of the \$3.2 trillion JPMorgan Chase is holding off-balance sheet according to data at the FFIEC. (See this link; check the box “Off-Balance Sheet Items,” then click the hyperlink for “Off-Balance Sheet Items.”)

Off-Balance Sheet Items JPMorgan Chase	12/31/2023	12/31/2022
Outstanding (\$000)		
Home Equity (1-4 Family)	23,682,000	16,926,000
Credit Card	915,626,000	821,346,000
Commercial RE Secured by RE	12,919,000	11,425,000
1-4 Fam Residential Const & Land	2,660,000	350,000
Commercial RE, Oth Const & Land	10,259,000	11,075,000
Commercial RE Not Secured by RE	14,453,000	12,814,000
All Other	540,277,000	540,964,000
Securities Underwriting	0	0
Memo: Unused Commit w/mat GT 1 YR	426,292,000	399,782,000
Standby Letters of Credit	81,679,000	93,269,000
Amount Conveyed to Others	47,071,000	39,438,000
Commercial Letters of Credit	4,933,000	4,646,000
Assets Securitized or Sold w/recourse	52,399,000	49,474,000
Amount of Recourse Exposure	1,369,000	2,348,000
Credit Derivatives Bank as Guarantor	492,926,000	549,918,000
Credit Derivatives Bank as Beneficiary	559,739,000	586,449,000
All Oth Off-Balance Sheet Items	528,545,000	382,991,000
Off-Balance Sheet Items	3,227,178,000	3,070,222,000

Source: FFIEC, Uniform Bank Performance Report

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Wall Street Seizes Opportunity to Gut SEC Trading Surveillance (1)

By Chris Dolmetsch

- Consolidated Audit Trail captures almost all US trading data
- Citadel Securities is suing to halt 'Orwellian' SEC database

Bloomberg Law News 2024-05-02T13:02:37878227956-04:00

Wall Street Seizes Opportunity to Gut SEC Trading Surveillance (1)

By Chris Dolmetsch2024-05-02T12:07:43759-04:00

- Consolidated Audit Trail captures almost all US trading data
- Citadel Securities is suing to halt 'Orwellian' SEC database

After 14 years of debate, the Securities and Exchange Commission is in the final stages of bringing a powerful new surveillance tool fully online. But Wall Street is seizing on the ideal political environment for a last-ditch attempt to kill it.

The Consolidated Audit Trail is a database, one of the largest ever created, that is set to revolutionize how the agency monitors trading activity and spots potential misconduct. By its May 31 industry compliance deadline, it will collect almost all US trading data, as many as 500 billion records a day, and give the SEC a live window into activity across markets.

Citadel Securities is leading a suit seeking to have the CAT declared illegal, and Wall Street is rallying behind it. Though financial firms have long expressed skepticism about the project, they are now allying with Republicans in Congress to paint it as a dystopian nightmare that would allow the federal government to spy on the investment decisions of every American. The fight also comes as the US Supreme Court has hinted that it's inclined to rein in the SEC and other federal agencies.

'Orwellian Surveillance'

Ken Griffin 's market-making firm declined to comment for this article but pointed to its Feb. 8 court brief, in which it accused the SEC of trying to "keep the American people in the dark about the adverse impacts of its unprecedented effort to subject the national securities markets to an Orwellian surveillance regime."

In a Feb. 15 filing, Citadel Securities got the support of the Securities Industry and Financial Markets Association, the Managed Funds Association , the Alternative Investment Management Association and other trade groups representing just about every major US bank, brokerage, hedge fund, private equity and asset management firm – everyone from Goldman Sachs Group Inc. to Robinhood Markets Inc. Rival market maker Virtu Financial Inc. signed on separately in a show of unity against a common threat.

The SEC called the challenge "meritless" in an April 15 court filing and said Citadel Securities had never objected to the CAT before it filed its challenge last fall.

The regulator defended the CAT as a natural progression of its oversight powers and said the previously “cumbersome, time-consuming and frequently unsuccessful” process of tracking orders had become obsolete in today’s faster and more automated markets. The agency also said there were limits on the CAT’s access to and use of personal data and decried the “caricature” of the database being used “to snoop on Americans’ personal financial decisions.”

Wall Street has a specific beef with how the SEC wants to pay for the CAT – by imposing billions of dollars in fees on broker-dealers. The database is actually owned by CAT LLC, which is composed of stock exchanges and the industry-backed Financial Industry Regulatory Authority. The current SEC plan is to allocate two-thirds of the costs of developing and operating CAT to broker-dealers as opposed to the exchanges and Finra. Citadel Securities claims those fees will result in higher costs for investors over time.

But David Rosenfeld, a former SEC enforcement official now teaching law at Northern Illinois University, said there’s also clearly concern on Wall Street about enhancing the agency’s ability to examine trading activity.

“It gives the SEC not exactly real-time but close to real-time insight into what’s going on as far as trading is concerned,” said Rosenfeld. “That can give them a huge advantage in terms of ferreting out certain types of misconduct. There’s lot of things you can figure out just by looking at the data.”

One in a Trillion

First proposed in the wake of the 2010 “flash crash,” the CAT’s data collection has proceeded in stages, starting with equity trades and non-complex options trades in 2020 and moving to complex options trades the following year. The May deadline is for market participants to submit client information to the CAT.

In December 2022, the SEC gave its first indication of how it would use CAT data for enforcement, quietly crediting the database with uncovering one of the biggest front-running schemes ever. Nuveen trader Lawrence Billimek was charged with tipping off Oregon retiree Alan Williams about stocks the asset-management giant was planning to buy, netting them \$47 million in illegal profits.

Legal experts say the pair’s insider trading probably wouldn’t have been caught without the CAT.

Major insider-trading cases have often focused on single-market events like merger announcements. In the Nuveen case, the SEC used the CAT to track some 1,697 intraday equity trades made by Williams, finding he had a 97% “win rate” over a five-year period. The chances of that occurring randomly were less than one in a trillion, the SEC said.

Both men pleaded guilty to criminal charges last year, and Billimek is scheduled to be sentenced on May 20. He faces up to 20 years in prison.

“Before the CAT, it was literally like the SEC was in the horse-and-buggy era of the 19th century trying to catch the fastest race car drivers of the 21st century,” said Dennis Kelleher, co-founder of financial reform advocacy group Better Markets. “I mean, it just wasn’t a fair fight. This changes all of that.”

Supreme Court v. Agencies

At an October conference in Chicago, SEC enforcement official Rachael Clarke said the agency has built a whole analytic infrastructure to crunch CAT data. She hinted more enforcement cases were in the works.

“Stay tuned. More CAT in the future,” she said.

But that promise of stepped-up enforcement could be in jeopardy.

In November, the conservative [Supreme Court majority indicated](#) that it might bar the SEC from using in-house judges to decide enforcement cases, forcing it to litigate all actions in federal court. The same justices in January [suggested they might also overturn](#) the court's landmark 1984 decision in *Chevron v. NRDC*, which held that federal judges must defer to the expertise of government agencies like the SEC.

Citadel Securities filed its October suit in the federal appeals court in Atlanta, which is regarded as more conservative than its counterpart in Washington. The firm argues in its suit that a project as big and expensive as the CAT, with an estimated price tag of \$1 billion to develop and then \$200 million a year to maintain, can't be pushed on the industry by the SEC without explicit congressional approval.

Congressional Brief

David Slovick, a former SEC lawyer now at Barnes & Thornburg, said rulings on agency overreach by the Supreme Court could influence the judges in the CAT case.

"If there's an avenue for a win here," he said, "I think it's the Supreme Court saying, 'You're acting outside of the scope of your regulatory authority and you need to go back to the congressional well and get legislative authority to do what you're trying to do.'"

More specifically, Citadel Securities argues that the CAT goes against the spirit of the 1934 Securities Exchange Act, which created a regime of private self-regulatory organizations, namely the exchanges and Finra, that the SEC oversees. The CAT improperly shifts to the SEC a primary enforcement role previously entrusted to SROs, the suit claims.

