

Tort reform group slams 'referral fee' for W. Va. opioid lawyer, hopes lawmakers will investigate

 legalnewsline.com/stories/660222299-tort-reform-group-slams-referral-fee-for-w-v-a-opioid-lawyer-hopes-lawmakers-will-investigate

June 3, 2024

Harry F. Bell, Jr. | belllaw.com

HUNTINGTON, W.Va. (Legal Newsline) - A West Virginia tort reform organization is calling on lawmakers to investigate \$141 million in fees being distributed to private lawyers involved in government opioid lawsuits after one attorney sued to collect referral fees for connecting lawyers with municipal officials.

The distribution of fees has triggered at least one lawsuit by an attorney who claims he is being shortchanged. Charleston attorney Harry F. Bell sued Morgan & Morgan, claiming he is owed \$1.6 million under an agreement to split fees among three law firms that represented a number of West Virginia municipalities. Bell described his share as a “pittance of a referral fee.”

Referral fees are banned in most states unless a lawyer also performs significant work on a case, but they are allowed in West Virginia.

West Virginia Citizens Against Lawsuit Abuse said legislators should determine why lawyers got \$141 million out of \$940 in settlements the state and municipalities obtained from opioid manufacturers and distributors.

“Paying \$141 million to personal injury lawyers was always an outrageous concept and this follow-up litigation is further proof that many of these lawyers did next to nothing to receive millions of dollars in awarded settlement monies,” said Greg Thomas, WVCALA's Executive Director, in a statement prompted by a *Legal Newsline* article about Bell's lawsuit.

“The Legislature needs to hold hearings to find out exactly why lawyers were paid \$141 million and get a full detailed account of these payments.”

Lawyers formed consortiums to pursue opioid lawsuits on behalf of thousands of state and local governments nationwide, often bringing in attorneys solely for their connections to officials who might hire them. In one curious example, an Ohio county paid more than \$1 million in fees to two law firms that never appeared on any of the court filings, including one associated with a prominent Washington lobbyist whose firm represented multiple companies being sued by the county. Another lawyer paid in that case formerly held a position with a national association of county officials.

West Virginia Attorney General Patrick Morrisey and WVCALA have feuded for months over the fees the state pays to outside counsel, with Morrisey calling them justified and WVCALA calling them excessive.

At 15%, the \$141 million in fees awarded to outside counsel in West Virginia is about double the rate for lawyers involved in national opioid litigation. But those lawyers stand to make more than \$6 billion in fees, second only to the \$13 billion in fees many of the same firms shared after settling government tobacco litigation in the late 1990s.

ORGANIZATIONS IN THIS STORY

U.S. District Court for the Southern District of West Virginia

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May 31, 2024, 11:16 AM PDT

Musk Accused of \$7.5 Billion of Insider Trades in Investor Suit

By Jef Feeley

- Investor claims Tesla CEO knew of production miss when selling
- The stock sale helped Musk buy Twitter, shareholder says

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Musk Accused of \$7.5 Billion of Insider Trades in Investor Suit

By Jef Feeley2024-05-31T14:16:03820-04:00

- Investor claims Tesla CEO knew of production miss when selling
- The stock sale helped Musk buy Twitter, shareholder says

Elon Musk had inside knowledge of a miss on production and delivery numbers that Tesla Inc. was facing when he sold more than \$7.5 billion in stock in 2022, a shareholder in the electric vehicle maker claimed in a lawsuit.

Tesla's chief executive officer had nonpublic information that Tesla would miss the fourth-quarter targets that year when he sold the shares, Tesla investor Michael Perry alleged in the suit, filed Thursday in Delaware Chancery Court.

By relying on that information when selling part of his Tesla stake for funds to bolster his buyout of the social media platform X, then known as Twitter, Musk "exploited his position at Tesla, and he breached his fiduciary duties" to the company and its shareholders, Perry said in the complaint.



Elon Musk

Photographer: Nathan Laine/Bloomberg

“Musk profited from his misconduct and his exploitation of material and adverse inside information,” the suit alleges. Perry asked Judge Kathaleen St. J. McCormick to order Musk, the world’s second-richest person, to return the profit from his allegedly improper trading to the company.

Alex Spiro, a lawyer for Musk, didn’t immediately return an email Friday seeking comment on the lawsuit.

It’s the latest dispute over Musk and his stock purchases, sales and talk. The suit comes in the same week the 52-year-old billionaire agreed to sit for a third round of questioning by the US Securities and Exchange Commission in its probe of his Twitter acquisition and whether he properly disclosed his initial stake in the company.

Earlier, after clashing with the SEC over a Twitter post he made about taking Tesla private, he incurred a fine and was forced to accept a “Twitter sitter,” a Tesla lawyer to screen his communications about the company.

Read More: Tesla’s Slump Exposes Elon Musk’s Distractions Across His Empire

In his lawsuit, Perry also names as defendants Tesla directors for allegedly failing to make sure Musk complied with his legal obligations in the stock sales and statements about the carmaker's performance. Musk touted the quarterly performance earlier in 2022, saying the company enjoyed "excellent demand" and expected "to sell every car we make as far into the future as we can see," according to the suit.

But he learned in November 2022 — about midway through the quarter — that Tesla wouldn't meet its targets for the period, Perry claims. Before that development was announced publicly in January 2023, Musk made the \$7.53 billion share sale, Perry says.

On Jan. 3, 2023, the first trading day after the Jan. 2 announcement of the numbers, Tesla shares fell 12% from their close of \$123.18 on Dec. 30, 2022, to \$108.10, according to the complaint.

McCormick has dealt with Musk before. She oversaw a case over his unsuccessful effort to back out of buying Twitter. And in January she voided his \$56 billion pay package after finding that Tesla directors who approved it in 2018 had a conflict of interest and that Tesla failed to properly disclose the terms of the executive compensation plan.

Tesla is asking investors to vote on it a second time, at the company's June 13 annual meeting, to show they still back the plan, which could help in a legal appeal of McCormick's decision. Proxy adviser Institutional Shareholder Services is urging them to reject the pay package.

The stock sale case is *Perry v. Musk*, 2024-0560, Delaware Chancery Court (Wilmington).

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Exclusive: Tesla director Gebbia says he discussed selling house to Musk

 [reuters.com/business/tesla-director-gebbia-says-he-discussed-selling-house-musk-2024-06-03](https://www.reuters.com/business/tesla-director-gebbia-says-he-discussed-selling-house-musk-2024-06-03)

Rachael Levy

Elon Musk, Chief Executive Officer of SpaceX and Tesla and owner of Twitter, looks on as he attends the Viva Technology conference dedicated to innovation and startups at the Porte de Versailles exhibition centre in Paris, France, June 16, 2023. REUTERS/Gonzalo Fuentes
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June 3 (Reuters) - Joe Gebbia, the Tesla (TSLA.O) , opens new tab director who exited a board committee that made key decisions about the car maker's future, told Reuters that CEO Elon Musk had discussed purchasing a house from his start-up and that he was concerned their friendship could be seized on to attack the committee's independence. Gebbia, whose start-up Samara makes tiny prefabricated houses, was one of two directors that Tesla's eight-member board deemed independent enough to serve on a "special committee" that deliberated on the company reincorporating from Delaware to Texas.

The board formed the special committee after Musk called in January for Tesla to move its corporate domicile out of Delaware, where a court shot down his \$56 billion pay package. The special committee was initially comprised of Gebbia, an Airbnb (ABNB.O) , opens new tab co-founder, and Kathleen Wilson-Thompson, a former Walgreens Boots Alliance (WBA.O) , opens new tab human resources chief, according to a regulatory filing. Gebbia stepped down from the committee in March after its mandate was expanded from deciding on the redomestication to also considering what to do about Musk's pay package, the filing states. His exit left behind a special committee of one, an unusual corporate governance setup that has been criticized by some of Tesla's shareholders.

Gebbia left the special committee "out of an abundance of caution", citing his personal relationship with Musk and a "potential business transaction" involving Samara that was "currently on hold", according to the filing.

Gebbia told Reuters that the transaction the filing was referring to was about Musk potentially buying a house made by Samara.

"I did not want Elon's status as a potential customer of Samara to be used against the committee, so I disclosed that I had put that potential business transaction on hold," Gebbia said in a statement.

The special committee's lawyers at Sidley Austin concluded that Gebbia's ties to Musk did not constitute a conflict of interest that jeopardized Gebbia's independence, according to the regulatory filing. Gebbia, however, chose to step down from the special committee

regardless.

"I believed I was and am independent, but decided to step down because I did not want my relationship with Elon to be used to unfairly attack the committee," Gebbia said in a statement to Reuters.

Tesla chair Robyn Denholm said in her own statement to Reuters that the board followed Delaware law in setting up the special committee, and that it was committed to strong corporate governance. "Whether and where to reincorporate was clearly a board decision, not a CEO decision," Denholm said.

Musk and Wilson-Thompson could not be reached for comment.

The previously unreported details on the circumstances of Gebbia's exit from the special committee shed new light on Tesla's efforts to counter criticism that many of its directors are beholden to Musk.

Convincing investors that its board can deliberate without influence from its larger-than-life CEO will be key to Tesla securing shareholder approval for its move from Delaware to Texas and for reinstating Musk's pay package in a vote at the company's annual meeting on June 13.

Proxy solicitor Glass Lewis and a group that represents the interest of workers invested in union pension funds last month questioned the special committee's findings and called on other Tesla shareholders to reject both moves. Institutional Shareholder Services, another proxy adviser, also recommended against reinstating Musk's pay package, but sided in favor of the move from Delaware to Texas.

"Several legal experts expect Texas to prove more forgiving to directors and executives when it comes to reviewing corporate acts such as the approval of pay packages," Glass Lewis wrote in its recommendation. Tesla's special committee, on the other hand, found that the litigation rights of investors are "substantially equivalent" in Texas and Delaware.

Wilson-Thompson, who also sits on the boards of drug wholesaler McKesson (MCK.N) [opens new tab](#) and footwear maker Wolverine Worldwide (WWW.N) [opens new tab](#), made decisions for Tesla's special committee in consultation with several advisers she tapped, the regulatory filing shows.

Special committees are deliberative bodies responsible for deciding some of a company's thorniest issues independent of management or controlling shareholders. Having a special committee of one director is rare and could make the company more vulnerable to legal challenges, four corporate governance experts said in interviews.

"Tesla has employed something akin to corporate governance-lite... a board substantially comprised of the CEO's friends and family," said Adam Epstein, whose firm Third Creek Advisors advises company boards.

DELAWARE RULING

The Delaware judge who in January ruled that Tesla's \$56 billion payout to Musk should be rescinded, because it was unfair to shareholders, questioned in her ruling the independence of the board that approved it.

"At least as to this transaction, Musk controlled Tesla," the judge, Kathaleen McCormick, wrote in her ruling, referring to the board's decision to grant Musk's pay package. The package was worth as much as \$56 billion, but is now valued at about \$43 billion based on Tesla's current stock price.

Since the approval of Musk's payout in 2018, five directors have remained on Tesla's board: venture capitalist Ira Ehrenpreis, former Twenty-First Century Fox Chief Executive James Murdoch, Denholm, Musk, and his brother Kimbal.

McCormick criticized Ehrenpreis, Murdoch and Denholm as beholden to Musk, and said she expected Musk's brother to be loyal to him. In its regulatory filings, Tesla has stated that JB Straubel, a Musk protégé and former Tesla chief technology officer who has since joined the board, owns a company that provides scrap materials to Tesla.

That left only two out of eight directors – Gebbia and Wilson-Thompson – as independent enough to serve on the special committee, well below corporate America's average of 85% of directors in a board deemed independent of the chief executive, according to corporate consulting firm Spencer Stuart.

PRECEDENT

Delaware courts have found that one-member special committees are permissible, if the director can be shown to be independent.

In November 2023, for example, a Delaware judge upheld drug distributor AmerisourceBergen's decision to form a one-member special committee to decide on litigation facing the company, ruling that the director involved was independent. In April, in a case involving online dating company Match Group (MTCH.O) [opens new tab](#), Delaware's Supreme Court ruled that every member of a special committee should be independent, showing that having more than one independent director does not shield the committee from legal challenges.

The corporate governance experts Reuters interviewed, however, said that staffing special committees with one director was a risky choice, because courts in Delaware have ruled that the sole member has to be above reproach "like Caesar's wife".

"The court is likely to be particularly suspicious of whether the single director was truly independent and acted with care and might allow, for example, more discovery into that issue if there is a suggestion of lack of independence," said Ann Lipton, a corporate law professor at Tulane University.

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Reporting by Rachael Levy in Washington, D.C. Editing by Greg Roumeliotis and Diane Craft

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<https://www.reuters.com/investigates/special-report/tips/>

Tesla stands by Musk pay after ISS urges shareholders to reject package

 [reuters.com/business/autos-transportation/tesla-stands-by-musk-pay-after-iss-urges-shareholders-reject-package-2024-06-03](https://www.reuters.com/business/autos-transportation/tesla-stands-by-musk-pay-after-iss-urges-shareholders-reject-package-2024-06-03)

Reuters

SpaceX, Twitter and Tesla CEO Elon Musk looks on as he attends a roundtable during the 6th edition of the "Choose France" Summit at the Chateau de Versailles, outside Paris, France on May 15, 2023. Ludovic Marin/Pool via REUTERS Purchase Licensing Rights , opens new tab

June 3 (Reuters) - Tesla (TSLA.O) , opens new tab on Monday defended a proposal to ratify CEO Elon Musk's \$56 billion pay package and said a new compensation would be costlier, days after a top proxy advisory firm recommended shareholders to vote against the proposal.

The electric-vehicle maker argued that his pay package - one of the biggest in corporate America - motivated Musk to create "tremendous value" for shareholders.

This was in response to Institutional Shareholder Services (ISS) last week calling the pay "excessive", while raising concern over Tesla offering its shareholders an "all or nothing" option ahead of a vote at their annual meeting on June 13.

The compensation, set and approved in 2018 by shareholders, rewards based on Tesla's market value and operational milestones.

But a Delaware judge voided it in January, and Tesla has since then sought to move its state of incorporation to Texas.

The company said in its Monday filing that shareholder recommendation by ISS is based on a "technical misunderstanding" and that the advisory firm recognized the company's strong performance under Musk.

Under Delaware law, ratification means that the proposal is either accepted or rejected in its entirety, Tesla said, adding that a new pay package would be costlier to the shareholders.

"A functionally equivalent grant of new options could result in an accounting charge of more than \$25 billion, compared to the \$2.3 billion charge originally recognized for the 2018 award," it said.

"A deal should be a deal. He delivered on his end of the bargain. It's time for us to deliver on ours."

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AbbVie Hit With Investor Lawsuit Over Director Removal Bylaw

By Mike Leonard 2024-06-03T13:22:21000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0585](#)

Pharmaceutical giant AbbVie Inc. is the latest company facing a legal challenge to a bylaw that gives its board the power to oust individual members over errors, omissions, or lies in their paperwork.

The proposed class action is one of a dozen recent lawsuits to take aim at provisions requiring new board candidates—but not sitting directors—to submit resignations that can be retroactively triggered if the rest of the board determines they misrepresented material information on their nominating forms.

The wave of disputes in Delaware’s Chancery Court reflects the latest volley in a legal arms race between corporate boards and activist investors emboldened by regulatory developments that have strengthened their hand as they seek directorships. Earlier and ongoing cases are already forcing the leading US business court to grapple with other arrows in the anti-activist quiver, including [advance-notice nomination bylaws](#) and [a new generation of poison pills](#).

General Motors Corp. and General Dynamics Corp. are among the businesses targeted by virtually identical litigation initiated between May 22 and May 24. A [broader-ranging shareholder](#) suit filed against Halliburton Co. in January also included some similar claims.

The bylaw clauses violate two Delaware corporate statutes, including one that “vests stockholders with the near-exclusive right to remove directors,” according to the May 31 complaint against AbbVie. “The removal bylaw is also inconsistent with stockholders’ statutory entitlement to elect directors of their choosing.”

The company, based in North Chicago, Illinois, didn’t immediately respond to a request for comment Monday.

According to the new lawsuit, AbbVie’s board “backdoored” the bylaw past a mechanism authorized

by statutory amendments adopted nearly two decades ago to improve shareholder democracy. The changes—enacted in 2006, as companies were implementing a majority vote requirement for uncontested corporate elections—were supposed to allow board members to submit irrevocable resignations triggered if they fell short.

“The removal bylaw turns this stockholder empowerment on its head by purporting to require the tendering of irrevocable resignations that can be triggered by the board for reasons other than failing to receive sufficient votes,” the suit says.

The other companies contending with similar legal claims are Cactus Inc., Evolent Health Inc., GXO Logistics Inc., Huntington Ingalls Industries Inc., Insulet Corp., Knife River Corp., Nov Inc., and Teleflex Inc.

The shareholder leading the litigation against AbbVie, Robert Reese, is represented by Farnan LLP, Abbott Cooper PLLC, Fields Kupka & Shukurov LLP, Kaskela Law LLC, and Alfred G. Yates Jr. of Pittsburgh. Most of the investors behind the earlier lawsuits are represented by Block & Leviton LLP and Abbott Cooper.

The case is [Reese v. AbbVie Inc.](#) , Del. Ch., No. 2024-0585, complaint filed 5/31/24 .

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Lone Star, Evercore, RBC to Face Foundation Building Sale Case

By Mike Leonard

- Lawsuit says Lone Star pushed bad deal to secure tax buyout
- Judge lets litigation move forward but tosses some claims

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Lone Star, Evercore, RBC to Face Foundation Building Sale Case

By Mike Leonard 2024-05-31T16:02:59000-04:00

- Lawsuit says Lone Star pushed bad deal to secure tax buyout
- Judge lets litigation move forward but tosses some claims

Lone Star Funds, two major financial firms, and former senior leaders of Foundation Building Materials Inc. lost their bid Friday to end litigation challenging the drywall distributor's \$1.37 billion sale to American Securities LLC.

It's "reasonably conceivable" Lone Star orchestrated the transaction to secure a payout that overvalued its tax receivable agreement with the company, in which it held a controlling stake, a Delaware judge ruled. The value of the pact—requiring Foundation to pay the investment firm 90% of certain tax savings—plunged after the 2017 tax law slashed the top corporate rate from 35% to 21%.

The allegations, if true, show that minority stockholders would have been better off holding on to the company and making smaller payments to Lone Star, according to the 142-page ruling by Vice Chancellor J. Travis Laster. Only Lone Star allegedly did better with a transaction that triggered an early termination payment for the tax pact, the judge said.

The private equity firm "began pursuing a sale of the company after the Tax Act reduced the stream of contractual payments Lone Star could expect," he wrote. "The Lone Star defendants were fixated on the early termination payment and both sought out and approved a deal that would deliver it."

Laster also let shareholder claims move forward against Foundation's CEO, its board at the time, and financial advisers Evercore Group LLC and RBC Capital Markets LLC. But he let American Securities out of the case—saying it did nothing wrong—and dismissed several other counts.

'Hibernation'

The dispute is part of a wave of lawsuits in Delaware's Chancery Court taking aim at deals to compensate corporate insiders for giving up potentially lucrative tax assets tied to a company's initial public offering. Broadly similar cases recently advanced against Carlyle Group Inc. and the board of GoDaddy Inc., while other suits have targeted BGC Partners Inc., Premier Inc., Virtu Financial Inc., Funko Inc., Apollo Global Management Inc., and KKR & Co.

Read More: Carlyle Founders Must Face Lawsuit Over \$344 Million Payout

The lawsuit against Lone Star, filed by a pension fund in 2022, says it engineered the transaction using unreasonably favorable estimates of the tax pact's value after the 2017 cuts reduced its worth by roughly one-third. The prospect of a payout also led Lone Star to select American Securities after a private equity bidding war, the lawsuit said.

Laster threw out the latter claim, saying only the decision to sell in the first place reflected a conflict of interest because any sale would have included an early termination agreement.

And he rejected the idea that the tax buyout improperly diverted value from minority investors to Lone Star. Once the transaction was in the offing, the investment firm had the right to enforce its contracts, the judge said.

He also let the case move forward against the transaction committee set up by Foundation's board, saying it did "astoundingly little," spent most of the process "in hibernation," and seemed to rubber-stamp Lone Star's wishes. The allegations "describe a special committee that acted only when prompted by Lone Star and repeatedly went into hiding for months while the sale process was unfolding," Laster said.

Additional Conflicts

Evercore and RBC, meanwhile, must face aiding and abetting claims for allegedly papering over Lone Star's conflicts after demanding a fee structure—based partly on the size of the termination payment—that created an incentive to look the other way, the judge said.

And the full Foundation board is potentially on the hook for issuing public disclosures that concealed the fee structure while downplaying longstanding ties between Lone Star and the two financial advisers, Laster said.

Prickett, Jones & Elliott LLP and Kessler Topaz Meltzer & Check LLP are counsel for the pension fund, the Firefighters' Pension System of the City of Kansas City, Mo. Trust. American Securities was represented by Ross Aronstam & Moritz LLP and Weil, Gotshal & Manges LLP.

Lone Star is represented by Young Conaway Stargatt & Taylor LLP and Gibson, Dunn & Crutcher LLP. Evercore is represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP. RBC is represented by Abrams & Bayliss LLP and Paul Hastings LLP. Foundation's CEO is represented by Wilson Sonsini Goodrich & Rosati PC. The special committee is represented by Richards, Layton & Finger PA.

The case is Firefighters' Pen. Sys. of City of Kan. City, Mo. Trust v. Found. Bldg. Mat'ls Inc. , Del. Ch., No. 2022-0466, 5/31/24 .

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Luminar Gets Investor Lawsuit Over Chip Picture Tossed for Now

By Martina Barash 2024-06-03T11:11:14000-04:00

- Investors failed to show chip's sophistication misrepresented
- Executives' intent also not adequately alleged, court says

Luminar Technologies Inc. investors failed to show the lidar sensor company's image of a rival's silicon chip was material to investment decisions, even if it was misleading, a federal court in Florida said.

The picture of competitor Lidwave's photonic integrated circuit in an investor presentation slide "obfuscates visible details of the chip's architecture," so it didn't materially misrepresent anything about the capabilities and sophistication of Luminar's product, Judge Julie S. Sneed said May 31 for the US District Court for the Middle District of Florida.

The investors also didn't show the necessary level of intent for securities fraud, Sneed said, dismissing the proposed class action.

The chips are an important component for light detection and ranging technologies, or lidar, the suit said. Luminar is an automotive technology company that provides lidar sensors, which bounce lasers off objects to guide vehicles.

The investors [allege](#) the slide was meant to market the company's own products, and that its stock price gained 18% in the days following the Feb. 28, 2023 presentation. But a news report of legal action by Lidwave over Luminar's use of the image sent the stock down 9.1% over two days to \$7.80 on March 20, 2023, the investors said.

Sneed rejected Luminar's argument that its use of the picture wasn't misleading. "Omitting a disclaimer identifying the graphic as Lidwave's product implicitly conveys to a reasonable investor that the depicted chip belongs to Luminar," regardless of whether it expressly represented the picture as its own, she said.

But the investors didn't adequately support the idea that Luminar and its executives "also sought to pass off Lidwave's capabilities or degree of sophistication" as its own, she said.

And they didn't include enough information about the executives' knowledge about the slide to establish their intent to inflate the stock price, she said.

The stock price could have fallen for reasons other than the disclosure that Luminar's chip was different from the one it depicted, "such as costs associated with defending against its rival's threat of legal action," she said.

The investors will have a chance to re-plead their case.

Faruqi & Faruqi LLP is lead counsel for the investors. Orrick, Herrington & Sutcliffe LLP and GrayRobinson PA represent Luminar.

The case is [Alms v. Luminar Techs., Inc.](#) , 2024 BL 186671, M.D. Fla., No. 6:23-cv-982, 5/31/24 .

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June 3, 2024, 2:00 AM PDT

This Week in Chancery Court: TransUnion Suit, Illumina Records

By Jennifer Kay

Bloomberg Law News 2024-06-03T10:23:06137932578-04:00

This Week in Chancery Court: TransUnion Suit, Illumina Records

By Jennifer Kay 2024-06-03T05:00:06000-04:00

TransUnion will argue this week that the Delaware Court of Chancery should dismiss investor claims that the credit reporting agency's senior leaders violated consumer protection laws for years, including after public pledges to implement reforms.

Here's more from the court's calendar:

Wednesday: ARC Glob. Inv. II LLC v Digit. World Acquisition Corp., Del. Ch., No. 2024-0186, teleconference 6/5/24.

At issue: Digital World Acquisition Corp., the special purpose acquisition company that combined with Trump Media & Technology Group Corp., will go to trial later this month over sponsor ARC Global Investments LLC's demand for its founders' shares to be converted to common stock at a ratio of 1.81 to one. Digital World contends the ratio should be 1.34 to one. A one-day trial is scheduled June 26 in Wilmington, Del. Before then, ARC wants to file an amended complaint, according to a motion; Digital World opposes that idea.

Court action: Teleconference.

Trump's \$4 Billion SPAC Deal Hit by Wave of Lawsuits Over Shares

Friday: The Pavers & Rd. Builders Benefit Funds v. Illumina Inc., Del. Ch., No. 2024-0136, trial 6/7/24.

At issue: A pension fund and Illumina Inc. will go to trial over records about the company's failed \$7 billion acquisition of Grail Inc. The fund sued for internal documents to investigate allegations the Illumina board pushed to complete the transaction despite antitrust worries that led regulators in the US and EU to block the deal that's currently being unwound. The lawsuit is one of a handful of Chancery Court cases focused on claims that Illumina's corporate leaders ignored obvious risks and rushed recklessly into the Grail transaction. The pension fund alleges that Illumina has so far only released files that are "so heavily redacted as to be effectively useless as an investigative tool," according to a pre-trial brief. Illumina argues the pension fund "has embarked upon nothing more than a fishing expedition," according to its own pre-trial brief.

Court action: Vice Chancellor Paul Fioravanti Jr. will preside over the trial in Wilmington, Del.

Illumina Sued for Records by Pension Fund Amid Icahn Court Fight

Friday: In re TransUnion Derivative Litig., Del. Ch., No. 2022-1103, oral arguments 6/7/24.

At issue: The lawsuit accusing TransUnion's top executives of steering it into legal trouble by breaching the terms of a 2017 consent order with the Consumer Financial Protection Bureau should be dismissed, TransUnion argues in a brief, because it fails "to plead any particularized facts from which the court can infer bad faith." Alternatively, the case should be stayed pending the outcome of federal litigation in Illinois, TransUnion said. The investors argue TransUnion's board "acted in bad faith when it deliberately ignored extensive legal violations reported to it," and it "failed to establish an adequate and functioning oversight system," according to an answering brief. The investors' complaint in Delaware arose from a 2022 enforcement lawsuit the CFPB filed against TransUnion and a former top executive in Illinois federal court.

Court action: Oral arguments on the motion to dismiss will be heard in Wilmington, Del.

TransUnion Investor Accuses Board of Ongoing Legal Violations

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May 31, 2024, 8:19 AM PDT

Vituity 401(k) Fee Suit Gets Partial Green Light in California

By Jacklyn Wille

- ERISA prohibited transaction claims viable under 9th Cir. law
- Judge dismisses challenge to 401(k) fees collected by employer

Bloomberg Law News 2024-06-03T10:51:05813200148-04:00**Vituity 401(k) Fee Suit Gets Partial Green Light in California****By Jacklyn Wille 2024-05-31T11:19:57000-04:00**

- ERISA prohibited transaction claims viable under 9th Cir. law
- Judge dismisses challenge to 401(k) fees collected by employer

Litigation over Vituity's 401(k) plan is moving forward after a federal judge rejected some legal theories raised against the California-based health-care company while allowing others claims to advance.

Vituity, formally known as CEP America LLC, must face claims that it mismanaged its 401(k) plan by overpaying Schwab Retirement Plan Services for administrative services, Judge Richard Seeborg said Thursday. Plan participants called these fees unreasonably high at about \$250 per person, per year, and said they were used to subsidize the administrative services Schwab provided to a different retirement plan covering Vituity physicians.

Seeborg, who sits in the US District Court for the Northern District of California, also allowed plan participants to use the Employee Retirement Income Security Act's prohibited transaction rules to challenge administrative fees Vituity paid itself from the plan—allegedly between \$236 and \$411 per person annually—along with a low-yield Schwab savings account that held more than \$50 million in plan assets. The US Court of Appeals for the Ninth Circuit recently issued an opinion taking an expansive view of ERISA's prohibited transaction rules that would allow many claims to proceed past a motion to dismiss, Seeborg said.

Other claims involving the Vituity plan didn't fare as well.

Seeborg dismissed ERISA fiduciary breach claims related to the fees charged by Vituity, saying the plan participants provided “no point of reference” for whether these fees were excessive, “but instead merely claim Vituity provided unspecified administrative services for too much in fees.” He also dismissed fiduciary breach claims tied to the Schwab savings account because the plan participants didn’t provide facts showing why it was imprudent for Vituity to favor this fund because it was insured by the Federal Deposit Insurance Corporation.

The plan participants can file an amended complaint within three weeks, Seeborg said.

Hundreds of lawsuits challenging retirement plan fees have been filed over the past few years, and federal appeals court rulings have been mixed.

The Third, Fifth, and Ninth circuits revived lawsuits against Wesco Distribution Inc., United Surgical Partners, Trader Joe’s Co. and Salesforce.com Inc., while the Sixth, Eighth, Tenth, and D.C. circuits have issued employer-friendly decisions largely favoring CommonSpirit Health Inc., TriHealth Inc., MidAmerican Energy Co., Barrick Gold, and Georgetown University.

The Seventh Circuit rejected a plan fee challenge against Oshkosh Corp. in 2022, but last year it allowed key claims to proceed against Northwestern University.

Faegre Drinker Biddle & Reath LLP represents Vituity. Bailey & Glasser LLP represents the plan participants.

The case is *Nagy v. CEP Am., LLC*, 2024 BL 184878, N.D. Cal., No. 3:23-cv-05648, 5/30/24.

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Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/06/i-cant-help-it-if-you-start-talking-about-caremark-its-like-a-honey-pot.html

Saturday, June 1, 2024

I Can't Help It, if You Start Talking About Caremark, it's Like a Honey Pot

By Ann Lipton

Which is why you get an extra blog post this week.

So I'm reading this entire fairness conflicted controller opinion and right there at the end, VC Laster preemptively wanders into a *Caremark* discussion - and the reason this is important is it hits on some of the issues I've blogged about previously with respect to the (over) extension of *Caremark*.

The case is *Firefighters' Pension System v. Foundation Building Materials*, and I've got threads up at other social media spaces of the horror show of fiduciary breaches (help yourself), but here I'll talk about the *Caremark* piece, which is tangential to the actual claims but important for theory.

The traditional rule is that "Delaware law does not charter law breakers," articulated in *In re Massey Energy Co.*, 2011 WL 2176479 (Del. Ch. May 31, 2011), and part of a general family of cases that fall under the *Caremark* rubric that requires Delaware managers to take reasonable steps to ensure legal compliance.

Here's what VC Laster writes in *Foundation Building Materials*:

timing principles govern *Massey* and *Caremark* claims. Before a plaintiff can invoke those theories, the plaintiff must point to some sufficiently concrete corporate injury. Typically, that will require a prior adjudication that the statute or regulation was violated, the payment of a fine or penalty, or a settlement.

The existence of a predicate injury serves an important policy function by limiting the ability of plaintiffs to use *Massey* and *Caremark* claims as vehicles to litigate alleged violations of far-flung statutory and regulatory regimes. Without that type of gating requirement, a stockholder plaintiff could assert that directors had knowingly violated a statutory or regulatory scheme in another state or country, plead facts supporting a statutory violation, and then litigate that claim in the Court of Chancery

In prior blog posts, I've expressed concern about how *Caremark* claims have been used as political weapons to attack corporate conduct even before a prior adjudication of wrongdoing or obvious injury to the corporation.

VC Laster's new opinion therefore takes some first steps toward cabinining that kind of use.