Citadel Securities' arguments have already found a receptive audience on Capitol Hill. In February, Congressional Republicans led by Senator Tom Cotton of Arkansas and including Senator Tim Scott of South Carolina, filed a brief in support the CAT challenge. They said "creating such an elaborate and intrusive structure involved significant policy judgments on questions of individual liberty, personal privacy, national security, and law enforcement" should be a matter for Congress.

'Core Values'

Republicans have expressed a particular fear that CAT data could be used to monitor investors' political and religious beliefs.

"Economic transactions offer a window into a person's deepest thoughts and core values," SEC Commissioner Hester Peirce, an appointee of former President Donald Trump, wrote in a dissenting May 2020 letter urging the agency to reconsider the project.

"That some investors undoubtedly are engaged in misconduct in our financial markets cannot justify amassing this information," she added. A conservative think tank last month filed a [suit in Texas federal court](#) challenging the CAT as an unconstitutional invasion of privacy.

But Slovick says the concerns about investor privacy are overblown, since the data was already being collected by the exchanges and Finra. In his view, the finance industry is harnessing the political argument to cloak its true reason for opposing the CAT.

"It makes the SEC's lift a lot lighter," said Slovick. "Their cases against Wall Street are going to be more effective and, of course, Wall Street doesn't like that."

(Updates with additional detail from court filings.)

--With assistance from Lydia Beyoud and Austin Weinstein.

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Insurer Chubb readies \$350 mln payout tied to Baltimore bridge collapse

 [reuters.com/business/finance/insurer-chubb-prepares-pay-350-mln-baltimore-bridge-collapse-wsj-reports-2024-05-02](https://www.reuters.com/business/finance/insurer-chubb-prepares-pay-350-mln-baltimore-bridge-collapse-wsj-reports-2024-05-02)

Reuters

Finance

Item 1 of 2 View of the Dali cargo vessel which crashed into the Francis Scott Key Bridge causing it to collapse in Baltimore, Maryland, U.S., April 4, 2024. REUTERS/Nathan Howard/File Photo

[1/2]View of the Dali cargo vessel which crashed into the Francis Scott Key Bridge causing it to collapse in Baltimore, Maryland, U.S., April 4, 2024. REUTERS/Nathan Howard/File Photo
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May 2 (Reuters) - Chubb (CB.BN) [🔗](#), opens new tab, which had insured Baltimore's Francis Scott Key Bridge, is getting ready to pay \$350 million to the state of Maryland, in what could be the first major payout tied to the collapsing of the bridge in March.

The payment is expected to be authorized within weeks, a spokesperson for WTW (WTW.O) [🔗](#), opens new tab, the broker for the bridge's insurance policy, confirmed on Thursday. The payout is likely to be the first of many related to the disaster that analysts have said might cost insurers up to \$4 billion, making it a record shipping insurance loss.

The tragedy that killed six people occurred after a Singapore-flagged container ship collided with the landmark bridge.

The FBI has also launched a criminal probe into the incident that led to the closure of one of the busiest U.S. ports

Plans for the \$350 million payout were first reported by the Wall Street Journal, which said Chubb, along with Maryland and the families of the victims of the crash, will likely sue the ship owner and others to recoup losses from the crash.

Chubb declined to comment to a Reuters request for comment.

The mayor and city council of Baltimore filed a lawsuit against the owner and operator of the ship last week, accusing them of negligence.

Reporting by Niket Nishant in Bengaluru and Carolyn Cohn in London; Editing by Shinjini Ganguli

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Dental Supply Co. Must Face Suit Over COVID-Era Woes

By **Katryna Perera**

Law360 (May 1, 2024, 10:23 PM EDT) -- Dental health products supplier Dentsply Sirona Inc. failed to get a suit dismissed accusing it of misleading investors about the extent of its pandemic-era woes, with a New York federal judge finding the suit identifies dozens of actionable misleading statements and plausibly pleads knowledge of wrongdoing by Dentsply's former executives.

In an **order** issued Wednesday, U.S. District Judge Arun Subramanian said that while many of the investors' claims may proceed, their so-called Item 303 argument must be tossed, with leave to amend.

Item 303 refers to descriptions of businesses' operations and financials in public filings that must be disclosed under the U.S. Securities and Exchange Commission's regulation S-K. Last month, a unanimous U.S. Supreme Court **ruled** that a corporation's omission of an Item 303 disclosure, absent any affirmative statement that would make such silence misleading, cannot itself be the basis of a private securities fraud claim.

Instead, management's failure to disclose trends or uncertainties that could harm their business can support a claim "only if the omission renders affirmative statements made misleading," the high court said.

Judge Subramanian said Wednesday that in the suit against Dentsply, the investors "refer generally to some of Dentsply's 10-Qs, but they fail to plead a particular statement rendered misleading," so the claim fails.

However, the judge found that the investors have identified dozens of other allegedly misleading or false statements that are actionable, including statements discussing the strength and sustainability of Dentsply's general earnings and demand for its products.

"These statements survive. It would be misleading if (as alleged) the company was having trouble getting the materials to make the products, many of the products it did make didn't work, and much of its sales were due to channel stuffing," the order said.

The judge also found that statements downplaying supply-chain disruptions the company was facing in late 2021 are "plausibly misleading."

"In September [2021], [former Dentsply CEO Donald Casey Jr.] said that 'we're very comfortable that we're going to be able to deliver what our customers need,' and that '[w]e feel very good that we have adequate supply.' And in November and December, Casey and [former chief financial officer Jorge Gomez] made several statements downplaying supply-chain problems," the order said. "If the company was already facing severe supply-chain issues, these statements could be misleading."

Further, the judge found that the investors established scienter on the part of Casey and Gomez. The motive is that their alleged fraud translated into "millions in performance-based pay," and the complaint draws a direct link between the two, according to the order.

"Based on the alleged scope of the fraud, plaintiffs calculate that Casey and Gomez inflated their 2021 earnings by several million dollars. And the alleged fraud was critical — the company just barely hit the thresholds necessary for bonuses," the order said.

"Casey and Gomez would've gotten away with more, too, if it weren't for the meddling board," Judge Subramanian said.

According to the order, as issues began to emerge at Dentsply, the company's board reduced cash and stock bonuses, which cost Casey and Gomez about \$7 million.

It is also clear that Casey and Gomez had direct knowledge of information contradicting their statements based on the detailed manner in which they spoke about inventory, the supply chain and product defects, the judge said.

Finally, the investors' scienter claims are supported by allegations that Casey and Gomez implemented a culture of fear on the sales team and maintained poor internal controls.

"Plaintiffs say Casey and Gomez suppressed dissent, heaped 'extreme pressure' on the sales team, and made employees fear that they'd be fired if they spoke up or fell short," the order said. "The complaint supports the inference of scienter by alleging that Casey set outlandish sales targets, silenced critics, muddled internal controls, and 'bull[ied]' [other employees] 'into meeting targets.'"

However, although the complaint strongly infers scienter for Casey and Gomez, the inference is not as strong for former Dentsply Chief Accounting Officer Ranjit Chadha, the judge said.

"Signing boilerplate financial statements is weak evidence. And though he resigned, he did so months after Casey and Gomez did and months after the internal investigation began," the order said. "The strongest evidence is simply that Chadha was 'the executive most responsible for the company's accounting.' But even then, courts have required some specific allegation suggesting that the executive was made aware of the issue underlying the fraud."

Judge Subramanian also declined to toss the suit's loss causation claims, saying the investors have plausibly linked Dentsply's "disappointing earnings report" to the risks concealed by the alleged fraud.

"Plaintiffs' whole story is that the company faced a three-headed threat of supply chain constraints, product defects, and declining end-user demand that defendants papered over with channel stuffing, mortgaging the company's future. The complaint has specifically alleged a connection between that scheme and each wave of disappointing earnings," the order said.