The problem that remains theoretically, of course, is that to the extent the claim involves intentional lawbreaking, it isn't intended to protect shareholders at all. A claim for intentional lawbreaking can proceed even if, *ex ante*, the corporation calculates - correctly! - that the net present value of the wrongdoing, taking into account the risks involved, financially benefits shareholders. In that sense, *Massey* claims are for society, not shareholders; they represent the outer limits of shareholder primacy.

For that reason, one could argue that the requirement of a prior corporate trauma raises questions about "fit." If the claim isn't really about shareholders at all, why must there be a corporate trauma first before the claim can be brought?

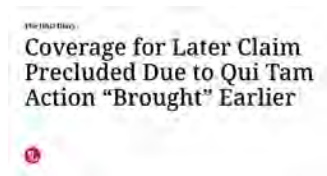
The argument would be, I suppose, something like, for the purposes of practicality of enforcement, it's a risk shifting framework. Directors can take that risk of lawbreaking to benefit shareholders, but they're the ones who will financially suffer (or their insurance) if the risk doesn't pan out and ultimately the corporation is injured as a result, because they'll functionally indemnify the corporation for any damages suffered as a result of the lawbreaking.

The problem is, that kind of calculus fits poorly with *Massey*-like rhetoric about Delaware not chartering lawbreakers; it ends up right back with a permission structure for lawbreaking.

Coverage for Later Claim Precluded Due to Qui Tam Action "Brought" Earlier

K [dandodiary.com/2024/06/articles/d-o-insurance/coverage-for-later-claim-precluded-due-to-qui-tam-action-brought-earlier](https://www.dandodiary.com/2024/06/articles/d-o-insurance/coverage-for-later-claim-precluded-due-to-qui-tam-action-brought-earlier)

June 2, 2024



By Kevin LaCroix on June 2, 2024
Posted in D & O Insurance



In numerous posts over the years (most recently here), I have noted that *qui tam* actions under the False Claims Act fit awkwardly with the typical D&O Insurance policy terms and conditions. Many of the related coverage problems arise from the fact that applicable procedures require a *qui tam* claimant to file his or her complaint under seal and to withhold service of process while the government decides whether or not it will intervene in the case. The upshot is that there sometimes can be a very long time lag between filing and service. This can make it challenging, for example, to determine when the claim was first made. It can also cause problems under the prior and pending litigation exclusion, as was the case in a recent bankruptcy-related proceeding.

As discussed below, the bankruptcy court judge granted a D&O insurer's summary judgment motion, agreeing with the insurer that, by operation of the policy's prior and pending litigation exclusion, coverage was precluded for a subsequent derivative suit that was based on the same operative facts as an earlier filed but not served *qui tam* lawsuit. As discussed below, as far as I am concerned, the upshot of this case (and other cases like it) is that the key policy terms should be modified so that the policy wording fits better with the *qui tam* procedures. A copy of the May 29, 2024, opinion in the Insys Therapeutics bankruptcy proceeding can be found [here](#).

Background

In 2012, Insys Therapeutics, a pharmaceutical company, was sued in a *qui tam* action under the False Claims Act. The *qui tam* action was filed under seal and was dismissed before it was served on the directors and officers of Insys. At the time Insys purchased the D&O insurance at issue in the subsequent coverage action, the company was unaware of the existence of the *qui tam* action.

In 2016, the company’s directors and officers were sued in a shareholder derivative lawsuit. Both the *qui tam* action and the derivative action involved the same allegedly fraudulent scheme to market addictive opioid products. Insys submitted the derivative lawsuit to its D&O insurer as a claim under the policy. The insurer denied coverage for the claim in reliance on the policy’s Prior and Pending Litigation exclusion, which precluded coverage for actions “brought” prior to May 02, 2012. The insurer contended that the *qui tam* action, involving the same allegations, had been brought prior to May 02, 2013.

In 2019, Insys filed for bankruptcy. The trustee for the litigation trust in bankruptcy filed a coverage lawsuit in the bankruptcy proceeding seeking to recover defense expenses the estate had incurred in defending against the derivative suit. The insurer moved for summary judgment based on the Prior and Pending Litigation exclusion. The litigation trustee filed a cross-motion for summary judgment arguing first that the “unique procedural characteristics” of *qui tam* suits call for different treatment under the Prior and Pending Litigation exclusion, and second that the word “brought” in the exclusion is ambiguous in this context.

The Prior and Pending Litigation exclusion provides as follows:

In consideration of the premium charged, no coverage shall be available under this Policy for claims based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact circumstance, situation, transaction, event or wrongful act, underlying or alleged in any prior and/or pending litigation, or administrative or regulatory proceeding or arbitration was brought prior to May 02, 2013.

The May 29, 2024, Order

In a brief May 29, 2024, order, District of Delaware Bankruptcy Court Judge John T. Dorsey, applying Delaware law, granted the insurer’s motion for summary judgment, and denied the litigation trustee’s cross-motion, holding that coverage for the derivative suit defense fees was precluded by the policy’s Prior and Pending Litigation exclusion.

In reaching this conclusion, Judge Dorsey first rejected the litigation trustee’s argument that, in the context of a *qui tam* lawsuit, the word “brought” in the exclusion reasonably could be interpreted to mean both filed *and served* on the defendant. The court said that it is “commonly understood” that a litigation is “brought” when “a complaint is filed.” Delaware law, Judge Dorsey said, requires that insurance policies must be construed in a “common sense manner.” Accordingly, he found that under the Prior and Pending Litigation exclusion, litigation is “brought” when the complaint is filed with the court – which, in this case, was before the Prior and Pending Litigation date.

Judge Dorsey also rejected the litigation trustee’s argument that due to the “unique procedural characteristics” of the *qui tam* action, the action should be treated differently under the exclusion’s language. In so ruling, Judge Dorsey specifically cited and quoted with

approval from the Pennsylvania Superior Court’s 2014 appellate opinion in the *AmerisourceBergen Corp.* case, in which a court held that a Prior and Pending litigation exclusion precluded coverage under an E&O policy for a subsequent claim based on similar facts as an earlier filed qui tam action. (I discussed the *AmerisourceBergen* decision at length in a blog post at the time, [here](#).) Judge Dorsey concluded his analysis of this issue by saying that “Neither the arguments advanced by the Trustee, nor the relevant case law, indicate that the Qui Tam Action in this case should be treated any differently than other civil actions.”

Discussion

The litigation trustee may not have prevailed on the argument, but there is no doubt whatsoever that *qui tam* actions do indeed have “unique procedural characteristics.” And not only do *qui tam* actions have unique procedural characteristics, but these characteristics are such that over and over again they result in the preclusion of D&O insurance coverage for subsequent claims, owing to nothing other than the distinctive way that *qui tam* actions unfold.

It may well be that, as Judge Dorsey said, under this policy and indeed under most conventional D&O insurance policies as written, there is no reason that *qui tam* actions should be treated differently than other civil actions. However, that does not mean that the policies themselves should not be written differently so as to treat *qui tam* actions differently and in a way that takes the unique procedural characteristics of *qui tam* actions into account.

There is one quick way to clean up this recurring problem involving *qui tam* actions, and that would be to amend the Prior and Pending Litigation exclusion to provide that for purposes of *qui tam* actions, the claim is “brought” (or “commenced” or whatever the operative word is in the exclusion) when the action is *served*, not when it is filed. Alternatively, the exclusion could be amended to specify that the exclusion does not apply to *qui tam* action complaints that were filed but not served before the prior litigation date.

For me, a particularly compelling solution here would be to line up the language between the Prior and Pending Litigation exclusion and the standard Definition of Claim, so that both require service of process. For me, this alternative has the appeal of having the policy’s various clauses operate consistently – as it is now, the inconsistency between the Prior and Pending Litigation exclusion, which does not require service of process, and the Definition of Claim, which does require service of process, is a jarring inconsistency that not only is dissonant but it produces harsh, unsatisfying outcomes like the one here.

As I said at the outset, *qui tam* actions fit awkwardly with the standard D&O insurance policy language. As an industry, we can just acknowledge that the standard policy language does not operate well in the context of *qui tam* actions, and that it is time to do something about it.

I have proposed some possible solutions above. I hope that if others have suggestions they will add it to the dialog. The fact is this problem has been around for years. It should not be the case that there regularly are these situations where the D&O policy just doesn't work well.

Special thanks to a loyal reader for providing me with a copy of Judge Dorsey's opinion.

District court "bumps-up" D&O insurers' coverage defense: Long-running saga continues

 [reuters.com/legal/transactional/district-court-bumps-up-do-insurers-coverage-defense-long-running-saga-continues-2024-06-03](https://www.reuters.com/legal/transactional/district-court-bumps-up-do-insurers-coverage-defense-long-running-saga-continues-2024-06-03)

Michael Zigelman, Alexander Razi, Jack Eysers

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June 03, 2024 - In light of the proliferation of lawsuits challenging corporate mergers, the issue of whether a "Bump-Up" provision applies to exclude coverage under a directors and officers liability insurance policy for settlements of, or judgments entered in, such lawsuits is a recurring one for D&O insurers and their insureds. These provisions are implicated as a bar to indemnity coverage when a settlement or judgment (or portion thereof) represents an "effective increase" in the underlying merger consideration.

In a long-running insurance coverage litigation arising out of the merger between Towers Watson & Co. n/k/a WTW Delaware Holdings LLC ("Towers Watson") and Willis Group Holdings plc, the U.S. District Court for the Eastern District of Virginia recently granted summary judgment to the insurer defendants based on the application of a "Bump-Up" policy provision.

That provision excludes from the definition of covered "Loss" that portion of any judgment or settlement which represents an effective increase in "the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity." *Towers Watson & Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2024 WL 993871 (E.D. Va. Mar. 6, 2024).

The Towers Watson coverage litigation has been closely followed by the D&O insurance industry and has resulted in several interesting decisions by the district court and the 4th U.S. Circuit Court of Appeals, which is on track to hear the case again following the insured's appeal of the lower court's recent decision.

By way of background, the Towers Watson-Willis merger gave rise to litigation by Towers Watson shareholders in two venues: (1) a putative federal securities class action in Virginia alleging violations of §§ 14(a) and 20(a) of the Securities Exchange Act of 1934; and (2) a derivative action in the Delaware Chancery Court alleging breaches of fiduciary duty and aiding and abetting breaches of fiduciary duty (collectively, the "Underlying Actions").

The Virginia plaintiffs alleged that as a result of materially untrue statements and omissions in the proxy materials for the merger, Towers Watson shareholders accepted consideration for the merger that was well below the fair value of their shares.

The Virginia plaintiffs advanced a theory of "out of pocket" damages based on the assumption that if the alleged improperly withheld information had been disclosed, shareholders would have voted against the merger, the two companies would have gone their separate ways, and the price of Towers Watson's stock would have "reverted" back to its price immediately before the announcement of the merger.

The Delaware plaintiffs brought their claims based on essentially the same allegations asserted in the Virginia action.

The Underlying Actions were reported under a "tower" of D&O insurance issued to Towers Watson, consisting of a primary policy and several excess policies that generally followed form to the primary policy. The policies provide coverage for "Loss" (defined to include damages, settlements, judgments and defense costs) arising from "Claims" against "Insureds" for "Wrongful Acts," as those terms are defined in the policies.

The primary policy contains the following "Bump-Up" provision:

In the event of a Claim alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate, Loss with respect to such Claim shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased; provided, however, that this paragraph shall not apply to Defense Costs or to any Non-Indemnifiable Loss in connection therewith.

Here, the insurers acknowledged that the Underlying Actions were Claims as defined in the policy and agreed to advance defense costs. However, the insurers denied coverage for prospective settlements of the Underlying Actions or judgments entered therein, relying on the "Bump-Up" provision.

The Underlying Actions were ultimately both settled, and Towers Watson thereafter filed coverage litigation against the insurers, seeking coverage for the settlements.

In the coverage litigation, the district court initially determined that based on the language of the policy, the structure of the merger and the "recognized differences" between a takeover acquisition (which the court concluded is what is contemplated by the "Bump-Up" provision) and a merger under Delaware law, there was a reasonable, narrow reading of the "Bump-Up" provision such that it did not include the merger and therefore, did not apply.

The court held that under Virginia's applicable principles of insurance contract interpretation, that narrow construction "prevails as the construction providing broader coverage." Accordingly, in a decision issued Oct. 5, 2021, the court held that the settlements were covered under the policies.

The insurers filed an appeal to the 4th Circuit, which found the district court's analysis to be flawed in several respects, including that (contrary to the analysis of the district court) nothing in the "Bump-Up" provision stipulates, "or even hints" that the term "acquisition" was intended to refer only to a particular form of acquisition — i.e., a takeover — under Delaware law.

The 4th Circuit concluded that the district court's initial interpretation of the "Bump-Up" provision disregarded the policy's plain language and inserted terms not included by the parties, with the result that such interpretation could not be characterized as one of two "equally possible" constructions, as required by Virginia law.

Accordingly, in a decision issued May 9, 2023, the 4th Circuit vacated the district court's judgment, but remanded the case to the district court to resolve issues raised by Towers Watson that were not addressed in the district court's first decision.

On remand, the insurers moved for summary judgment on three grounds: (1) the Underlying Actions alleged inadequate consideration; (2) Towers Watson was "an entity" whose acquisition fell within the "Bump-Up" provision; and (3) the settlements represented an effective increase in consideration for the merger. Towers Watson moved for summary judgment on the sole ground that the settlements did not "effectively increase" the merger consideration.

The district court concluded that allegations that the consideration received by shareholders for the merger were inadequate were "intrinsic" to the theory of the claims under Section 14(a) of the Exchange Act, because to prevail on such a claim, a plaintiff must show that the proxy statement contained a material misrepresentation or omission that caused the plaintiff injury and that the proxy solicitation was an essential link in the accomplishment of the transaction.

The court further noted that the Delaware plaintiff class alleged that it was "harmed by ... receiving a material discount for the value of their Towers [Watson] shares[.]"

The court concluded that because the allegations of inadequate consideration were the basis for the harms underlying both the Section 14(a) claims and the breach of fiduciary duty claims, the Underlying Actions necessarily "alleged" inadequate consideration, thereby implicating the "Bump-Up" provision.

The district court also determined that based on the ordinary and customary meaning of the term "entity," Towers Watson constituted "an entity" for purposes of the "Bump-Up" provision.

The court further noted that the policy elsewhere specified when the term "entity" was meant to exclude Towers Watson, including references to "an officer or director of any entity other than the Organization" and "any person or entity other than an Insured"

On that basis, the district court determined that the unrestricted and undefined term "an entity," suggested that the clause was intended to be read broadly and encompass not only the "Named Entity," but any other entity as well. Accordingly, the court held that the insurers established that Towers Watson was unambiguously "an entity."

The district court also concluded that the settlements effectively represented an increase in the consideration for the merger. In that regard, the court focused on "the overall result — whether, at the end of the day, the former Towers Watson shareholders were paid additional monies because the amount they received in the merger was inadequate."

The court found that was the case, noting that the shareholders' allegations of harm "were solely predicated" on the theory that they got less in the merger than Towers Watson was worth.

The court ultimately concluded that the "Bump-Up" provision unambiguously applied to the settlements of the Underlying Actions, and on that basis granted the insurers' motion for summary judgment, denied Towers Watson's motion, and declared that the "Bump-Up" provision bars coverage for the amount of the settlements.

Towers Watson has appealed the district court's grant of summary judgment to the insurers, and the case is now back before the 4th Circuit.

Although it remains to be seen how the Towers Watson case plays out in its second trip to the 4th Circuit, for the time being, Towers Watson is part of a recent line of cases in which insurers have obtained rulings in their favor on several issues concerning "Bump-Up" provisions, including that Section 14(a) claims allege "inadequate consideration" (Komatsu Mining Corp. v. Columbia Cas Co., 7th Cir. 2023); the phrase "an entity" includes the named entity insured (Ceradyne, Inc. v. RLI Ins. Co., C.D. Cal. 2022; Onyx Pharmaceuticals Inc. v. Old Republic Ins. Co., Cal. Super. 2022); the application of "Bump-Up" provisions is not limited to Claims that "only" or "exclusively" allege inadequate consideration (Ceradyne); and "Bump-Up" provisions apply whether the insured is acquiror or the acquiree (Onyx).