The suit, initially filed in July 2022, alleges Dentsply executives knowingly downplayed the company's supply chain issues during the COVID-19 pandemic and artificially inflated sales by forcing distributors to take on more inventory, also known as channel stuffing.

Dentsply then reported "disappointing earnings" for several quarters in a row, replaced its top brass, conducted an internal investigation and restated its financials, causing harm to investors, the order said.

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

The investors are represented by Luke O. Brooks, Hillary B. Stakem, Nicole Q. Gilliland, Samuel H. Rudman and David A. Rosenfeld of Robbins Geller Rudman & Dowd LLP and Thomas C. Michaud of Vanoverbeke Michaud & Timmony PC.

Dentsply Sirona Inc. is represented by Roger A. Cooper of Cleary Gottlieb Steen & Hamilton LLP.

Donald Casey Jr. is represented by Bryce L. Friedman of Simpson Thacher & Bartlett LLP.

Jorge Gomez is represented by Seth L. Levine of Levine Lee LLP.

Ranjit Chadha is represented by H. Christopher Boehning of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is San Antonio Fire and Police Pension Fund v. Dentsply Sirona Inc. et al., case number

1:22-cv-06339, in the U.S. District Court for the Southern District of New York.

--Editing by Drashti Mehta.

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10b-5 Litigation Questions Follow Justices' Macquarie Ruling

By **Steve Quinlivan and Sean Colligan** (May 1, 2024, 2:12 PM EDT)

On April 12, the U.S. Supreme Court **unanimously held** in *Macquarie Infrastructure Corp. v. Moab Partners LP* that failure to make management discussion and analysis disclosures required by Item 303 of the U.S. Securities and Exchange Commission's Regulation S-K does not violate Rule 10b-5(b).

The court reiterated the tenet of its 1988 decision in *Basic Inc. v. Levinson* that "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5." [1]

The facts are straightforward. Macquarie, at the time a publicly traded aerospace company, operated a number of infrastructure businesses, including large liquid storage terminals for bulk commodities.

In 2016, the United Nations' International Maritime Organization effectively banned No. 6 fuel oil, capping the sulfur content for fuel oil used in shipping at 0.5% by 2020. At the time, No. 6 fuel — with a typical sulfur content six times the new limit — was Macquarie's largest storage product.

Macquarie did not disclose the new IMO 2020 regulations to shareholders. As the bottom dropped out of the No. 6 fuel market, customers began terminating their contracts with Macquarie's subsidiary. Macquarie missed their financial projections, and its stock price fell 41%.

Representing a class of investors, Moab sued Macquarie along with current and former officers. Per Moab, "Macquarie violated SEC Rule 10b-5(b), which makes it unlawful to omit material facts in connection with buying or selling securities when that omission renders 'statements made' misleading."

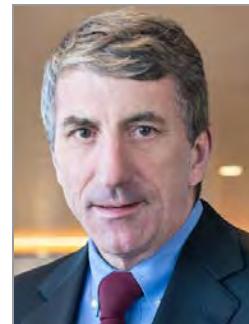
The plaintiffs argued Macquarie should have disclosed the IMO 2020 information as the new rule would have eliminated half its business. Under Item 303 of Regulation S-K, companies must disclose to the SEC when "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."

Initially, the U.S. District Court for the Southern District of New York **dismissed** Moab's complaint, but the U.S. Court of Appeals for the Second Circuit **reversed on appeal**.

According to the Second Circuit, the likely material effect of IMO 2020 created a duty to disclose under Item 303. The Second Circuit determined that the Item 303 violation was enough to sustain Moab's Section 10(b) and Rule 10b-5 claim. The case eventually ended up before the Supreme Court.

The Supreme Court held that pure omissions are not actionable under Rule 10b-5(b).

Rule 10b-5(b) makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." In addition to prohibiting "any untrue



Steve Quinlivan



Sean Colligan

statement of a material fact"— i.e., false statements or lies — the rule also prohibits omitting a material fact necessary "to make the statements made ... not misleading."

The question before the court was whether this second omission barring half-truths could be extended to pure omission as well, as Macquarie hadn't said anything about IMO 2020 in its SEC filings.

According to the court, "[a] pure omission occurs when a speaker says nothing, in circumstances that do not give any special significance to that silence. Half-truths, on the other hand, are 'representations that state the truth only so far as it goes, while omitting critical qualifying information.'"

The court went on to state that Rule 10b-5(b) ensures that statements made in disclosures are clear and complete. "Logically and by its plain text," the court determined, "Rule 10b-5(b) therefore covers half-truths, not pure omissions" because it "requires identifying affirmative assertions (i.e., 'statements made') before determining if other facts are needed to make those statements 'not misleading.'"

While clearly a favorable decision for public companies, and somewhat of a setback for the plaintiffs bar, the decision will likely not have a material impact on the volume of Rule 10b-5(b) litigation. One decision denying plaintiffs a path to relief can result in increased litigation as plaintiffs explore alternative paths to a favorable result.

As a result of Macquarie, plaintiffs will have to plead an affirmative statement that omits critical qualifying information and explain why it was misleading. This is a slightly higher bar than pleading a pure omission, but likely not insurmountable for plaintiffs in many cases.

The court disclaimed deciding any question other than "[w]hether ... a failure to make a disclosure required under Item 303 can support a private claim under Section 10(b), even in the absence of an otherwise-misleading statement."

This leaves open questions: What can constitute a "statement made"? What omitted information would qualify to make such a statement a half-truth? Macquarie sets the stage for further litigation over these issues.

The focus of Macquarie is solely on Rule 10b-5(b). But what about Rule 10b-5(a) and Rule 10b-5(c)? Subsection (a) of the rule makes it unlawful to "employ any device, scheme, or artifice to defraud." And Subsection (c) makes it unlawful to "engage in any act, practice, or course of business" that "operates ... as a fraud or deceit."

Perhaps through creative scheme liability allegations these two provisions of Rule 10b-5 will become the next battleground on whether pure omissions are actionable.

For companies engaged in public offerings of securities, Section 11(a) of the Securities Act prohibits any registration statement that "omit[s] to state a material fact required to be stated therein." By its terms, Section 11(a) creates liability for failure to speak, and imposes essentially strict liability on issuers for misstatements or omissions.

But while the Securities Act may reach the type of pure omissions at issue in Macquarie, a cause of action under Section 11(a) is available to a much narrower scope of plaintiffs than those who could bring a Section 10(b) claim. Section 11(a) applies only to public offerings, and a Section 11(a) plaintiff must meet tracing requirements by pleading and proving that the shares the plaintiff acquired are traceable to the allegedly misleading registration statement.[2]

Tracing is made difficult because of the role of Cede & Co., which acts as a nominee titleholder to process shares of most public companies on behalf of the Depository Trust Company. When securities trade in U.S. markets, sellers do not generally provide buyers with a certificate. Rather, a book entry reflecting the transfer is made to the ownership positions for the banks and brokerages that are involved in the trade on the books of the Depository Trust Company.

Accordingly, the moment shares are issued outside a challenged offering, shares issued under the

allegedly offending registration statement, and those not so issued, become commingled at Cede & Co. — and arguably impossible to trace.

Therefore, while Section 11(a) reaches the type of pure omission that Macquarie rejected as a basis for liability under Rule 10b-5(b), only a limited number of plaintiffs will be able to avail themselves of such a Section 11(a) claim.

Of course, Macquarie is not a reason to relax efforts to comply with SEC rules governing disclosures in periodic and other required reports. As noted in the Macquarie opinion, even if a private cause of action for damages is unavailable for pure omissions, the SEC can still bring an enforcement action for failure to comply with required disclosures. Such a failure may also open the door for end runs on Macquarie discussed above.

Accordingly, public companies should continue to review compliance with disclosure requirements on a quarterly basis with the preparation of Forms 10-K and 10-Q. All relevant disclosure requirements should be addressed unless clearly inapplicable or immaterial.

Steve Quinlivan is a partner at Stinson LLP.