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ANALYSIS

Feds Using Data Analytics to Turbocharge Insider Trading Enforcement

"There are very powerful tools out there that the government is using, and they're clearly going to get better and better," said Shannon Eagan, a partner at Cooley.

June 03, 2024 at 06:49 AM

White Collar Crime



Maria Dinzeo

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

The Department of Justice and U.S. Securities and Exchange Commission have three words for executives tempted to trade on inside information to make a quick buck in the stock market: “We’re watching you.”

Federal securities enforcement officials are using data analytics to streamline their insider trading investigations, helping them bring cases faster and with more precision than ever before.

Speaking late last month at Securities Enforcement Forum West near Stanford University, the SEC’s Rahul Kolhatkar said the agency’s ability to more quickly identify aberrant trading helped lead to the [successful prosecution late last year](#) of Brazilian national Romero Cabral Da Costa Neto.

The DOJ and SEC said Neto got wind that one of the firm’s biopharma clients was going to be acquired and traded on that information before the merger announcement in late May 2023.

He was charged in August, pleaded guilty in November, and was sentenced to two months in federal prison in December.

“This action was brought maybe three months after the trading at issue, and that’s simply not possible without data analytics identifying the issue,” said Kolhatkar, an assistant regional director for the SEC’s Division of Enforcement.

Analytics also allowed the SEC to [pull off the feat](#) of charging 13 defendants in four separate insider trading schemes in one day.

One of those cases involved former Pfizer employee Amit Dagar, who got caught trading in advance of the 2021 announcement of positive clinical results for the company’s COVID-19 drug Paxlovid. The good news caused Pfizer shares to shoot up nearly 11%, the biggest percentage gain since 2009.

A jury in [January convicted Dagar](#) of securities fraud and conspiracy to commit securities fraud. He is scheduled for sentencing next month.

Dagar also had tipped off a friend and business partner, and together they made more than \$274,000 in illegal profits, authorities said.

Kolhatkar said the pair purchased short-term, out-of-the-money call options, “which is sort of a telltale sign that there was potentially riskier trading.”

That data analytics can yield promising investigative leads is especially valuable given the fact-specific and resource-intensive nature of insider trading investigations.

“We’re trying to select the best cases that are going to have the highest impact and have a big deterrent impact,” Benjamin Kingsley, chief of the Oakland, California, branch of the U.S. Attorney’s Office, said at Securities Enforcement Forum West.

“Obviously, the vast majority of things that are going to be identified through data analytics are not going to be a criminal case, and many of them probably aren’t going to be an SEC case, because there are lots of reasons data can show things. But it’s going to give us a broader field of cases to work from,” Kingsley said.

He said the analytics push also signals to the marketplace that “we’re watching you. And while we can’t prosecute every single case, there is going to be a broad set of information that’s flowing into the SEC that’s flowing into Main Justice and going to the U.S. attorney’s offices, and we’re looking for cases that are really egregious and are worth putting in our resources.”

Data analytics also helped the DOJ last year bring its first-ever criminal case over 10b5-1 trading plans. Such plans allow executives to schedule trades in advance, including during periods when blackout periods would otherwise bar insider sales.

Authorities allege Terren Peizer, chairman and former CEO of health care company Ontrak, dumped more than \$20 million in company stock between May 2021 and August 2021 based on inside knowledge that it was about to lose a contract with Cigna. Text messages reveal that Peizer knew the relationship with Cigna was deteriorating and that the insurer was planning to terminate its contract with Ontrak.

Peizer, who faces securities fraud and insider trading charges, denies wrongdoing. His trial in Los Angeles federal court is scheduled to start Tuesday.

Just as data analytics can help enforcers detect insider trading, it can also help companies and their employees avoid trouble, said Shannon Eagan, partner in charge and head of the business litigation practice for Cooley’s Palo Alto office.

Eagan, who also spoke on the panel, said that white-collar defense lawyers should be making sure their clients “understand that there are very powerful tools out there that the government is using, and they’re clearly going to get better and better.” Companies should also be using their own data analytics “to suss out anything that’s wrong.”

6/3/24, 11:11 AM

Feds Using Data Analytics to Turbocharge Insider Trading Enforcement | National Law Journal

Another panelist, Christopher Frey, former head of the Justice Department’s Criminal Division, said the recent raft of insider trading cases presents a teaching opportunity for compliance personnel “to instill fear and obedience” in employees and executives.

“The government’s efficiency and precision in bringing these cases is just increasing,” he said. “It’s just incredibly important to be extra-vigilant.”

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Arguing Class Actions: Trusting Juries and the Courts to Manage Damages Issues in Class Actions

Arguing Class Actions is a monthly column by Adam J. Levitt for the National Law Journal.

June 03, 2024 at 06:00 AM

Class Actions

By Adam J. Levitt | June 03, 2024 at 06:00 AM



Juries are more than capable of deciding damages for class members, not just individual litigants. Acknowledging that fact begs the question of why courts (and defense counsel), in class action cases, place such an emphasis on the need for expert testimony regarding damages at both the class certification and merits stages of those cases. Class action litigation nowadays all too often turns into a battle of the experts (and efforts to exclude them), especially related to damages, which invades the province of the jury, contributes to out-of-control litigation costs for all parties and results in the overuse of judicial resources. Indeed, the cost of preparing an expert report on damages can conservatively range between \$75,000-\$250,000, per expert, and is often exponentially more, especially, for example, in antitrust litigation.

Notwithstanding this blind rush to “expertize” damages issues, the fact is that juries and the courts can and should be trusted to handle those issues in class actions. For example, in a recent class action automobile defect trial in which my firm served as lead counsel, the jury awarded \$2,700 per class vehicle, for a total of over \$102 million in classwide damages, which they awarded following less than a full day of deliberation after an almost three-week trial. See *Siqueiros v. General Motors*, 676 F. Supp. 3d 776, 814–15 (N.D. Cal. 2023) (concluding there was substantial evidence to support the jury’s award of \$2,700 per class vehicle). Although the plaintiffs there had a damages expert who testified that the cost of repair could be used as a basis for damages to restore to each class member the benefit of their bargain, the \$2,700 amount came from an internal GM memo. The court further concluded that the expert’s testimony could be applied classwide, as it was based on an objective standard, and not the individual subjective expectations of each consumer. This example shows how juries can weigh record evidence and expert testimony at trial to determine not only per-class member damages but also classwide damages.

Notwithstanding that reality, class actions all too often unnecessarily get mired in damages expert minutiae at the class certification stage. Multiple treatises have recognized this problem. See 3 Newberg and Rubenstein on Class Actions Section 7:24, Use of Expert Testimony at the Class Certification Stage (6th ed.) (“Issues arising out of the use of expert witnesses at the class certification stage have beguiled the federal courts”); Introduction to Damages in Class Actions (“Few topics in class action practice have generated more controversy, and are more complex and nuanced, than the issue of monetary damages.”); 3 Bus. & Com. Litig. Fed. Cts. Section 25:68, Use of Experts in Class Certification (5th ed.) (citing how one issue that has split the circuits, and which the Supreme Court has yet to resolve, is whether expert testimony used in class certification must meet the reliability standards of *Daubert*); 7 Jones on Evidence Section 53:44, Class actions and Expert Testimony to Establish Classwide Damages (7th ed.) (“Establishing classwide damages is no small feat for class action attorneys.”).

But is it truly necessary to consistently approach damages through experts in class actions? For several reasons, the answer is “no.” First, perpetual reliance on expert testimony could form bad judicial habits in at least two respects. It can contribute to forming expectations that damages issues must be technical and complex, when that is not necessarily so. At the same time, it can discourage courts and trial lawyers from putting into place the trial tools and settings that would allow juries to rise to the task of determining damages issues on their own. Second, class certification is generally not the time to decide the merits of the case, which should make expert testimony less of a focus. See 3 Newberg and Rubenstein on Class Actions Section 7:23, Consideration of the Merits at Class Certification, (6th ed.) (citing how the Supreme Court has cautioned against free-ranging merits inquiries at the class certification stage and the merits may be considered only to the extent relevant to determining the Rule 23 prerequisites).

Third, the key to damages at the class certification stage is for plaintiffs to demonstrate a classwide method for determining damages, and not proving the existence and exact amount of damages at that stage of the litigation. 6 Newberg and Rubenstein on Class Actions Section 20:62, Damages at Class Certification—Common Method of Proving Damages Across the Whole Class (6th ed.); see also 4 Newberg and Rubenstein on Class Actions Section 12:1 (6th ed.) (“What persists across the different types of class suits is the need for a method for determining damages that can be applied to the claims of all or most class members.”). Demonstrating such a method need not be overly complicated nor the exclusive province of experts. Arguably, using a defendant’s own analysis and documents—such as GM’s internal repair memo in the *Siqueiros* case—could provide such a method in appropriate circumstances. Additional ways of demonstrating such a method include representative proof regarding an average class member that can be applied to other class members, statistical extrapolation from a representative sample of class members, appointing a special master to determine individual damages in a common fashion, and pursuing nominal damages. See 4 Newberg and Rubenstein on Class Actions Section 12:5, Methods of Proving Individual Damages, (6th ed.); 7 Jones on Evidence Section 53:44, Class actions and Expert Testimony to Establish Classwide Damages (7th ed.).

For the foregoing reasons, today’s immense focus on experts for all parties at the class certification stage and at trial largely misses the forest for the trees. An undue focus on experts is not only unnecessary, but also comes with immense cost for parties and judicial resources, while affirmatively undermining the province of the judiciary and the jury. It is no wonder that some courts have even limited parties to a small number of experts. See *Frasco v. Flo Health*, Case No. 3:21-cv-00757 (N.D. Cal.) (in a February 2024 hearing, Judge James Donato described the parties’ nine proposed experts for summary judgment and class certification motions as an “overkill approach” and limited the plaintiffs to two experts and the defendants to sharing two rebuttal experts).

The solution to an over-emphasis on experts in class actions is not to entirely do away with them. Indeed, they may be necessary for certain damages methods like conjoint analysis and statistical sampling. However, damages experts in class actions need not be so consistently front-and-center. Instead, litigants and the courts can use the available strategies and court procedures discussed herein to manage damages issues, and they can and should trust juries to be able to decide damages issues in class action trials when it comes time to determining how and to what extent class members have been harmed.

—DiCello Levitt partner, Adam Prom, contributed to the preparation of this column.

Adam J. Levitt is a founding partner of DiCello Levitt, where he heads the firm’s class action and public client practice groups. He can be reached at alevitt@dicellolevitt.com.

Delaware judge lets more than 70,000 Zantac lawsuits go forward

 [reuters.com/legal/delaware-judge-lets-more-than-70000-zantac-lawsuits-go-forward-2024-06-01](https://www.reuters.com/legal/delaware-judge-lets-more-than-70000-zantac-lawsuits-go-forward-2024-06-01)

Brendan Pierson

Zantac heartburn pills are seen in this picture illustration taken October 1, 2019.

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June 1 (Reuters) - A Delaware judge has allowed more than 70,000 lawsuits over discontinued heartburn drug Zantac to go forward, ruling that expert witnesses can testify in court that the drug may cause cancer.

The ruling on Friday by Judge Vivian Medinilla of the Delaware Superior Court in Wilmington is a setback for former Zantac makers GSK (GSK.L) , opens new tab, Pfizer (PFE.N) , opens new tab, Sanofi (SASY.PA) , opens new tab and Boehringer Ingelheim, which had argued that the expert witnesses' opinions lacked scientific support.

Medinilla wrote that the strength of each sides' scientific arguments should be decided by juries.

"Delaware courts are loath to step into the heart of technical debate between opposing scientists," she said.

"This moves us one step closer to justice for our clients," Brent Wisner, one of the plaintiffs' lead lawyers, said in a statement on Saturday.

GSK, Pfizer and Sanofi said in separate statements that they disagreed with the decision and would appeal. They said there was no reliable evidence showing Zantac caused cancer. A spokesperson for Boehringer Ingelheim did not immediately respond to a request for comment.

In 2019, some manufacturers and pharmacies halted Zantac sales after a chemical called NDMA, which is known to cause cancer, was detected in some pills. Some tests showed that Zantac's active ingredient, ranitidine, could degrade into NDMA over time or when exposed to heat.

Lawsuits began piling up from people who said they developed cancer after taking Zantac. Plaintiffs said the companies knew, or should have known, that ranitidine posed a cancer risk and that they failed to warn consumers.

The U.S. Food and Drug Administration asked manufacturers to pull the drug off the market in 2020. The drugmakers have maintained that there is no evidence Zantac exposed users to harmful levels of NDMA.

Medinilla is presiding over the majority of nearly 80,000 cases still pending in the United States over Zantac, which was once the world's top-selling drug.

In addition to the cases in Delaware, the drugmakers are facing about 4,000 claims in California state court and about 2,000 in various other state courts around the country.

Last month a jury in Chicago rejected an Illinois woman's claim that Zantac caused her colon cancer, handing GSK and Boehringer Ingelheim a victory in the first case to go to trial. The drugmakers notched a significant win in 2022, when another judge dismissed about 50,000 lawsuits making similar claims that had been consolidated in federal court in Florida. That judge concluded that the opinions of the plaintiffs' expert witnesses that Zantac can cause cancer were not supported by sound science. Plaintiffs are appealing that ruling, which concerns different experts from those in the Delaware case.

1988 and one of the first-ever drugs to top \$1 billion in annual sales. Originally marketed by a forerunner of GSK, it was later sold successively to Pfizer, Boehringer and finally to Sanofi.

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Reporting By Brendan Pierson in New York, Editing by Alexia Garamfalvi, David Barrio and Diane Craft

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Will Zantac ruling make Delaware a mass torts magnet?

 [reuters.com/legal/government/column-will-zantac-ruling-make-delaware-mass-torts-magnet-2024-06-03](https://www.reuters.com/legal/government/column-will-zantac-ruling-make-delaware-mass-torts-magnet-2024-06-03)

Alison Frankel

Zantac heartburn pills are seen in this picture illustration taken October 1, 2019.

REUTERS/Brendan McDermid/Illustration/File Photo Purchase Licensing Rights , opens new tab

June 3 (Reuters) - If you are mass torts lawyer, you should be paying attention to a trend that has emerged in litigation over the discontinued heartburn medication Zantac.

On Friday, as my Reuters colleague Brendan Pierson reported, a Delaware Superior Court judge ruled , opens new tab that nearly 75,000 lawsuits alleging that Zantac causes cancer can move forward, rejecting arguments by former Zantac makers GSK (GSK.L) , opens new tab, Pfizer (PFE.N) , opens new tab, Sanofi (SASY.PA) , opens new tab and Boehringer Ingelheim that plaintiffs' scientific experts should not be allowed to present their opinions to jurors.

The Delaware judge, Vivian Medinilla, ruled that the defendants — who all maintain that no credible evidence links the drug to a plethora of cancers — raised some valid points about the methodologies and credibility of some of the plaintiffs' experts, even using the word “shaky” to describe some of the experts' opinions.

But ultimately, Medinilla ruled, Delaware law leaves it to juries — not judges — to decide which side should prevail in a battle of legitimate experts.

“When experts disagree, or credibility or other questions confound the reliability issue, resolution of those issues rests with the jurors,” Medinilla wrote. “Delaware courts are loath to step into the heart of technical debate between opposing scientists.”

That's a marked contrast from the approach of the judge overseeing the consolidated federal Zantac litigation. In December 2022, U.S. District Judge Robin Rosenberg of West Palm Beach, Florida, held , opens new tab that plaintiffs' experts, as a matter of law, failed to offer sufficiently credible evidence that Zantac's key ingredient, ranitidine, causes cancer.

The Florida judge ruled that plaintiffs' experts could not present their causation testimony to jurors — and that without expert testimony linking Zantac to cancer, plaintiffs could not prove their cases. The judge granted summary judgment to the defendants, erasing about 50,000 lawsuits in a single decision.