Sean Colligan is a partner and co-chairs the firm's business torts litigation practice group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] **Moab Partners v. Macquarie Infrastructure Corp.** , No. 21-2524 (2d Cir. Dec. 20, 2022).

[2] **Slack Technologies LLC v. Pirani** , 143 S.Ct. 1433 (2023).

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Del. Justices Reverse Toss Of \$7.3B Inovalon Deal Challenge

By **Jade Martinez-Pogue**

Law360 (May 1, 2024, 6:40 PM EDT) -- Delaware's top court on Wednesday reversed a Chancery Court dismissal of stockholder challenges to the \$7.3 billion go-private sale of Inovalon Holdings Inc. to Nordic Capital, saying that the lower court wrongly concluded that minority investors were adequately informed about the deal and special committee conflicts of interest.

The court **reversed and remanded** the dismissal of a case filed all the way back in August 2022, when shareholders **sued** the health care data venture asserting claims of breaches of fiduciary duty, breach of Inovalon's charter and unjust enrichment stemming from the merger, which was **announced** in August 2021.

The suit claimed, among other things, that advisers including JPMorgan Securities and Evercore Group LLC had conflicts of interest.

Chancellor Kathaleen St. J. McCormick **dismissed all five counts** of the shareholders' complaint in July 2023, finding it "fell short" on claims that shareholders had been uninformed, that the advisers were conflicted, or that members of a special committee failed in their duties when evaluating the deal.

The shareholders, led by the City of Sarasota Firefighters' Pension Fund, challenged the dismissal, saying the shareholder vote on the multibillion-dollar go-private deal was not informed because the proxy disclosure omitted material information about the nature and extent of the special committee's advisers' conflicts and Evercore's role in the market outreach to potential bidders.

Counsel for the shareholders **argued** in February that Inovalon didn't properly disclose that investors that bought the company in 2021 paid \$400 million in fees to its financial adviser, a JPMorgan unit, before the transaction. Additionally, the attorney argued that Inovalon's founder, CEO and controlling stockholder, Kenneth R. Dunleavy, was conflicted when he negotiated the deal because Nordic had told him he would have the opportunity to participate in a rollover of his shares, putting him on "both sides of the bargaining table."

Counsel for the Inovalon special committee defendants previously said that Dunleavy didn't discuss the rollover with Nordic early in the process.

The lower court found in its dismissal that the "disclosure deficiency" the shareholders pointed out about JPMorgan and Evercore's conflicts wouldn't have "altered the total mix of information available to stockholders." But the supreme court found that the trial court did not "adequately address" the separate disclosure issues, which required an assessment of the materiality of the conflicts from the shareholder's perspective.

"According to the complaint, Evercore's mitigation role was affected not only by its own conflicts but also by its secondary and more limited role in the outreach process," the ruling said. "It would not be a stretch to say that it is reasonably conceivable that the alleged facts could make a difference to stockholders in analyzing and weighing the advice of the advisors and in evaluating the overall effectiveness of the market outreach."

The panel said it "need not 'pile on' another basis for reversal," and that boards, committees and their advisers should make sure to accurately describe "the events and the various roles played by

board and committee members and their retained advisors."

Representatives for the parties did not immediately return requests for comment on Wednesday.

The shareholders are represented by Ned Weinberger, Brendan Sullivan and John Vielandi of Labaton Keller Sucharow LLP, Jeremy Friedman and David Tejtrel of Friedman Oster & Tejtrel PLLC, and Lee D. Rudy, Eric L. Zagar, J. Daniel Albert, Geoffrey C. Jarvis and Grant D. Goodhart III of Kessler Topaz Meltzer & Check LLP.

The special committee defendants are represented by Blair Connelly, Kristin N. Murphy and Ryan A. Walsh of Latham & Watkins LLP, and William M. Lafferty, Ryan D. Stottmann and Alexandra M. Cumings of Morris Nichols Arsht & Tunnell LLP.

Inovalon and the non-special committee directors are represented by Raymond J. DiCamillo, Kevin M. Gallagher and Craig K. Ferrere of Richards Layton & Finger PA.

The case is City of Sarasota Firefighters' Pension Fund et al. v. Inovalon Holdings Inc. et al., case number 305, 2023, before the Supreme Court of the State of Delaware.

--Additional reporting by Leslie Pappas and Jeff Montgomery. Editing by Adam LoBelia.

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Globe Life Hid Toxic Culture And Policy Fraud, Investors Say

By **Sydney Price**

Law360 (May 1, 2024, 5:51 PM EDT) -- Life insurance company Globe Life Inc. has been hit with a proposed class action alleging investors were damaged when a short-seller report revealed that the company had been ignoring rampant sexual harassment among its employees and participating in fraudulent underwriting practices.

According to the suit filed by the City of Miami General Employees' & Sanitation Employees' Retirement Trust, Globe Life's largest subsidiary is American Income Life Insurance Co. Globe Life reported consistent premium revenue growth at the company, led by growth at AIL, but failed to disclose that it was engaged in widespread insurance fraud while permitting a culture of unchecked sexual harassment, the suit alleges.

A short-seller report published in April revealed that Globe Life subsidiaries maintained a hostile workplace where sexual harassment, drug use and sexual assault were disregarded, the suit states. The report also revealed that Globe Life's subsidiaries were underwriting policies for dead and fictitious people, as well as adding policies to existing users' accounts without their consent, according to the suit.

In addition to Globe Life, the suit's individual defendants include its current co-CEOs Frank M. Svoboda and James Matthew Darden, Chief Financial Officer Thomas P. Kalmbach, Chief Accounting Officer M. Shane Henrie, and former CEOs Gary L. Coleman and Larry M. Hutchinson.

Throughout the class period, which begins May 8, 2019, Globe Life said it maintained a code of business conduct and ethics, according to the suit, which included nondiscrimination and anti-harassment policies. Additionally, the defendants affirmed throughout the class period that AIL was driving revenue increases. In truth, Globe Life was engaged in widespread insurance fraud, therefore inflating the company's financial results, the suit alleges.

On a Feb. 8, 2024, investor call, Darden addressed articles related to litigation pending AIL, which described a "tawdry, drug-fueled, violent world." He told investors that the company employed a third party to conduct "an impartial and thorough investigation." These comments, however, did not fully reveal the extent of the issues within the company, the suit alleges.

A couple of months later, on April 11, short-seller Fuzzy Panda published its report with allegations about the hostile work environments at Globe Life and its subsidiaries and the company's fraudulent underwriting activities.

Following the report's publication, shares of Globe Life declined by \$55.76, or 53%, to close at \$49.17 on April 11, according to the complaint.

The suit accuses the defendants of violating the Exchange Act and alleges their statements aren't covered by the safe harbor provisions of securities laws.

Counsel for Miami General Employees' & Sanitation Employees' Retirement Trust and a representative of Globe Life did not immediately respond to requests for comment on Wednesday.

City of Miami General Employees' & Sanitation Employees' Retirement Trust is represented by Elvin E. Smith III of Siebman Law LLP, Hannah Ross, Avi Josefson and Scott R. Foglietta of Bernstein Litowitz

Berger & Grossmann LLP and Robert D. Klausner of Klausner Kaufman Jensen & Levinson PA.

Counsel information for Globe Life and the individual defendants was not immediately available on Wednesday.

The case is City of Miami General Employees' & Sanitation Employees' Retirement Trust v. Globe Life Inc. et al., case number 4:24-cv-00376, in the U.S. District Court for the Eastern District of Texas.

--Editing by Jay Jackson Jr.

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Insulin Pump Maker Wins Toss of Investor Suit For Now

By **Katryna Perera**

Law360 (May 1, 2024, 4:17 PM EDT) -- A California federal judge has sided with an insulin pump maker and tossed a suit alleging it misled investors about the potential growth of the company amid inflation and an uptick in competition, saying the suing investors have failed to plead any false or misleading statements or knowledge of wrongdoing by the defendants.

U.S. District Judge Marilyn L. Huff issued an **order** on Monday dismissing, with leave to amend, a suit brought by co-lead plaintiffs Mason Raines, Thomas Martel and Linna Rae Martel, alleging they were harmed after trading prices for Tandem shares fell by more than 30% in a day in November 2022 to about \$36, when the company lowered its sales forecast for the year from a possible maximum of \$845 million to \$805 million at best, citing pandemic-linked pressures, increased competition and soaring inflation.

Just three months earlier, the company had said that it expected sales to grow to as much as \$845 million for the year, a gain of roughly 20% compared to 2021.

Tandem, its CEO, John F. Sheridan, and its chief financial officer, Leigh A. Vosseller, moved for dismissal in March, arguing that as an initial matter, the court should not take stock in the statements of two former employees included in the suit because they are neither "reliable nor particularized and do not support falsity or any inference of scienter."

The investors had claimed that the former employees' statements demonstrated that the defendants knew Tandem's sales targets for the second and third quarters of 2022 were unrealistic, among other things.

However, Judge Huff agreed with the defendants on Monday, saying the allegations are insufficient to establish either former employee's reliability or personal knowledge. The former employees' roles as a territory manager and sales representative in Canada, respectively, do not establish how they would have "personal knowledge" of Tandem's sales or general market conditions across the U.S.

"There are no allegations suggesting that FE1 knew or was able to know or access Tandem's financial reports, forecasting techniques, or other financial data that would implicate how the company evaluated or discounted the [three significant adverse market conditions that existed during the second quarter of 2022] in creating its sales forecasts and estimates," the order states.

"Like FE1, FE2's statements regarding management's disregard for the adverse market conditions and Tandem's method for setting sales targets are not pleaded with sufficient particularity to establish FE2's reliability or personal knowledge," the order further states.

The suit also fails to adequately plead any false or misleading statements made by the defendants, according to the order, since they are all non-actionable as forward-looking statements, opinions or corporate puffery.

The investors have also failed to properly plead scienter, the judge said. The investors alleged that the defendants were motivated to withhold material information regarding the true impact of the three significant adverse market conditions that existed during the second quarter of 2022 — known in the suit as the three headwinds — in order to prevent Tandem's stock price from falling and "in hopes of being able to rely on future positive earnings results to offset bad news if and when it was

ultimately disclosed."

But Judge Huff said Monday that "simply wanting to avoid a stock decline is 'far to common to support an inference of scienter.'"

The suit lacks specific facts to support claims of scienter, the judge said, and the complaint's "conclusory" allegations that the defendants were aware of and "closely monitoring" the headwinds due to their high-level positions at Tandem are insufficient.

Additionally, once the former employees' allegations are "stripped away" from the suit, the complaint lacks specific claims that the defendants "were aware of or reckless in not knowing any negative information that competition was not 'in line' with their prior expectations."

"The [amended complaint's] factual allegations, taken as a whole, do not defeat defendants' competing inference that defendants reasonably believed in the presence and persistence of the three headwinds, but that the company would achieve its financial goals due to the usual, seasonal uptick in sales that typically begins in the third and fourth quarters," the judge said.

Judge Huff also tossed the suit's loss causation and control person liability claims on Monday.

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

The investors are represented by Michael J. Wernke and Jennifer Pafiti of Pomerantz LLP, Adam M. Apton of Levi & Korsinsky LLP and Peretz Bronstein of Bronstein Gewirtz & Grossman LLC.

Tandem and the individual defendants are represented by Koji F. Fukumura, Peter M. Adams, Linh K. Nguyen and Dylan K. Scott of Cooley LLP.

The case is *Lowe v. Tandem Diabetes Care Inc. et al.*, case number 3:23-cv-01657, in the U.S. District Court for the Southern District of California.

--Additional reporting by Emilie Ruscoe. Editing by Patrick Reagan.



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Paramount Faces Chancery Suit Over Skydance Merger Moves

By **Jeff Montgomery**

Law360 (May 1, 2024, 6:22 PM EDT) -- The general treasurer of Rhode Island has sued Paramount Global in Delaware's Chancery Court for access to records regarding efforts to merge the mass media giant with Skydance Media, accusing Paramount's billionaire controller, Shari Redstone, of usurping company opportunities and tilting the terms and processes toward her own benefit.

In a complaint filed Tuesday on behalf of the Employees Retirement System of Rhode Island, the state's Office of the General Treasurer pointed to widely published news reports that Redstone and Skydance founder David Ellison are in talks about a possible multistep deal to combine their businesses. The arrangement could shortchange Paramount's public shareholders, which includes the Rhode Island pension fund, according to the filing.

Potential paths for the merger include Skydance purchasing Redstone's shares in National Amusements Inc., a controlling shareholder of Paramount, in a \$2 billion deal, followed by the production company absorbing Paramount, which lists Redstone as nonexecutive chair.

"Publicly available information indicates that Shari Redstone and NAI have used third parties' interest in acquiring some or all of Paramount to usurp Paramount's corporate opportunity by offering NAI to potential buyers as an alternative means to acquire Paramount or all or a portion of its assets," the complaint read.

Redstone serves as chair, CEO and president of National Amusements, which also holds controlling stakes of CBS and Viacom. The Rhode Island government alleged that Redstone, whose family founded and owned National Amusements since 1936, has conflicting interests between her need to sell the family business and the fiduciary duties owed to Paramount stockholders.

Driving Redstone's interest in selling National Amusements are debt payments it owes to Wells Fargo for a \$175 million loan, the complaint said. Under one version of the possible merger, Skydance would pay \$2 billion, much of it going to Redstone, then acquire Paramount through an all-stock transaction, it added.

"In other words, Shari Redstone gets \$2 billion, and the other Paramount stockholders get diluted," Rhode Island's general treasurer wrote. The state also expressed concerns that Paramount's board failed to stop Redstone from "diverting" corporate opportunities or interfering with independent Paramount interests, and asserted that a special deal investigation committee only moved to exclude the billionaire from its workings in January.

Meanwhile, Redstone has been able to block a Paramount committee's efforts to negotiate or reach its own terms for a sale of Paramount, the complaint continued. In addition, insiders loyal to Redstone have received executive change in control severance protection packages set to trigger upon a sale of National Amusement, the suit said.

"Plaintiff is concerned about the timing of these overly generous severance packages that were gifted to insiders in the shadow of Shari Redstone's efforts to sell NAI," the general treasurer said.

Paramount did not immediately respond to a request for comment Wednesday.

Competing offers for the Redstone business surfaced in recent months, including media figure Byron

Allen's proposal to buy outstanding shares of Paramount for \$14.3 billion, or \$28.58 per voting share and \$21.53 for each nonvoting stock.

The complaint said Apollo Global Management offered \$11 billion for Paramount Studios in March and \$27 billion for all of Paramount in a later proposition.

Rhode Island noted it has concerns that Paramount's board "failed to prevent Shari Redstone from diverting corporate opportunities or interfering with Paramount's ability to seek the best deal for Paramount and its other stockholders."

According to the suit, the state pension fund demanded a range of documents April 5, including details pertaining to merger proposals and the formation of an independent review committee, along with access to emails and texts Redstone sent or received regarding the issue.

Paramount refused the request April 19, citing its scope and saying it failed to link the demands to a "proper purpose."

Adding to the unrest, Paramount Global reported Tuesday that President and CEO Bob Bakish had stepped down from his position.

An executive troika, dubbed the Office of the CEO, will act in place of Bakish. Members of that office include George Cheeks, president and CEO of CBS, Chris McCarthy, president and CEO of Showtime/MTV Entertainment Studios and Paramount Media Networks, and Brian Robbins, president and CEO of Paramount Pictures and Nickelodeon.

Paramount did not immediately respond to a request for comment Wednesday.

The State of Rhode Island Office of the General Treasurer is represented by Michael Hanrahan, Eric J. Juray, Stacey A. Greenspan, Jason W. Rigby, and Seth T. Ford of Prickett Jones & Elliott PA, and Lee D. Rudy, Eric L. Zagar, Grant D. Goodhart and Cameron N. Campbell of Kessler Topaz Meltzer & Check LLP.