Those divergent decisions on the admissibility of plaintiffs' expert evidence is a prime example of a “widening gap” between federal and state court judges in their interpretation of their role as gatekeepers in mass tort cases, said Brent Wisner of Wisner Baum, one of the

co-lead counsel in the Delaware Zantac litigation.

“The Delaware judge gave proper deference to letting juries decide which evidence to believe when there’s good science on both sides,” Wisner told me, asserting that the MDL judge “went way out there on a ledge” when she rejected plaintiffs’ experts.

The drugmakers, I should note, have said they disagree with Medinilla’s ruling and plan an appeal to the Delaware Supreme Court. Defense lawyers from Williams & Connolly, Dechert and Arnold & Porter Kaye Scholer, among other firms, relied heavily on Rosenberg’s ruling in the MDL in their briefing to the Delaware judge, pointing out that Delaware also applies the federal-court standard for excluding expert testimony, as established in the U.S. Supreme Court’s 1993 decision [Daubert v. Merrell Dow Pharmaceuticals](#). Some plaintiffs in the federal case are appealing Rosenberg’s summary judgment decision to the 11th U.S. Circuit Court of Appeals. In the meantime, both Sanofi and Pfizer have disclosed settlements of thousands of Zantac lawsuits this spring.

Wisner and co-counsel Jennifer Moore of the Moore Law Group made a bet four years ago that their Zantac clients would fare better in state court than in the consolidated federal litigation. Wisner, who had been appointed to the leadership team in the MDL proceeding before Rosenberg, resigned that job in May 2020 and opted to litigate all of his cases in state court in California and Delaware rather than in the federal MDL.

“Historically, Delaware was not considered a plaintiffs-friendly jurisdiction,” Wisner said. But he said he and Moore believed they’d have a better chance of surviving a Daubert challenge to their scientific evidence in Delaware than in the MDL.

State courts in California and Illinois, which apply modified versions of the Daubert standard, have also allowed [Zantac](#) plaintiffs to proceed to trial. (Defendants have settled several California cases as trial dates approached but won a defense verdict last month in Illinois state court in the first Zantac case to be tried.)

The Delaware Zantac ruling, if it survives on appeal, is arguably a bigger problem for mass tort defendants than lawsuits in California or Illinois state courts.

Most U.S. companies, as you know, are headquartered in Delaware and are therefore subject to the jurisdiction of its state courts. That means plaintiffs from all over the country can sue Delaware-based companies in Delaware Superior Court without risk of defendants removing their cases to federal court. They can also sue multiple defendants in a single consolidated litigation in Delaware because the state is home to so many companies.

If Wisner is right that Medinilla’s ruling on the admissibility of testimony from plaintiffs’ experts reflects a gap between state and federal judges on the application of the Daubert test, plaintiffs’ lawyers will have to think hard about whether to file lawsuits in Delaware

instead of federal court, or even state courts where their cases could be subject to removal to federal court.

“It’s absolutely something that plaintiffs’ lawyers must consider,” Wisner said. “Forum selection is the single most important thing I have to do at the beginning of a case.”

I’m guessing that if the Zantac defendants are granted a right to appeal Medinilla’s ruling to the Delaware Supreme Court, they will argue not only that the judge erred in the extent of her deference to jurors as the ultimate fact-finders but also that her decision will make Delaware state courts a magnet for mass tort claims.

If defendants really want to push the policy point, they’ll likely contend that Medinilla’s interpretation of Delaware law is bad for Delaware: Its court system will be swamped with lawsuits by out-of-state residents and companies will think twice about incorporating in a plaintiffs-friendly venue.

Delaware, you’ll recall, is already facing blowback from companies disgruntled by rulings from the business-law specialists on its Court of Chancery. It’s a good bet that the Zantac defendants will try to capitalize on the state’s interest in preserving its role as the premier U.S. locale for companies.

Read more:

Delaware judge lets more than 70,000 Zantac lawsuits go forward
Zantac not a cause of woman’s cancer, jury says in first trial over drug
Drugmakers’ huge win in consolidated Zantac case shows process can work for defendants
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Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters,

she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

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GSK PLC

GSK shares tumble after Delaware court ruling on Zantac

Ruling means plaintiffs can present evidence alleging link between heartburn drug and cancer



The ruling leaves GSK exposed to US jury trials for more than 70,000 cases over its heartburn treatment Zantac © Bloomberg

Ian Johnston 13 HOURS AGO



GSK shares dropped almost 10 per cent on Monday after a ruling from a Delaware judge left the UK drugmaker exposed to US jury trials over its allegedly carcinogenic heartburn treatment Zantac.

Judge Vivian Medinilla ruled that scientific evidence presented by lawyers in more than 70,000 cases was [admissible](#), meaning scientists would be able to testify that there is a link between the plaintiffs' cancers and their exposure to NDMA, a probable human carcinogen, through Zantac.

[GSK](#) won US approval for Zantac in 1983 and it became the first pharmaceutical “blockbuster” by generating more than \$1bn in revenue. Pfizer, Boehringer Ingelheim and Sanofi all later acquired the rights to sell the drug after GSK’s patent expired.

Exposure to Zantac litigation has dogged GSK's share price since the summer of 2022, when analysts estimated the potential costs to be as much as \$45bn, wiping a combined \$40bn off the market capitalisation of large pharmaceutical groups linked to the drug in days.

GSK and the other drugmakers that sold Zantac dispute these claims. The London-listed group said it planned to appeal against the Delaware ruling.

Shares in GSK were down 9.5 per cent on Monday while shares in French pharma group Sanofi, which sold the drug from 2017, fell 2 per cent.

Medinilla delivered her judgment on Friday, having heard plaintiffs' scientific evidence in January. The judgment was published on Saturday.

The judgment came as a "surprise", wrote Citi analyst Peter Verdult, given that a Florida federal court decided in 2022 that other scientific experts' findings about the carcinogenic nature of Zantac were based on "unreliable methodologies".

Verdult estimated the company's potential settlement costs to be about \$3bn in a note on Monday.

The vast majority of outstanding cases are being heard in Delaware. In seeking to prevent the plaintiffs' scientists from testifying, GSK had hoped to draw a line under the vast majority of outstanding cases. Although Medinilla's ruling does not endorse the plaintiffs' claims, it enables their cases to advance to jury trials.

Brent Wisner, the co-lead counsel in cases brought by plaintiffs in Delaware and California state courts, said Friday's ruling recognised "the central role juries must play in holding companies accountable".

GSK said: "[The] scientific consensus is that there is no consistent or reliable evidence that ranitidine increases the risk of any cancer and GSK will continue to vigorously defend itself against all claims," referring to the generic name for the drug.

The ruling is also a blow to chief executive Emma Walmsley's efforts to turn around the company. GSK has had recent successes in the launch of a vaccine for respiratory syncytial virus last year that delivered more than \$1bn in sales in around nine months.

Over the weekend, it also presented positive late-stage trial data for a blood cancer drug Blenrep at an oncology conference in Chicago. The Blenrep results “should have been a straightforward positive for GSK. Unfortunately the market will . . . fret over Friday’s Delaware ruling,” said Verdult.

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NEWS

Lawyers Forge On With Ozempic Litigation Amid MDL Reassignment Uncertainty

“When a client reads that their judge has passed, it is a scary, scary thing,” said Jonathan Orent, a member at Motley Rice.

June 03, 2024 at 02:40 PM

Mass Torts



Aleeza Furman
Litigation Reporter



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

What You Need to Know

- U.S. District Judge Gene Pratter's death has created some uncertainty in the Ozempic MDL.
- The JPML has not yet determined what judge will take over the MDL or what court it will be based in going forward.
- Plaintiffs lawyers said the parties have continued to advance the litigation behind the scenes as they wait for the MDL to be reassigned.

The unexpected [death](#) of U.S. District Judge Gene Pratter has left the four-month-old Ozempic multidistrict litigation without a judge to oversee it.

But despite the uncertainty of a looming reassignment, lawyers involved in the MDL said the parties are working behind the scenes to keep the litigation moving.

“Everybody recognizes the tragedy that has happened,” said Motley Rice’s Jonathan Orent, one of the plaintiffs co-leads. “Everybody takes their obligation to their clients seriously, and everybody has committed to working collectively to keep this litigation on track and moving despite the tragedy that has occurred.”

Pratter, who served in the Eastern District of Pennsylvania, died May 17 at age 75. Her death came just three and a half months after she was assigned to oversee the Ozempic MDL, at a time when the parties were still working out the ground rules for the litigation.

Wagstaff & Cartmell partner Sarah Ruane, another co-lead for the plaintiffs, said the loss of the judge had the potential to stall the litigation, but that did not happen.

“We have been pleasantly surprised at our ability to continue to work with the defense as it relates to this, and we are still making progress,” Ruane said.

Ruane said that work has been possible in part because Pratter had already established the plaintiffs’ [leadership structure](#). She said that Pratter set clear expectations at the outset of the litigation that placed the case on a direct course.

“What Judge Pratter did was set a group in place that are able to continue that work even right now,” Ruane said.

Still, the parties are waiting to find out who will take over the MDL and whether it will even remain in the same court.

According to Orent, the Judicial Panel of Multidistrict Litigation’s process for assigning cases can be opaque, but the panel generally takes into account factors like a court’s docket space, location and the availability of its judges.

When the panel [assigned](#) the MDL to Pratter in February, it reasoned that the Eastern District of Pennsylvania is near the headquarters of defendant Novo Nordisk in Plainfield, New Jersey, and that the lawsuits allege “many of the witnesses and documents relating to the sales and marketing, regulatory affairs, and safety and pharmacovigilance of Novo Nordisk’s products will be located there.”

Orent said that the geographical factors that led the JPML to favor Pennsylvania remain the same, but the panel could theoretically send the litigation anywhere. He said he does not know exactly when the JPML will reassign the case, but he said they “tend to act quickly.”

In the meantime, Orent said, the biggest challenge for counsel is reassuring clients that the litigation is still on track.

“The hardest part is dealing with that emotional toll for them of ‘what does this mean for my case?’” he said. “When a client reads that their judge has passed, it is a scary, scary thing.”

Plaintiffs in the lawsuits alleged that Eli Lilly and Novo Nordisk failed to warn about stomach paralysis risks for users of Ozempic and related drugs, which are prescribed for type 2 diabetes but increasingly used for weight loss. About 100 cases were coordinated in the MDL as of June 3, and lawyers have predicted at least 10,000 lawsuits will be filed over the medications.

A Novo Nordisk spokesperson did not respond to requests for comment.

A spokesperson for Eli Lilly said in a statement, “We are deeply saddened by Judge Pratter’s passing. Our thoughts are with her family during this difficult time. We also extend our heartfelt condolences to Judge Pratter’s colleagues on the bench and in the legal community.”

RELATED STORIES

[**Active Pa. Federal Judge Gene Pratter, 75, Dies**](#)

[**Meet the Pennsylvania Judge Overseeing the Ozempic MDL**](#)

[**Judge Expands Ozempic Plaintiffs' Leadership Team, Names 4 Co-Lead Counsel**](#)

[**A Pennsylvania Judge Will Oversee Lawsuits Targeting Weight Loss Drug Ozempic**](#)

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Meta to settle Texas lawsuit over Facebook facial recognition data

 [reuters.com/legal/transactional/meta-settle-texas-lawsuit-over-facebook-facial-recognition-data-2024-05-31](https://www.reuters.com/legal/transactional/meta-settle-texas-lawsuit-over-facebook-facial-recognition-data-2024-05-31)

Mike Scarcella

Facebook app is seen on a smartphone in this illustration taken, July 13, 2021.

REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

May 31 (Reuters) - Meta's Facebook (META.O) , opens new tab has agreed to settle a lawsuit by the state of Texas that accused the social media giant of illegally using facial-recognition technology to collect biometric data of millions of Texans without their consent. Meta and Texas said in a court filing in Texas state court on Friday that they have agreed in principle to resolve the lawsuit, filed in 2022.

They asked a judge to pause the case for 30 days to allow the sides to finish the deal and present it to the court. The filing did not spell out the terms of the settlement.

Meta declined to comment on Friday, and the Texas attorney general's office did not immediately respond to a request for comment. Meta previously said the "claims are without merit and we will defend ourselves vigorously."

Jury selection in the lawsuit was due to begin on June 17.

The lawsuit , opens new tab was the first major case to be brought under Texas' 2009 biometric privacy law, according to law firms tracking the litigation. A provision of the law provides damages of up to \$5,000 per violation.

Texas accused Facebook of capturing biometric information "billions of times" from photos and videos that users uploaded to the social media platform as part of a free, discontinued feature called "Tag Suggestions."

The technology could recognize a Facebook user's friends in a photo and suggest that the user "tag" that person.

Facebook said in a court filing that it provided "clear notice" that explained the feature to users and gave them control over its use. The company in late 2021 said , opens new tab it was moving to end its facial recognition system.

Meta separately agreed to pay \$650 million in 2020 to settle a biometric privacy class action that was brought under an Illinois privacy law that is considered one of the nation's most stringent. The company denied wrongdoing.

The case is State of Texas v. Meta Platforms, 71st Judicial District, Harrison County, No. 22-0121.

For Texas: Brent Webster of the Attorney General's Office

For Meta: John "Trey" Cox of Gibson, Dunn & Crutcher

Read more:

BNSF Railway to pay \$75 mln to resolve biometric privacy class-action

ByteDance agrees to \$92 million privacy settlement with U.S. TikTok users

Texas sues Meta's Facebook over facial-recognition practices

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Reporting by Mike Scarcella

Climate Capital Climate change

The uninsurable world: how the insurance industry fell behind on climate change

Surge in floods and fires has caught out the insurance industry and added an 'uncertainty factor' to premiums

Ian Smith and Kenza Bryan in London JUNE 1 2024



Half a century ago, one of the world's leading reinsurers published a paper on floods, referencing ancient diluvial stories such as the Mesopotamian epic of Gilgamesh, and urged better monitoring of "climatic variations".

The 1970s paper by Munich Re, now the largest in the industry, pointed to global warming, polar melt and other environmental shifts as needing further study, "especially as — as far as we know — its conceivable impact on the long-range risk trend has hardly been examined to date".

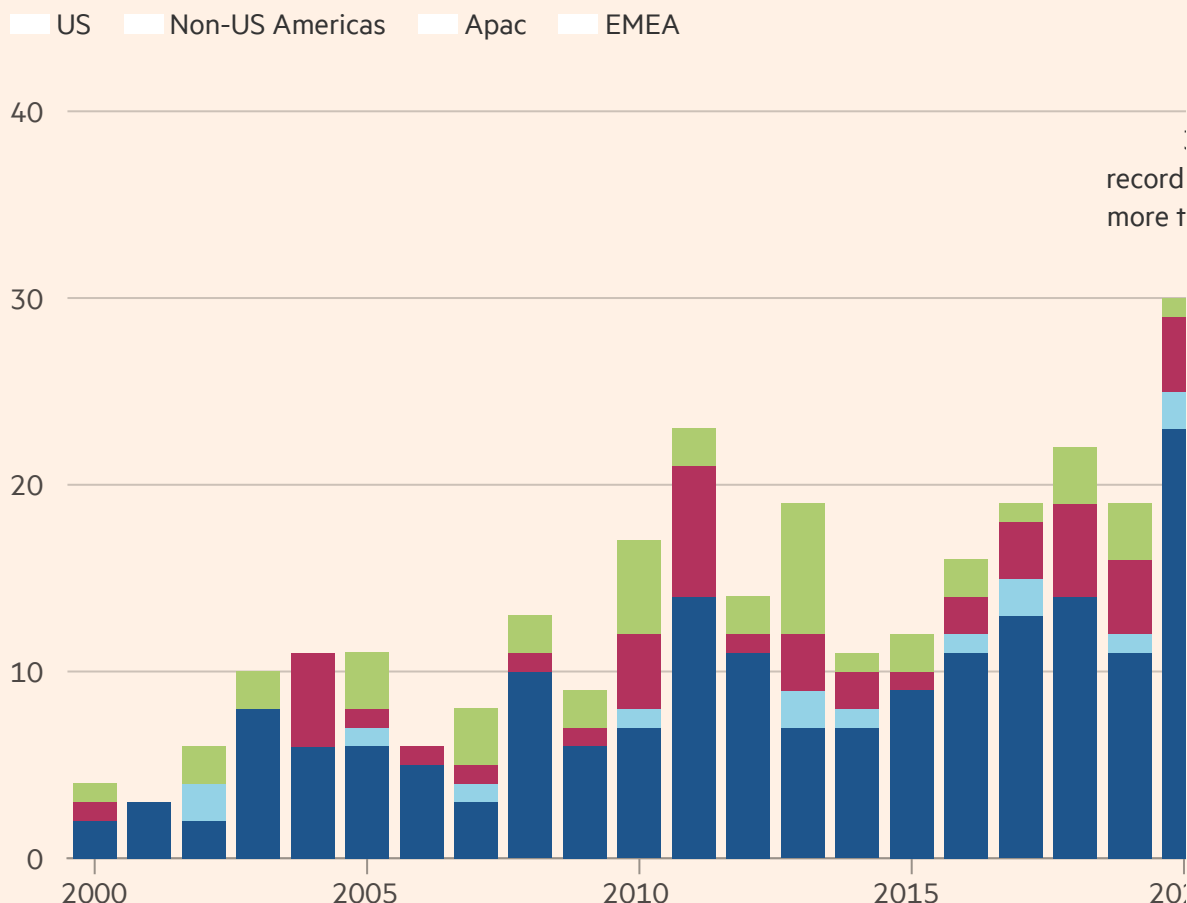
Today, the effect of [climate change](#) fuelling natural catastrophes such as floods and wildfires is evident, and insurance companies are scrambling.