Counsel information for Paramount was unavailable Wednesday.

The case is State of Rhode Island Office of the General Treasurer v. Paramount Global, case number 2024-0457, in the Court of Chancery of the State of Delaware.

--Editing by Covey Son.



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'Foul' BioVentrix Cash-Out Gets Extra Scrutiny, Chancery Says

By **Leslie A. Pappas**

Law360, Wilmington, Del. (May 1, 2024, 6:41 PM EDT) -- A medical device company's decision to suddenly and without explanation cash out its common stockholders for less than a penny just two months before the company raised \$48.5 million in new capital creates such a "foul flavor" that it deserves extra scrutiny, a Delaware Chancery Court judge said Wednesday.

In a bench ruling following oral arguments in Wilmington, Vice Chancellor Paul A. Fioravanti Jr. refused to toss a shareholder's suit against BioVentrix Inc. and its 10-member board, finding the facts behind a February 2023 recapitalization were so "egregious" and "glaring" that they raised suspicions that directors may have acted in bad faith.

"The facts of this case present such a foul flavor," the vice chancellor said. The way directors cashed out common stockholders appears to have "exceeded the realm of rational decisions that can be made by a fiduciary in the interests of stockholders."

Gary Moline **filed the proposed class action** in August, alleging a group of controlling stockholders had used its power to "largely wipe out the company's common stockholder in exchange for a penny per fractional share while simultaneously radically increasing the control group's percentage ownership in the company."

Defendants in the complaint include BioVentrix, its 10 directors, and two "significant" BioVentrix investors: Taglich Brothers Inc., a New York brokerage firm, and Richmond Brothers Inc., a Michigan-based investment adviser.

Moline alleges Taglich and Richmond, along with French private equity firm Andera Partners — which was not named as a defendant in the complaint — acted as a control group due to their relationships with members of the company's board.

Moline, who held 1,538 shares of the company's stock, alleges he was unfairly forced out of his investment in February 2023 when the company carried out a 65,500-to-1 reverse stock split that wiped out any common stockholder who held less than 65,500 common shares.

The company sent stockholders an information statement ahead of the recapitalization, but carried it out so quickly that stockholders didn't have time to demand corporate documents about the transaction, the complaint says.

The information statement didn't explain how the shares had been valued.

The reverse stock split cashed out each fractional share for a penny — meaning the value of the entire company would have been just \$286.27 at the time, Moline's attorney, Derrick Farrell of Bleichmar Fonti & Auld LLP, said Wednesday during arguments on the motions to dismiss.

Since the company is private, there is no way to know exactly how much the shares were actually worth, but in 2019, the CEO told the plaintiff that his investment was worth about \$7.50 per share, Farrell said Wednesday.

When the recapitalization occurred, there were about 19.5 million shares. "That means you would have had to have invested more than a half a million dollars in 2019 to avoid being cashed out,"

Farrell told the court.

BioVentrix, headquartered in Mansfield, Massachusetts, is a medical device company that has developed a new treatment for congestive heart failure caused by ischemic cardiomyopathy.

The recapitalization came just two weeks after the U.S. Food and Drug Administration approved an expanded access program for one of BioVentrix's key heart failure treatments.

About two months after common shareholders were pushed out, on April 13, BioVentrix announced that it had closed on a round of Series A equity financing that raised \$48.5 million. The financing round was led by Andera Partners and included Richmond Brothers and Taglich Brothers.

The timeline of events in the case is "simple, and it is striking," Vice Chancellor Fioravanti said Wednesday in his bench ruling.

Just two weeks after receiving positive regulatory news that had potential to increase the company's value, BioVentrix cashed out common shares at a price that valued the company at less than a thousand dollars, the vice chancellor said. Then two months later, the company raised millions in new capital.

Although Delaware courts usually defer to a board's "business judgment" about company transactions unless there are conflicts of interest on the board, the court may apply a higher standard of scrutiny if a board takes actions that are irrational, the vice chancellor said.

The idea that within three months, the company went from good news to a penny-per-share valuation and then two months later raised \$48.5 million "exceeds the realm of rationality," he said.

The vice chancellor dismissed one claim for breaches of fiduciary duty against Richmond Brothers and Taglich Brothers, saying that "the complaint lacks well-pleaded allegations that Taglich Brothers, Richmond Brothers and Andera Partners formed a control group."

He dismissed the count without prejudice, however, saying if discovery turned up new information, the plaintiff could revive the claim later.

He also preserved claims against the directors for breaches of fiduciary duty and for alleged violations of Delaware law that require proper disclosures.

Moline is represented by Derrick Farrell, Matthew Miller and Robert Lackey of Bleichmar Fonti & Auld LLP.

The defendants are represented by Josh J.T. Byrne, Gerard J. Kowalski and M. Claire McCudden of Marshall Dennehey PC.

The case is Gary Moline v. BioVentrix, case number 2023-0883, in the Court of Chancery of the State of Delaware.

--Editing by Janice Carter Brown.



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Autonomy CEO's Atty Says Judge 'One-Sided' Against Client

By **Bonnie Eslinger**

Law360 (May 1, 2024, 11:58 PM EDT) -- A Steptoe LLP partner representing former Autonomy CEO Michael Lynch in his criminal fraud jury trial accused the judge overseeing the case of making comments to the jury that are "one-sided" in a way that prejudices the defense.

Former CEO Lynch and Autonomy Corp.'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. The **high-profile trial** began March 18 and is expected to run through June.

According to the government's case, the two executives duped HP into buying the British company at an inflated price of \$11.7 billion by using a variety of dubious revenue boosters, including posting revenue from reseller deals before an end-user was secured, undisclosed hardware sales, and software subscription deals that were prepaid to generate upfront revenue.

On Wednesday, the government brought to the witness stand a former Autonomy software sales representative. Jane Snider told jurors the company had pressured her and customer Abbott Laboratories to ink an agreement for a prepaid licensing deal for electronic document sorting that the pharmaceutical company was facing as a result of a subpoena it had received from the U.S. Department of Justice.

During Snider's cross-examination, a lawyer for Lynch reviewed many of the same documents about the negotiations that the government had shown to jurors, to indicate Abbott had been interested in the deal before it bowed out in the end.

One of the emails is an internal Autonomy communication from June 30, 2011, in which Snider's boss tells higher-ups that Abbott's general counsel had vetoed the deal and "says and has said in the past that they will never authorize forward looking commitment deals," so, "there's nothing left to be done."

Lynch's lawyer, Celeste Koeleveld of Clifford Chance LLP, asked Snider if the point about not authorizing forward-looking commitments was motivated, at least in part, by Abbott hoping the matter with the DOJ would be settled, eliminating the need for Autonomy's help with electronic discovery.

U.S. District Judge Charles Breyer asked how Snider would know that, and Koeleveld suggested it could be knowledge the sales rep acquired through her discussions with Abbott.

"I'm a little concerned," the judge said. "This is what I don't get about the questioning."

According to the evidence, Abbott gave several reasons, the judge said, one of which is the services might not be needed. The other is how much the company is willing to pay for the service and under what terms.

"So we spent over 40 minutes going through all of this," Judge Breyer said. "That's what I'm taking away from it."

The judge then turned to the jury and told them it was for them to decide.

"You are the triers of fact ... based upon the evidence that is offered," he said. "You should not be influenced by what I say, what I thought."

He then excused the jury for lunch and then told the parties he doesn't usually express his views, but he didn't understand why Koeleveld had taken so much time re-reviewing the deal emails.

Koeleveld said the government's questioning of Snider left the misleading impression that Abbott was never interested in the deal.

Judge Breyer said that wasn't his takeaway from Snider's direct examination.

"Maybe that's the impression you believe was created. Then I understand the cross, I guess, but I didn't get that impression," the judge said.