The industry has been alert to the threat for decades. Yet executives have been spooked by the surge in extreme weather events, creating a property [insurance](#) crisis in some parts of the world.

The sector has been rocked four years in a row as natural catastrophe losses topped \$100bn. Even in 2023, a quiet year for hurricanes, there were a record-breaking 37 separate events costing at least \$1bn in losses.

"Very clearly the [insurance industry's] models are not working," said Lindsay Keenan, EU co-ordinator at campaign group Insure Our Future. "I'm amazed how they have managed to blag the regulators with their rhetoric that 'It's all OK, we have models for that' over the years, and still today."

Last year had a record number of billion-dollar insured losses from extreme weather



FINANCIAL TIMES

Source: Aon

Reinsurers took heavy losses before sharply tightening their terms two years ago, putting extra pressure on primary insurers. US property and casualty insurers incurred more than \$20bn in underwriting losses in both 2022 and 2023, according to rating agency AM Best. State Farm, the biggest US home insurer, suffered a net loss of more than \$6bn in both years. It has since paused new business in California and will not renew tens of thousands of policies.

Veteran industry executives have voiced their concerns about the battle to keep up with climate effects.

William Berkley, the founder and executive chair of insurer WR Berkley Corporation, challenged fellow executives recently about their response to a changing climate that “doesn’t follow” historic patterns.

“It doesn’t seem like we are changing fast enough for the pace of change we have to adjust to,” Berkley told a gathering at New York University in April.

Insurance models “struggle to factor, with any precision, the probabilities that are accruing from climate change”, said Paula Jarzabkowski, an expert on risk at the University of Queensland. “I suspect that factoring climate risk into underwriting models is adding an uncertainty factor to premiums.”

Industry figures who spoke to the Financial Times identified a few reasons why the sector had fallen behind the curve.

A key issue was the one-year term of insurance policies — the question of whether to insure or reinsure a property or postcode for the coming year only — with little incentive to take a longer-term view.

Adopting a conservative approach to climate threats also risked the loss of business or driving up capital requirements, some argued.

“The individual insurance companies look at this and say ‘there is very little advantage to us’ . . . being a leader in this area,” said one insurance expert, speaking privately.

This feeds into a second charge made by some: the risk models provided by the very biggest groups, Verisk and Moody’s RMS, were slow to reflect the effect that accelerating climate change was having on day-to-day losses.

Their priority was to gauge “peak perils”, such as hurricanes, that can cause calamitous losses that can bring the sector to its knees, rather than “secondary perils” such as wildfires and storms, which may have a lesser individual cost — until they begin to widen and cascade.

Big risk modellers reject the idea that they did not focus enough on secondary perils. Jay Guin, chief research officer for extreme event solutions at Verisk, said the company had “been offering models for secondary perils for over 20 years and has made significant investments”.

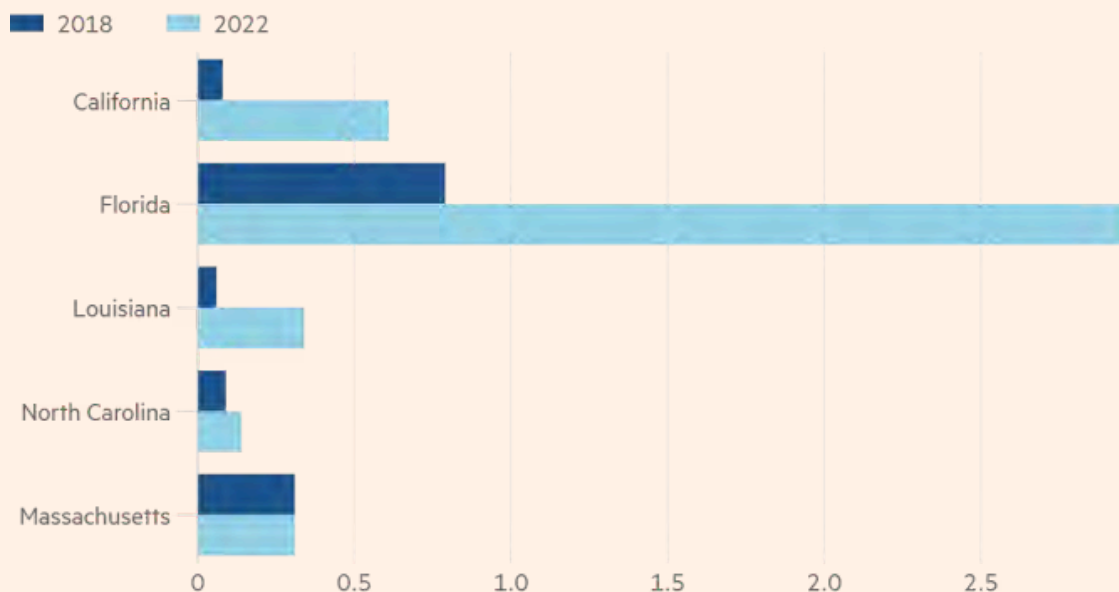
But it was not until the 2017-18 wildfire losses in California that the whole industry began to take a “more critical look” at such events, Guin said. “We have improved most aspects of the model and have accounted for the impact of climate change.”

Executives describe an industry that is now recalibrating the threat from fires and floods. “Everyone has been surprised [by the surge in secondary perils]. It’s a fair criticism that we fell behind,” said Christian Mumenthaler, the departing chief executive of reinsurer Swiss Re.

He said it had been very difficult to predict how global warming would feed through to the cost of localised events, such as floods, which might affect one building on a street but not another.

State insurers of last resort grow

Home insurance premiums (\$bn) in state-backed schemes



Excludes so-called beach plans for waterfront properties

Source: Moody's Ratings, PIPSO

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Julie Serakos, head of the model product management team at Moody's RMS, cited other complicating factors such as population growth in vulnerable regions and inflation in payouts. “There’s just more exposure to these types of events.”

Investment has now poured into new software tools and expertise that allow insurers to develop a longer-term view of climate effects.

Despite these efforts to catch up, however, the risk remains that the models will not fully reflect the catastrophic outcomes.

“As scientific evidence on climate change accumulates, you typically find the risks are higher in the new risk assessments compared to the previous one,” said Wim Thiery, a climate scientist at Vrije Universiteit Brussel.

Scientists have also been unnerved by an unprecedented stretch of record heat over land and sea over the past year. Global average temperatures surpassed the 1850-1900 average by 1.61C in the 12 months to April.

Members of the UK's Institute and Faculty of Actuaries argued in a recent report with University of Exeter scientists that more attention should be paid to the risk that extreme climate scenarios could be made more likely by a series of atmospheric and physical feedback loops, including the collapse of ice sheets. These tipping points would add even more guesswork to the modelling.

"It's product recall time for some of these models, things are moving more quickly [than predicted] . . . we need to move on to the next generation of climate scenarios," said Sandy Trust, head of organisational risk at British fund manager M&G, and a co-author of the report.

Another issue is how the consensus models developed by the Intergovernmental Panel on Climate Change, the UN body of scientists, are interpreted by the private sector.

Scientists and actuaries "are sailing past each other like ships in the night despite the fact they are using the same language of climate risk", said Kris de Meyer, head of the UCL climate action unit.

The scientific method focuses on the most likely outcomes within the full range of scenarios. The insurance world, conversely, aims to forecast the worst case, however unlikely, to avoid fluke events.

The response from the all-important reinsurance sector has been to draw back from covering secondary perils and to push up prices for primary insurers, who have passed them on to consumers. Greater numbers of property owners are relying on state-backed insurers as a last resort.

Most in the industry expect a continuation of that trend. "The reality is that climate change is essentially a slowburn," said Steve Bowen, chief science officer at reinsurance broker Gallagher Re. "The general trend [in losses] is going to continue to go up."

This is the second article in an FT series about the consequences of climate change on insurance. Read part one [here](#).

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https://www.law.com/2024/05/31/talc-plaintiffs-move-to-quash-subpoenas-as-jj-defends-attorneys-conduct/?cmp=share_twitter



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NEWS

Talc Plaintiffs Move to Quash Subpoenas as J&J Defends Attorney's Conduct

On Thursday, Beasley Allen and the plaintiffs' steering committee in the talc multidistrict litigation filed motions to quash subpoenas sought by Johnson & Johnson in the talc litigation.

May 31, 2024 at 05:30 PM



Amanda Bronstad
staff reporter



What You Need to Know

- On Friday, Johnson & Johnson, in a letter, insisted that outside counsel Jim Murdica, of Barnes & Thornburg, acted ethically after receiving a Beasley Allen client's email.
- J&J has a pending disqualification motion against Beasley Allen and, this month, moved to subpoena the firm for records about its relationships with litigation funders.
- Beasley Allen is an outspoken critic of J&J’s latest \$6.48 billion bankruptcy plan to resolve thousands of talcum powder lawsuits,

The fight between Johnson & Johnson and plaintiffs firm Beasley Allen escalated this week with accusations of “ethical lapses” and a “revenge campaign.”

Montgomery, Alabama-based Beasley Allen is fending off allegations of impeding [J&J’s latest \\$6.48 billion bankruptcy plan](#) to resolve thousands of talcum powder lawsuits by insisting to others in the plaintiffs bar that the settlement values fall far below what their clients could get in court.

J&J has a pending disqualification motion against Beasley Allen and, this month, moved to subpoena the firm for records about its relationships with litigation funders after one of the firm’s clients emailed its lawyers, who include Barnes & Thornburg’s Jim Murdica, asking about the bankruptcy plan.

On Thursday, Beasley Allen and the plaintiffs’ steering committee in the talc multidistrict litigation, in U.S. District Court for the District of New Jersey, fired back with two motions to quash the subpoenas, which are “the latest move in J&J’s revenge campaign” against Beasley Allen, principal Andy Birchfield and talc victims.

“Not content with filing a disqualification motion for purely tactical reasons and to harass opposing counsel, J&J served a subpoena on Beasley Allen to obtain irrelevant, privileged communications with its clients,” Jeffrey Pollock, of Fox Rothschild in Princeton, New Jersey, argued in Beasley Allen’s motion. “The subpoena is a new low for J&J in its proxy war with opposing counsel Beasley Allen and its assault on its own customers—individuals harmed by J&J’s products and Beasley Allen’s clients.”

In a statement to Law.com, Birchfield compared Johnson & Johnson to Big Tobacco.

“The letter filed with the Court is a continuation of J&J’s strategy to deny, delay and attack in order to distract attention away from callously exposing countless women to its asbestos-tainted baby powder,” he wrote. “Here, by suggesting a sham vote arising from a bogus bankruptcy, J&J is desperately trying to deprive women of their individual right to choose. This is wrong and must be stopped.”

In a separate motion, the plaintiffs’ steering committee in the talc multidistrict litigation said the subpoenas exceeded the scope of permissible discovery and sought communications that are protected by the attorney-client privilege and the work product doctrine. Further, the motion says, there is no evidence that any of the litigation funders are driving legal decisions.

“It is unfortunate that this is all going on,” Chris Placitella, of Cohen, Placitella & Roth in Red Bank, New Jersey, who is liaison counsel in the talc multidistrict litigation, told Law.com. “I look forward to getting back to addressing the merits of the case.”

On Friday, J&J, in a letter, said no attorney-client privilege applied to the client’s email, which was copied to Thomson Reuters and two of its own lawyers. Further, the client, based on a Google search, appeared to be a “self-proclaimed influencer.”

J&J also refuted Beasley Allen’s insistence in a May 22 letter that Murdica, in Los Angeles, committed professional misconduct by communicating with the client.

“As the record amply reflects, he did no such thing,” King & Spalding partner Kristen Fournier wrote in the letter. “Such spurious accusations are nothing more than a thinly veiled attempt at distraction after Beasley Allen’s own ethical lapses were exposed by its client—without prompting or solicitation from the J&J defendants.”

“Jim Murdica was pointedly told by Beasley Allen not to communicate with a firm client,” Pollock told Law.com. “Just hours later, Murdica violated RPC 4.2 by knowingly communicating with that client on the substance of the matter. J&J’s lawyers must comply with the law. It’s that simple.”

‘Let the Women Vote’

The fight over the subpoenas is the latest battle between Beasley Allen and J&J, which announced a May 1 bankruptcy plan after two prior Chapter 11 cases filed by subsidiary LTL Management failed last year.

U.S. Magistrate Judge Rukhsanah Singh, in the talc multidistrict litigation, and Atlantic County Superior Court Judge John Porto, who is overseeing New Jersey state court cases against J&J, held three days of hearings on whether to disqualify Beasley Allen from the leadership of the talc litigation. Beasley Allen principal Leigh O’Dell is co-lead counsel in the talc multidistrict litigation, but the disqualification motion is largely focused on Birchfield, who struck a deal with former J&J lawyer James Conlan to pitch a \$19 billion talc settlement last year.

Neither judge has issued a ruling on the disqualification motion.

Meanwhile, Beasley Allen and five other plaintiffs firms [filed a class action](#) on May 22 against J&J and its subsidiaries and executives over its “fraudulent transfers,” such as the “Texas two-step” merger, that limited compensation to thousands of talc victims with ovarian cancer and mesothelioma.

J&J, in Friday’s letter, cited the class action and this week’s quash motions as among the “litany of materials” designed to stop women from voting for the bankruptcy plan.

“It is time for their own lawyers to show the same confidence in their clients’ ability to determine their own best interests,” Fournier, in New York, wrote. “Let the women vote.”

The Subpoenas

The subpoenas focus on a May 14 email from a Beasley Allen client to firm principal Brittany Scott, in Atlanta, as well as Murdica and another J&J attorney, Jones Day partner Gregory Gordon, in Dallas. Thomson Reuters was copied on the client’s email.

After Beasley Allen’s Elizabeth Achtemeier, in Montgomery, advised Murdica later that day to disregard the client’s email, the J&J lawyer asked in his own email to clarify if Beasley Allen had a “surreptitious” relationship with Thomson Reuters. Thomson Reuters in-house attorney Christopher Lee later clarified that its reporter in the email had no attorney-client relationship with Beasley Allen.

“As you know,” Achtemeier wrote Murdica in a May 15 email, “it is not permissible for you to communicate directly with a represented individual.”

In a later email, the client told Murdica that Beasley Allen had informed her that “Johnson & Johnson is not willing to settle your case at this time.” In her last email to Murdica, she said, “Please make an offer so I can get on with my life.”

J&J, suggesting that financial interests might be driving decisions at Beasley Allen, which could get 12% in fees from the talc multidistrict litigation, initially asked for records [relating to Fortress Investment Group](#), a private equity firm. In a declaration, Fortress’ head of litigation denied any funding to Beasley Allen for talc cases but admitted to investing in a \$24 million loan to the firm’s co-counsel, The Smith Law Firm in Ridgeland, Mississippi. As of three years ago, funding came from hedge fund Ellington Management Group.

J&J said it planned to subpoena Ellington Management, as well as The Smith Firm and Thomson Reuters.

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Judge denies dueling requests for sanctions in Elon Musk defamation case

 [abajournal.com/news/article/judge-denies-dueling-requests-for-sanctions-in-elon-musk-defamation-case](https://www.abajournal.com/news/article/judge-denies-dueling-requests-for-sanctions-in-elon-musk-defamation-case)

Ethics

By Debra Cassens Weiss

June 3, 2024, 8:56 am CDT

Attorney Alex Spiro emerges from a courtroom at the Palm Beach County Courthouse in April 2019 in West Palm Beach, Florida. (Photo by Patrick Dove/TCPalm.com via the Associated Press)

A Texas judge has denied a bid for sanctions claiming that BigLaw partner Alex Spiro “brazenly” appeared at a deposition for Tesla CEO Elon Musk without pro hac vice permission and then acted in “an obnoxious manner.”

Judge Maria Cantu Hexsel of Travis County, Texas, also denied a cross-motion for sanctions against the opposing counsel, Mark Bankston, who allegedly “descended into schoolyard antics” at the deposition.

Law.com, Law360 and Reuters have coverage of Hexsel’s May 29 decision.

Spiro is a partner at Quinn Emanuel Urquhart & Sullivan who represents Musk in a defamation lawsuit claiming that Musk defamed Bankston’s client, Benjamin Brody. Musk is accused of amplifying a false claim about Brody on X, the former Twitter social media website now owned by Musk.

Hexsel also granted pro hac vice status to Spiro and another lawyer at his law firm. But she denied Musk’s motion to dismiss Brody’s case.

Bankston issued this May 29 statement on X: “Elon Musk’s attorneys called it ‘a shakedown,’ but I am proud to announce that today a Texas judge has rejected Musk’s attempts to dismiss the lawsuit I brought on behalf of Ben Brody, a Jewish college student who was falsely accused of being a neo-Nazi rioter.”

FirstEnergy, the center point of a bribery plot, could officially beat the rap this summer

[cleveland.com/open/2024/06/firstenergy-the-center-point-of-a-bribery-plot-could-officially-beat-the-rap-this-summer.html](https://www.cleveland.com/open/2024/06/firstenergy-the-center-point-of-a-bribery-plot-could-officially-beat-the-rap-this-summer.html)

June 2, 2024

1. Ohio Politics

- Updated: Jun. 02, 2024, 4:05 p.m.]
- Published: Jun. 02, 2024, 5:30 a.m.



FirstEnergy headquarters in Akron. (File photo/Cleveland.com)

By

Jake Zuckerman, jzuckerman@cleveland.com

COLUMBUS, Ohio – July could mark the end of a shameful era as federal prosecutors are set to release FirstEnergy, the Akron power company at the center of intersecting multimillion dollar bribery schemes, from a special cooperation agreement that offered prosecutors a roadmap of a compromised state government.

Unless the government invokes a one-year extension, July 20, 2024, will mark the end of the three-year term of FirstEnergy's "deferred prosecution agreement" with the office of the U.S. Attorney for the Southern District of Ohio.

Prosecutors charged the company three years ago with a conspiracy to commit honest services wire fraud in its efforts to bribe government officials in exchange for favorable treatment. But in exchange for the company's cooperation with the government, payment of a \$230 million fine, forfeiture of another roughly \$7 million involved in the bribery plot, some corporate reforms, and its issuance of a public statement of guilt, the government will drop that charge within 30 days of the agreement's expiration date.

The agreement is perhaps less significant for its terms than the extraordinary "statement of facts" that accompanied it. FirstEnergy, over about 40 pages signed by an interim CEO who has since departed under murky circumstances, admitted to two separate bribery schemes.

In one, the company said it paid off ex-Ohio House Speaker Larry Householder with \$60 million via a nonprofit he secretly controlled in exchange for passage of bailout legislation worth more than \$1 billion for the company. In the other, the company said it paid Sam Randazzo a \$4.3 million bribe just weeks before Gov. Mike DeWine appointed him as chairman of the Public Utilities Commission of Ohio, which regulates FirstEnergy. From there, Randazzo steered the commission toward decisions that benefitted FirstEnergy, while shepherding FirstEnergy's proposed bailout toward passage.

The agreement's cast of characters included "State Official 1" and "State Official 2" – more commonly known as Gov. Mike DeWine and Lt. Gov. Jon Husted – ensuring Randazzo's confirmation. Other pseudo-anonymous cameos (since outed in the evidence trove that emerged from the various related civil lawsuits) in the statement of facts, all in the service of passing House Bill 6 in 2019, include Cleveland businessman Tony George, well-known political operatives such as Bob Paduchik and Rex Elsass, the late Murray Energy CEO Bob Murray, now-Congressman Mike Carey, Boich Companies Chairman and CEO Wayne Boich and company president Matt Evans.

At the time prosecutors announced the deal, Householder was legally an innocent man, ousted by his colleagues as House speaker but still an elected public official who was yet to be found guilty of the racketeering charge against him (which a jury eventually did in March 2023). Randazzo had resigned from his job, given the specter of FBI agents raiding his apartment. But at the time, he hadn't been charged with any crime. (DeWine told reporters at the time that, despite the FBI raid at Randazzo's home, "We have no indication he's under investigation or he's the target of an investigation.")

Randazzo has since been charged by both the state and federal government for accepting a \$4.3 million bribe from FirstEnergy. He pleaded not guilty but died by suicide before trial.

The statement of facts pins blame for paying the bribes on the company's ex-CEO, Chuck Jones, and ex-senior vice president of external affairs, Mike Dowling. Despite the conclusion, the federal government has not charged either of the two with any crimes. In February 2024,

a task force led by Attorney General Dave Yost charged them with bribing Randazzo, but not Householder. Under U.S. Department of Justice policy, federal prosecutors almost always avoid initiating cases after state prosecutors have done so on the same set of facts. Jones and Dowling this week moved to dismiss the entirety of the state indictments against them. A common pleas judge hasn't yet ruled on their motions.

Stories by Jake Zuckerman

The precise significance of the July 20, 2024, end date is unclear. Ken Parker, the U.S. Attorney for the district, declined an interview request. A spokeswoman for the office declined to answer a list of questions about the agreement. But she noted a provision that requires FirstEnergy to continue cooperating "until the later of the date the [agreement] ends or the date upon which all investigations and prosecutions arising out of such conduct are concluded, as determined by the government."

What they're investigating is anyone's guess. The only federal case remaining is against Randazzo – the docket has seen no filings since April and bears no official recognition of his death. Two witnesses who pleaded guilty to racketeering offenses in October 2020 and served as government witnesses against Householder up through March 2023 have yet to be sentenced, suggesting their work isn't done.

David DeVillers, a Republican who as U.S. Attorney during President Donald Trump's administration opened the cases that led to Householder and Randazzo's downfall, couldn't be reached for comment Friday.

The deferred prosecution agreement binds FirstEnergy in other ways. As of today, FirstEnergy must disclose all its "dark money" spending, which for most politically active companies is a closely held secret, online. And it must consult with the government before making public statements "in connection with this agreement."

FirstEnergy, via spokeswoman Jennifer Young, declined to answer a list of questions about the agreement or the significance of its end date. Instead, she noted a new board of directors and executive team, and what she called "meaningful improvements to our culture of ethics, integrity and accountability."

"We look forward to successful resolution of the deferred prosecution agreement this summer," Young said.

The agreement has its detractors. Ashley Brown, a former PUCO commissioner who now directs the electricity policy group at Harvard University's Kennedy School of Government, thinks Parker "dropped the ball." The deferred prosecution agreement didn't put anyone in jail. The drawn-out nature of the criminal prosecution, assuming any cases are ongoing,

froze out investigations at the PUCO that could have produced consumer refunds. FirstEnergy has continued to successfully fight the public release of internal investigations it commissioned that would bring the whole truth of the scandal to light.

“My view is the order was inadequate,” he said. “It didn’t compensate the crime victim. It didn’t open enough transparency. And the penalty itself was really not much, the equivalent of a parking ticket to an average consumer.”

J.P. Blackwood, a spokesman with the Ohio Consumers’ Counsel, said the unhurried pace of the PUCO’s investigation has blocked the whole truth of FirstEnergy’s conduct from coming to light, all while all Ohio ratepayers statewide continue to pay a surcharge every month on their electric bills to pay for a coal bailout that wound up folded into FirstEnergy’s nuclear bailout during the legislative process.

“Three years after FirstEnergy’s admission of guilt, we are still seeking justice for consumers,” he said. “Ohio consumers continue to pay the cost of corruption -- \$260 million and counting for coal subsidies. There may be more hidden costs of corruption but answers for consumers are slow in coming.”

Rob Kelter, an attorney with the Environmental Law and Policy Center, who opposed FirstEnergy’s bailout as it passed through the Statehouse, thinks the company “got away with murder.” A few people paid a high price, but a much longer list of actors has managed to escape scrutiny.

It simply should not have taken this long, he said, for the federal government to do something about a corporation it believes led a bribery scandal of epic proportions.

“At some point, it becomes absurd,” he said. “How many years do they need to dig into the facts? Something’s not right here.”

Before his death, Randazzo argued in a related court case that the deferred prosecution agreement was a vehicle through which FirstEnergy “bought its way out of a criminal prosecution” via a spread of “hearsay” and “unsupported evidence.”

All the texts and emails mentioned in the agreement have since been released. However, the document was signed on FirstEnergy’s behalf by Steven Strah, who on Sept. 11, 2022, according to FirstEnergy’s deposition testimony in a civil lawsuit, was offered the “opportunity to retire from his position as CEO.”

Others offered warmer takes.

While they may not be supporters, two unexpected beneficiaries of the deferred prosecution agreement? Jones and Dowling. They were charged, among other offenses, with the theft from FirstEnergy of the \$4.3 million they spent allegedly bribing Randazzo. This would make

the company, as state attorneys have somewhat perversely argued, a victim. Lawyers for Jones and Dowling, in fighting FirstEnergy's victim status, relied heavily on the deferred prosecution agreement in seeking to convince a judge that the company was a perpetrator, not a victim.

Rob Glickman, an attorney who represented Householder at trial, said the nearly \$240 million FirstEnergy paid as a penalty is far larger than the \$60 million it allegedly paid as a bribe. The government could have followed through with its charge against FirstEnergy, but that would risk dismantling a company that provides electricity to millions of Northeast Ohioans. And for all that effort, you can't put a corporation in jail. While the federal government almost certainly won't prosecute Jones and Dowling now that the state has, he noted the government didn't offer them any sort of immunity.

"I don't think this was some kind of thing where they [the government] just took money to avoid doing their jobs," he said.

Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.

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Around the Web

Calling on Attorney General Yost to dissolve FirstEnergy

 columbusfreepress.com/article/calling-attorney-general-yost-dissolve-firstenergy



A group of consumers and environmental and democracy organizations held a press conference at the Thomas Worthington Center on May 29 to demand that Ohio Attorney General David Yost dissolve FirstEnergy Corporation for its central role in the massive bribery scheme to pass House Bill 6. Members of the FirstEnergy Accountability Coalition at the Ohio Statehouse urged Yost, who has filed a civil suit against the company, to dissolve the company pursuant to the Ohio Revised Code 2923.34(B)(3).

Activists dressed as Ida B. Wells and 1920s reporters pointed out to the crowd that citizens have the right to dissolve corporations.

FirstEnergy Accountability Coalition members believe it's time to hold FirstEnergy accountable in proportion to the scale of its historic admitted crime of a \$61 million payment in 2021 to a nonprofit secretly operated by former GOP Speaker of the Ohio House Larry Householder (now in prison) and another \$4.3 million payment to the state's top utility regulator, Sam Randazzo, who was recently indicted and is now deceased. The bribes were intended to pass House Bill 6 (HB6), a \$1.3 billion bailout of two FirstEnergy antiquated, failing nuclear power plants, which would have cost ratepayers hundreds of millions of dollars.

Brief statements from those presenting at the press conference:

"Fines and settlements do little to deter corporate misconduct, and I think we all know that. What is the real difference between a fine and a bribe, when FirstEnergy can just pay the government and go back to generating profit off Ohioans? Ohio's leaders must use the law to make FirstEnergy face real consequences for the harm they caused."

Tabitha M. Woodruff, Esq., Ohio National Lawyers Guild

"FirstEnergy should be dissolved for lying about their nuclear plants being unprofitable, bribing politicians into handing them Ohioans' hard-earned tax dollars, and when that failed - surprise - keeping Davis-Besse and Perry running."

Patricia Marida, Ohio Nuclear Free Network, onfn.org

"The FirstEnergy scandal belies the business-as-usual corruption of the Ohio Statehouse, where it is standard practice for the energy industry to buy politicians. Our supermajority gerrymandered legislature has pushed through law after law squashing solar and wind while rigging the system for oil and gas. A good example is HB 507, a bill about poultry chicks, stuffed with amendments declaring fracked gas to be 'green' energy and mandating fracking of our state parks and public lands. Such laws do not represent the will of the people, and the companies that pay for them need to be held accountable -- starting with pulling the plug on FirstEnergy."

Cathy Cowan Becker, Steering Committee, Save Ohio Parks

"FirstEnergy's historic bribery scheme undermines our democracy and harms our environment. Dissolving the corporation is the proportionate response. As Greens, we stand firmly on our Consumer Protection plank, advocating for transparency, fairness, and affordability for all Ohioans."

Philena Farley, Ohio Green Party Co-Chair

"As a Professional Civil Engineer in and for the State of Ohio, I am but one of ninety-three professions requiring a license to operate in this State. I can lose my license if I do not comply with the code of ethics, continuing education requirements and the law. Similarly, if FEC is a corporate "person", shouldn't it lose its Charter, or is the biggest bribery and corruption scandal in Ohio's history not considered a minor misdemeanor in this State?"

Joseph A. Mosyjowski, P.E.

"We cannot allow the corporation behind the largest public corruption scandal in Ohio history to get a pass on undermining our democracy."

Deb Hogshead, Move to Amend Miami County

“By any measure, FirstEnergy has failed, and failed spectacularly, to meet its chartered obligations to its consumers and to all Ohioans who value their health, the environment, and our democracy.”

Sandy Bolzenius, Central Ohio Move to Amend

“Corporate charters or licenses were originally meant to define corporate actions. When corporations failed to follow the provisions of their charter, including breaking the law, they were often revoked – less as a punishment to the company than to protect Ohioans and our direct and representative democracy.”

Greg Coleridge, National Co-Director, Move to Amend

Following the press conference, Coalition members and supporters marched across the street to the office of Attorney General David Yost. The march will feature banners, signs and handouts calling for Yost to “Unplug FirstEnergy.” A request has been sent to the Attorney General asking for a meeting to discuss corporate dissolution of the admitted corporate criminal, FirstEnergy.



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NEWS

Autonomy CEO Downplays Panicked Emails, Denies Firm Was Tanking Before \$11B Sale to HP

“What we’re looking at is the sausage-making that goes into every quarter and the stress that goes into sales,” Autonomy CEO Michael Lynch said of internal emails expressing alarm about the company’s progress closing deals.

May 30, 2024 at 03:55 PM

White Collar Crime



Maria Dinzeo



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

On the stand at his fraud trial Wednesday, former Autonomy CEO Mike Lynch dismissed email evidence that presented a gloomy picture of his company’s finances leading up to its \$11 billion sale to Hewlett-Packard in 2011.

The emails, largely from finance chief Sushovan Hussain, offered a glimpse into the mad end-of-quarter rush to close deals, hit sales targets and realize revenue, a process that grew increasingly stressful between 2009 and 2011.

Under questioning from Assistant U.S. Attorney Adam Reeves, Lynch denied that Autonomy was having trouble selling its signature software product, a data management platform called IDOL that was capable of extracting meaning from vast amounts of unstructured data. It did well with large consumers of data such as major banks and government agencies, but struggled to gain a foothold with a wider set of customers.