After, a different lawyer for Lynch, Brian Heberlig of Steptoe LLP, told Judge Breyer that he didn't think it was appropriate for the court to make such comments in front of the jury, even with added instruction that it's the jurors' view of the evidence that matters.

"They obviously respect you greatly, and I don't think that instruction unwinds what you said," Heberlig said. "I understand that you can be impatient at times, and not always understand what we're doing."

Heberlig noted that the government's lawyer had taken up time during Snider's direct examination on the pressure the sales rep felt, which didn't feel relevant since the trial is not about an employment case.

"Be that as it may, the comments from my perspective have been more one-sided toward the defense, in front of the jury," Heberlig said.

Judge Breyer said this was the only comment he could recall making during the trial.

"I think there have been two or three other occasions, it's not been pervasive," Heberlig replied.

He asked the judge to refrain from making comments in the future, saying even if the court walks them back, they're prejudicial.

"Of course," the judge replied.

Earlier in the day, a lawyer for the government suggested that after Autonomy failed to close an upfront payment deal with Abbott directly, the company got what it wanted from a deal with one of its resellers.

"At the end of the quarter, around June 30, 2011, did anyone tell you that a company called Discover Technologies was going to act as a reseller to sell software to Abbott Labs?" asked Kristina Green of the U.S. Attorney's Office for the Northern District of California.

Snider said she had not been informed of such a deal.

The trial continues Thursday.

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 Kristen Becker.

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Attys Say \$5M Fee In Acella Settlement A Modest Proposal

By **Chart Riggall**

Law360 (May 1, 2024, 1:55 PM EDT) -- Plaintiffs' attorneys who recently reached a \$46.5 million class action settlement with Acella Pharmaceuticals LLC over faulty thyroid medication asked a Georgia federal judge Tuesday to sign off on their \$5 million cut of the deal as a "presumptively reasonable" proposal.

The Block Firm LLC's Aaron K. Block and Max Marks – who reached the deal with Acella on behalf of 1.2 million drug buyers earlier this year – argued the roughly 10% commission in fact falls well short of the 20%-25% threshold the Eleventh Circuit has identified as an acceptable percentage.

Acella, meanwhile, has already agreed to cover Block and Marks' fee as part of the settlement, they added. The settlement is awaiting final approval from U.S. District Judge Richard Story.

"Under Eleventh Circuit precedent, the court could approve the fee request without the need to conduct further analysis," the lawyers said.

The attorneys' fee bid comes after Judge Story gave preliminary approval of the settlement in February, drawing to a close the nearly two-year-old suit filed by Sue Faulkner against the Alpharetta, Georgia-based drugmaker. Faulkner – now the lead plaintiff in an estimated class of 1.2 million consumers – alleged the company falsely claimed for years that its hyperthyroidism treatment drug was made to the highest standards under manufacturing rules from the U.S. Food and Drug Administration.

Faulkner's suit came on the heels of a series of FDA probes into the manufacture of Acella's flagship drug NP Thyroid in 2019 and 2020. Federal regulators found batches of the drug that were made at either 110% – "superpotent" – or 90% – "subpotent" – of the drug's purported potency, Faulkner said.

The inspections triggered three "Class I" recalls of NP Thyroid, indicating that exposure to the adulterated drug would cause adverse health consequences or death, according to Faulkner's complaint.

Faulkner initially accused the company of fraud, racketeering, negligence and breach of warranty, though the racketeering claim was thrown out by Judge Story last year. Then in December, court records show, the parties formulated the outlines of the settlement that's now pending before the court.

Under the terms of the deal, consumers who used NP Thyroid will receive a cash reimbursement of either \$50 or a 90-day supply of the drug, whichever is lower. Those who had no out-of-pocket costs in buying the drug will receive \$10.

In their fee bid filed this week, Block and Marks argued that the request is reasonable on its face. But they also said that were the court to investigate further, the proposal still stands up to scrutiny under the test laid out by the Eleventh Circuit in [Johnson v. NPAS Sols., LLC](#).

Most important among those 12 factors is a determination of whether the suit was a success, which the plaintiffs' attorneys said was clear.

"Given the level of complexity and risk, securing recovery for the economic damages of such a broad range of purchasers without requiring them to release personal injury claims is an excellent result that supports the fee request," they added.

Attorneys for the plaintiffs didn't immediately respond to a request for comment Wednesday. Counsel for Acella declined to comment.

The drug buyers are represented by Aaron K. Block and Max Marks of The Block Firm LLC.

Acella is represented by David F. Norden, Elizabeth P. Waldbeser, Hyung P. Steele and Callan G. Stein of Troutman Pepper Hamilton Sanders LLP.

The case is Sue Faulkner et al. v. Acella Pharmaceuticals LLC, case number 2:22-cv-00092, in the U.S. District Court for the Northern District of Georgia.

--Additional reporting by Peter McGuire. Editing by Patrick Reagan.

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Attys Seek \$95M In Fees For Elite Schools' Aid-Fixing Deals

By **Dorothy Atkins**

Law360 (May 1, 2024, 4:34 PM EDT) -- Class counsel representing students who accused 17 top universities of colluding to fix student aid packages have asked an Illinois federal judge to award them \$94.7 million in fees plus \$3.5 million in expenses for securing \$284 million in settlements with 10 schools.

In a **33-page motion** filed Monday, attorneys for the class argued that after three years of heated litigation, the 10 deals are an "extraordinary" relief for the students. They noted the fee requests represent 33% of the total settlement pot, relying on "a modest" hourly-rate lodestar multiplier of 1.35, which class counsel contended is well below multipliers awarded in comparable antitrust litigation and other class actions.

The lawyers further highlighted that they took on the litigation on a contingency basis, working more than 91,000 hours, which represents more than \$70 million worth of uncompensated time, and litigating the case against 17 "sophisticated, determined and well-resourced defendants," while also taking on \$3 million in costs.

"Settlement class counsel initiated this complex antitrust class action — which has achieved tangible results of a large class of current and former students of 17 elite universities alleged to have colluded to depress financial aid — without the benefit of a governmental investigation or enforcement action," the motion read.

The filing additionally asked U.S. District Judge Matthew F. Kennelly to approve service awards of \$20,000 to each class representative.

Ted Normand of Freedman Normand Friedland LLP, who serves as the students' lead counsel, told Law360 Pulse Wednesday the settlements to date are an excellent result for the class, and that the facts and the law support the fee and service awards sought in the motion.

Counsel and representatives for the schools that settled didn't immediately respond to requests for comment Wednesday.

The fee bid is the latest chapter in a **sprawling antitrust case** students launched in 2022. They accused a group of 17 universities of violating antitrust laws by agreeing to limit student aid they provided, and alleged this affected the attendance price for around 170,000 students over 20 years. All 17 universities participated in the so-called 568 Presidents Group, a group of colleges formed to collaborate on financial aid formulas.

Shortly after the case was filed, the schools moved to toss the claims, arguing that they qualified for the Section 568 exemption of the Improving America's Schools Act of 1994, which allows universities to collaborate on financial aid opportunities as long as they admit students on a "need-blind basis," or without considering their financial standing.

The students countered that the schools evaluated the financial situations of students and their families while making admissions decisions for wait-listed and transfer students, and told the court that the universities showed preference toward students connected to past or potential donors.

In August 2022, Judge Kennelly rejected the private universities' bid to exit the suit, finding the

students had adequately alleged the schools considered their financial standing during the admissions process, and the case headed into full-blown discovery, sparking numerous **evidentiary fights** along with a raft of back-to-back **individually negotiated** settlements.

In February 2024, Judge Kennelly swiftly **granted preliminary approval** for the 10 settlements, which are set for a final approval hearing in July.

The settling defendants are University of Chicago, Brown University, Columbia University, Duke University, Emory University, Yale University, Dartmouth, Northwestern University, William Marsh Rice University and Vanderbilt.

Schools remaining in the case include University of Pennsylvania, Georgetown University, Cornell University, the University of Notre Dame, the Massachusetts Institute of Technology, the California Institute of Technology and Johns Hopkins University.

The plaintiffs are represented by Devin "Vel" Freedman, Edward J. Normand, Ivy Ngo, Joseph Delich, Peter Bach-y-Rita and Richard Cipolla of Freedman Normand Friedland LLP, Robert D. Gilbert, Elpidio Villarreal, Robert S. Raymar, David Copeland and Natasha Zaslove of Gilbert Litigators & Counselors PC, and Eric L. Cramer, Ellen T. Noteware, David Langer, Jeremy Gradwohl, Daniel J. Walker, Robert E. Litan, Hope Brinn and Richard D. Schwartz of Berger Montague.

The University of Chicago is represented by Arnold & Porter Kaye Scholer LLP.

Brown University is represented by Morgan Lewis & Bockius LLP.

Columbia University is represented by Skadden Arps Slate Meagher & Flom LLP.

Duke University is represented by Gibson Dunn & Crutcher LLP.

Emory University is represented by Jones Day.

Yale University is represented by Hogan Lovells.

Dartmouth is represented by Jenner & Block LLP.

Rice is represented by King & Spalding LLP and Kirkland & Ellis LLP.

Northwestern is represented by Sidley Austin LLP.

Vanderbilt is represented by White & Case LLP.

The case is Henry et al. v. Brown University et al., case number 1:22-cv-00125, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Lauren Berg, Lauraann Wood, Celeste Bott and Matthew Perlman. Editing by Covey Son.



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Chancery Nixes Amazon.com Investor's Antitrust Docs Probe

By **Jeff Montgomery**

Law360 (May 1, 2024, 10:02 PM EDT) -- An Amazon.com stockholder on Wednesday lost a Delaware Court of Chancery suit seeking court-ordered access to company records to probe claims that the online retailing giant engages in anti-competitive practices, with a court magistrate finding the evidence insufficient to justify the demand.

In a decision following a one-day trial on Friday, Magistrate Bonnie W. David found that attorneys for Roberta Ann K.W. Wong Leung Revocable Trust failed to state a proper purpose needed to justify court-directed release of Amazon records.

The trust sued in December for documents that could indicate corporate mismanagement, wrongdoing, and waste related to anti-competitive practices by Amazon.com fiduciaries, including its board of directors. Cited in the complaint were a number of state, federal and European investigations based on the same competition-stifling concerns, with Chancellor Kathaleen St. J. McCormick assigning the Delaware case to the magistrate on Dec. 15.

Amazon indicated that it was "potentially" willing to provide documents, conditioned on a confidentiality agreement. Attorneys for the stockholders, however, objected to delays and some terms of the confidentiality agreement as improper and as "gamesmanship," then sued and went to trial

But Delaware law does not provide that "evidence of open inquiries and lawsuits alone necessarily begets a credible basis from which the court can infer possible mismanagement," the decision said, citing a 2020 decision in a books and records demand involving a different industry.

"Because the evidence, in the aggregate, does not satisfy plaintiff's burden to demonstrate a credible basis to investigate possible wrongdoing concerning Amazon's compliance with antitrust laws, plaintiff's inspection request must be denied," Magistrate David wrote.

In its complaint, the stockholder pointed in particular to a four-year Federal Trade Commission investigation of Amazon, concluded in 2023, that **ended in a suit** joined by 17 state attorneys general.

The FTC complaint, slated for trial in 2026, accuses the online retailer of using its "dominating market position to require and enforce a set of interlocking anticompetitive and unfair strategies to illegally maintain its monopoly power, benefiting the products it makes and sells internally and to the detriment of third-party sellers that utilize the company's marketplace."

It also alleges that Amazon acted unlawfully by using anti-discounting tactics to prevent rivals from growing by offering lower prices and "coercive tactics involving its order fulfillment service to prevent rivals from gaining the scale they need to meaningfully compete."

Unlike other cases in other jurisdictions cited by the trust, the decision said, "plaintiff has identified not thousands, but a handful, of lawsuits, many of which merely repeat the allegations of the FTC complaint," Magistrate David wrote. She added that some of the government investigations cited closed without ultimately finding any, let alone "widespread" or "intentional and knowing" violations of law.

"Unfortunately for plaintiff, the other 'evidence' it identifies — more lawsuits and investigations — does not provide that necessary additional support," the opinion said.

The trust also disputed conditions that Amazon sought to place on documents that it would agree to release, the opinion acknowledged. But the magistrate said that, in the absence of a proper purpose for inspection, "I cannot opine on those conditions. The result is uncomfortable, but it is the risk plaintiff assumed."

Amazon.com and counsel for the trust did not immediately respond to requests for comment.

Roberta Ann K.W. Wong Leung Revocable Trust is represented by Samuel L. Closic and Seth T. Ford of Prickett Jones & Elliott PA, Brian J. Robbins, Stephen J. Oddo, Michael J. Nicoud and Eric M. Carrino of Robbins LLP and Daniel B. Rehns and Scott Jacobsen of Hach Rose Schirripa & Cheverie LLP.

Amazon.com Inc. is represented by Garrett B. Moritz, Dylan T. Mockenstrum and Benjamin M. Whitney of Ross Aronstam & Moritz LLP and Wachtell Lipton Rosen & Katz of counsel.

The case is Roberta Ann K.W. Wong Leung Revocable Trust v. Amazon.com Inc., case number 2023-1251, in the Court of Chancery of the State of Delaware.

--Additional reporting by Matthew Perlman. Editing by Linda Voorhis.



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Trump's Truth Social Stake Expands To Nearly 65%

By **Tom Zanki**

Law360 (May 1, 2024, 3:21 PM EDT) -- Former President Donald Trump's stake in his social media platform rose to 65%, according to a securities filing, valuing his stake at more than \$5 billion based on current trading, though Trump is barred from selling shares for several months.

Trump Media & Technology Group Corp. on Tuesday disclosed the former president was awarded an additional 36 million shares for a total 114.75 million shares of all common stock. The award increases his majority stake in the company that bears his name from 78.75 million shares, or about 58%, to 64.9%.

Trump Media owns Truth Social, a platform where the former president frequently posts, as its sole product.

The award of the bonus shares, called "earnout" shares, were conditioned upon Trump Media's stock achieving certain performance targets, including trading above \$17.50 for 20 out of 30 trading days. The shares satisfied that requirement last week, **triggering the award** disclosed in Tuesday's filing.

Based on Wednesday's stock price of \$46.29, Trump's stake in the company is worth \$5.3 billion on paper, though he is barred from selling any shares until September under a lockup provision absent a waiver by Trump Media's board of directors.

The lockup, which is in effect for about six months from Trump Media's listing date on March 26, was negotiated in connection with a merger that took Trump's vehicle public.

Lockup arrangements, which are intended to prevent a rash of selling and potentially harm a company's stock shortly after it goes public, are commonly used in initial public offerings and mergers with special-purposes acquisition companies.

Trump Media **went public** in March after merging with Digital World Acquisition Corp., a SPAC, rather than through a traditional IPO. SPACs are shell vehicles that raise money through a public offering and then use the funds to take a private company public.

The stock award also comes as Trump, the presumptive Republican presidential nominee for 2024, faces mounting legal bills from several lawsuits. Trump is **on trial** in New York City for allegedly falsifying business records related to hush money payments ahead of the 2016 election.

Shares of Trump Media fell \$3.64, or 7.3%, to \$46.29 in afternoon Nasdaq trading on Wednesday, continuing a roller coaster for the stock since it **began trading**.

Trump Media shares soared shortly after the company's merger with Digital World, closing at \$68.50 on March 27. They have since plunged below their peak, while remaining well above levels needed to satisfy the earnout requirement. Earnout agreements are common in SPAC mergers.

Sarasota, Florida-based Trump Media is unprofitable and has warned in previous filings that it may never generate sufficient operating revenue to turn consistent profits. Truth Social touts itself as on "a mission to create a free-speech beachhead against Big Tech censorship."

--Editing by Philip Shea.