It was IDOL that drew HP’s CEO at the time, Leo Apotheker, into the deal. He thought the purchase would reposition HP, which increasingly found itself competing in the commoditized computer-hardware market, as a major player in the software industry.

That vision never came to pass, and the merger now ranks as one of the most disastrous in the history of the tech industry. Within one year of closing, HP had written off \$8.8 billion of Autonomy’s value. HP contends that most of the write-down stemmed from Autonomy’s deceit.

Since March, Lynch and former Vice President of Finance Stephen Chamberlain have been standing trial in federal court in San Francisco, accused of inflating the U.K.-based company’s revenues, issuing false and misleading annual reports, and lying to auditors, regulators and market analysts. ([Read earlier trial coverage here.](#))

Hussain was [convicted of fraud](#) in 2018 and was sentenced to five years in prison.

On Wednesday, Reeves confronted Lynch with emails from Hussain, including one from the first quarter of 2009 with the subject line “Poor areas.” It read: “Many many reps are on zero. Europe was a disaster—License was down 50%. We haven’t been hiring anywhere and the reps have few real deals.”

On the stand Wednesday, Lynch brushed off Hussain’s email as containing “rather hyperbolic language,” adding, “He tends to live quarter to quarter, rather like the coach of a football team.”

Indeed, Hussain appeared to be growing more nervous as 2009 wore on. On Sept. 26 he messaged Lynch: “Yesterday was v bad.”

Lynch testified that Autonomy was still on track to hit its sales target but Hussain was nonetheless upset about a particular deal falling through. “He doesn’t like when things fall out in his plans,” Lynch told the jury.

Another email from Hussain two days later also highlighted declining IDOL sales. He wrote: “US IDOL is weak—we probably only close 35 deals (half the number of 3 years ago with more reps, managers, no competition and more products to sell). Europe is also weak (3 years ago we did 68 deals versus 42 deals this q).”

Lynch acknowledged that the third quarter of 2009 was a difficult one, but noted, “q3 is the most difficult quarter each year because Europe is on holiday.”

That December, Hussain sent Lynch an email with the subject line “bad news” that said Eli Lilly and Co. had backed out of a deal and that sales in France were “virtually zero.”

Lynch brushed it off, saying, “What we’re looking at is the sausage-making that goes into every quarter and the stress that goes into sales.”

Reeves also sought to chip away at Lynch’s story that he had little involvement in the company’s sales and accounting, showing him various emails in which Lynch, often in all caps, pressed Hussain and U.S.-based CEO Stouffer Egan to find more revenue. In one email in 2009, he simply wrote, “NOT ENOUGH.”

On the stand Lynch explained that the target for the quarter was \$190 million. The company was expected to meet that number, but he wanted a “safety cushion.”

Things came to a head in August 2010, when Lynch sent an email to Egan, Hussain and other sales managers over a deal with the Department of Veterans Affairs, which Lynch described as “the biggest deal in the quarter.”

Lynch seemed quite concerned about whether it would go through. “If there is any problem I WANT T KNOW ABOUT IT A F**** MILLISECOND from all of you,” he concluded. Asked about this email, Lynch nonchalantly explained, “This is a \$70 million deal. There are probably, in my career, four of those.”

Calls with skeptical analysts were also wearing on Hussain. In October 2009, he wrote Lynch: “Mike—I am burnt out given my ‘anal’ nature I am spending all my time (awake and asleep) worrying about the 10 minutes on Tuesday where I have to answer the analyst questions and I’m not doing anything else. I need you to take the questions this time round unless they are really easy. I don’t want to deal with the analysts anymore.”

Lynch said Hussain had felt burned by one particularly contentious call where three analysts, including Paul Morland at Peel Hunt, had “ganged up” on Hussain. Lynch agreed to sub in for Hussain.

“He was on a real-time call, and they fed him a trick question,” Lynch said. “They made a fool of him, and he was very upset. He was basically baited like a bear. ... He was a terrible public speaker, anyway. He was terrified they were doing it again, so we tried to protect him.”

“Mr. Hussain was your CFO and wasn’t part of his job to answer questions?” Reeves asked.

“I don’t think it was part of his job to be baited by a small number of people who were fronting hedge funds to produce misinformation in the market,” Lynch said. “I don’t think it should be anyone’s job to put up with that.”

Reeves also presented evidence that Lynch was apprised on deals that were happening in 2010.

Lynch said it was unusual for him to have so much insight into behind-the-scenes sales efforts.

“It was a very different situation to normal,” he said, noting that at the time he was stranded in San Francisco because volcanic eruptions in Iceland had disrupted air travel to Europe.

“It gave me the opportunity of seeing a little bit more about what was going on at an end of quarter in the U.S.,” Lynch said.

Lynch’s trial, now in its 11th week, is expected to wrap in early June.

NOT FOR REPRINT

UK tech founder Mike Lynch's lawyers seek acquittal at US fraud trial

 [reuters.com/legal/us-criminal-trial-british-tech-founder-mike-lynch-wrap-up-2024-06-03](https://www.reuters.com/legal/us-criminal-trial-british-tech-founder-mike-lynch-wrap-up-2024-06-03)

Jody Godoy, Abhirup Roy

British entrepreneur Mike Lynch leaves the High Court in London, Britain March 25, 2019. REUTERS/Henry Nicholls/File Photo Purchase Licensing Rights , opens new tab

SAN FRANCISCO, June 3 (Reuters) - Mike Lynch's lawyers on Monday portrayed the British tech pioneer as a savvy entrepreneur while prosecutors in a San Francisco court labeled him a greedy fraudster, and jurors will soon weigh allegations that Lynch defrauded Hewlett-Packard in its \$11 billion acquisition of his software company.

The 2011 deal was one of the biggest British tech deals at the time, but quickly went sour. HP wrote down Autonomy's value by \$8.8 billion within a year of the acquisition.

Assistant U.S. Attorney Robert Leach told jurors in closing arguments that they should have no reasonable doubt there was fraud at Autonomy, and that Lynch directed it.

The federal prosecutor urged jurors to follow the money, saying Lynch had made 500 million pounds (\$640 million) from the HP deal.

"Dr. Lynch had 500 million reasons to defraud HP. It tells you volumes about who was in charge and who benefited from this," Leach said.

Lynch and former Autonomy finance executive Stephen Chamberlain face charges of fraud and conspiracy for allegedly scheming to inflate the company's revenue starting in 2009, partly to entice a buyer.

The Cambridge University-educated entrepreneur took the stand in his own defense at the trial, denying wrongdoing and telling jurors HP botched the two companies' integration. Lynch's attorney Brian Heberlig told jurors on Monday that the testimony was devastating to the prosecution's case.

"It was more than reasonable doubt. It was truth," he said, as jurors saw a large photo of Lynch overlaid with the descriptions of the tech founder including "smart" and "focused on the future."

Lynch's defense team scored a win last week when U.S. District Judge Charles Breyer threw out one count of securities fraud as not supported by the evidence. Lynch still faces one count of conspiracy and 14 counts of wire fraud.

Prosecutors say the pair padded Autonomy's finances in several ways, including back-dated agreements and "round-trip" deals that fronted cash to customers through fake contracts.

At the trial, which began in mid-March, jurors have heard from more than 30 government witnesses including Leo Apotheker, the former HP CEO who was fired weeks after the Autonomy deal was announced.

Lynch's legal team has argued that HP was so eager to acquire Autonomy ahead of potential competitors that it rushed through due diligence before the sale.

On the stand, Lynch said he had been focused on tech issues, and entrusted money matters and the accounting decisions at issue to Sushovan Hussain, Autonomy's then-chief financial officer.

Hussain was separately convicted in 2018 at a trial in the same court on charges of conspiracy, wire fraud and securities fraud related to the deal with HP. He was released from U.S. prison in January after serving a five-year sentence.

Lynch was one of the UK's leading tech entrepreneurs, drawing comparisons to Apple (AAPL.O) [↗](#), opens new tab cofounder Steve Jobs and Microsoft (MSFT.O) [↗](#), opens new tab cofounder Bill Gates.

The Autonomy acquisition was meant to fuel HP's software business. Instead, it spawned a series of bitter and expensive legal battles.

HP largely won a civil lawsuit against Lynch and Hussain in London in 2022, though damages have not yet been decided. The company is seeking \$4 billion.

Closing arguments in the case are expected to conclude on Tuesday before the jury begins deliberations.

Reporting by Jody Godoy in New York and Abhirup Roy in San Francisco; Editing by Rod Nickel, Leslie Adler and David Gregorio

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Matt Levine's Money Stuff: GameStop Comes Roaring Back

By Matt Levine 2024-06-03T14:11:36107-04:00

This again, again

I have, over the past few years, had surprisingly many occasions to ponder the following question: If you had a magic lamp that allowed you to move up the price of a liquid publicly traded stock arbitrarily, by a large amount, a handful of times, what would you do with it? There's some stock that trades at \$20, and you could rub the lamp and it would go to \$30 for like a day or two: What do you do?

I think there is a theoretically correct answer, though it is neither investing nor legal nor magical advice. It goes like this:

- 1. Spend all of your money on somewhat out-of-the-money short-dated call options on the stock.
- 2. Rub the lamp.
- 3. Sell the options.

This maximizes your leverage in the trade: Instead of paying \$20 to buy the stock, you pay (say) \$1 to buy out-of-the-money options struck at say \$25. You rub the lamp, the stock jumps to \$30, the options jump to (say) \$6, and you sell them all. You've made a 500% return using options instead of a 50% return by buying stock.

There is a legal nuance here, though I stress that nothing here is legal advice. The legal nuance is that, in the real world, there are no magic lamps. In the real world, the way to actually move publicly traded stocks is mostly by making public statements to people who care about what you have to say (and who buy stock). What you do *not* want to do, in this scenario, is make public statements to the effect of "this company has discovered a cure for cancer and I'm bullish for the long term." Because Step 3 is selling your options, and if you say stuff like that then you are *lying* and could get in trouble. What you want to do is make a somewhat inscrutable public statement. Ideally the public statement can be read to mean "I have bought a ton of options on this stock, I am not giving you any advice

about anything, and I'm gonna go sell them at a profit right now," but can also be read in other, more bullish ways. Ideally other people read your statement and go out and buy the stock, so you can sell.

The modern US equity market has two main guys with lamps, Elon Musk and Keith Gill. Here's Gill:

GameStop Corp. shares surged after the Reddit account that drove the meme-stock mania of 2021 posted what appeared to be a \$116 million position in the video-game retailer.

The June 2 screenshot posted by Keith Gill, who goes by a profane handle involving the phrase Deep Value on Reddit, shows a stake of 5 million shares with an average cost basis of \$21.27 apiece. A position that large would make Gill one of the company's five biggest investors and is more than six times the number of shares his account showed in an April 2021 post, the last time it was active on Reddit, when accounting for a four-for-one stock split.

The screenshot, which also included 120,000 call options worth \$65.7 million due to expire on June 21, couldn't be verified. The options would allow him to buy the stock at \$20 a share, but would cost him some \$240 million to exercise.

Here's the [Reddit post](#), disclosing 5 million shares bought at an average cost of \$21.274 per share (\$106.4 million total) and 120,000 options contracts (on 12 million shares), all June 21 calls struck at \$20, at an average cost of \$5.6754 per share (\$68.1 million total). As Bloomberg News reports, the numbers are not verified, but they seem to match actual market activity:

Individual trades over the past two weeks show there are several block trades for 5,000 contracts each, according to data compiled by Bloomberg. Applying a so-called volume weighted average price, the price of \$5.67 per contract — a total cost of around \$68 million — gets very close to what Gill posted on Reddit.

Those trades were not exactly what my strategy suggests — the short-dated options were somewhat *in-the-money* when he bought them, and he bought shares too — but close enough. He paid about \$174.5 million for the position. This morning, GameStop's stock got as high as \$40.50, and those calls got as high as \$21.10. At those prices, Gill had a paper gain of about \$281 million. Also:

On X, Gill also [posted](#) an image of a reverse card from the game UNO that indicates a player is changing the card-pickup direction. The post had attracted 6.5 million views in the 12 hours since its

publication at about 8 p.m. Sunday New York time.

I don't know what the Uno card means! If I bought a giant pile of GameStop options and then magically made the price double, I would promptly sell those options. If the *method* I used to magically double the price was by publicly posting my giant position on Reddit, I *might*, in an extremely not-legal-advice sort of way, want to also publicly post a disclaimer to the effect of "I make no representations about how long I will hold this position, and for all you know I'm selling right now." Would posting a green Uno reverse card accomplish that goal? I would want to ask a very specialized sort of lawyer that question.

To be clear, this is just what *I* would do. I have no idea what *Gill* is doing. Probably he likes the stock and is in it for the long term. As of 1 p.m. today, only about 6,000 June 21 \$20 call options contracts had changed hands, so it doesn't seem like there's a lot of options selling. Really I don't know what to think beyond, like, "isn't this weird" and "maybe nobody should have a magic lamp that can arbitrarily move stock prices." A few questions, though:

- 1. Where did he get the \$174.5 million? That's a lot of money! As far as I can tell his wealth [peaked in the eight figures](#) in the 2021 GameStop mania, so ... did he find more? Is someone *financing* this trade?
- 2. Why is he not making the case for GameStop on YouTube? Gill seems to be back on [Twitter/X](#) (as Roaring Kitty) and on [Reddit](#) (as "a profane handle involving the phrase Deep Value"), but his [YouTube channel](#) (also Roaring Kitty), where he did most of his advocacy for GameStop in long detailed videos in 2021, is still dormant.
- 3. You see where I'm going with Questions 1 and 2, right? If you had a lot of money and a taste for danger, how much would Keith Gill's X account be worth to you? How much would his Reddit account be worth to you? How much would his *YouTube* account be worth to you? (Do you look and sound like him?) If you had the X and Reddit accounts, would those constitute a magic lamp in your hands? How would you most efficiently monetize it? If you were *Gill*, how would *you* most efficiently monetize your accounts? Is the answer "sell them to a whale"?
- 4. Those \$20 calls are now very in-the-money. Is Gill going to exercise them, by coming up with another \$240 million? You can hold GameStop stock forever, but you can only hold GameStop June 21 calls until June 21. After that, you need the \$240 million, unless you sell the options first. This is not a diamond-hands position; this is, by its nature, a sell-while-the-selling-is-good position.
- 5. Of course if Gill *did* exercise the options — finding another \$240 million wherever he found the previous \$174.5 million — he would own 17 million shares of GameStop, or roughly 5% of the outstanding stock. It would be funny if he went activist and demanded a board seat on a platform of

“more chaos.”

- 6. If you were an options market maker, and *last week a retail account* came to you to buy multiple 5,000-contract chunks of one-month at-the-money GameStop options, how would you have thought about pricing? How wide would your bid-ask spread be? How would you hedge? Would you have carried any [gamma risk](#) into the weekend? Who would you guess the buyer was?

Getty Images

I am not sure I have ever specifically discussed this with the US Securities and Exchange Commission, but I sort of think, when I write about securities fraud cases, that I am writing for them, and I also sort of think, when *they* are writing about securities fraud cases — like, the complaints and press releases — that they are writing for me. We have a nice little symbiosis. They try to bring funny securities fraud cases, and I try to make them funnier.

Never have I felt both of these things more than last Friday, when [the SEC](#) and [federal prosecutors](#) brought market manipulation charges against Robert Scott Murray, who did a fake takeover offer for Getty Images Holdings Inc. in April 2023. Here's me, in [the SEC complaint](#):

A reporter from Bloomberg also spoke with Murray on April 25. Murray did not inform Bloomberg that he had already sold his shares or otherwise abandoned the buyout proposal. Instead, Murray “told [Bloomberg] that he has good private equity and Wall Street contacts, but he can’t get committed financing for this deal without first doing due diligence on Getty.” The author noted, tongue in cheek, “It is a pickle!” “Is this ... is this what you would call a *fake* takeover offer? I don’t know!”

It’s nice that the SEC quoted me in a market manipulation case, but it’s even better that they had to explain when I was being sarcastic. The gist of the situation is that Murray:

- bought about \$2.6 million of Getty Images stock and options,
- “posted on LinkedIn that he was hearing rumors that Getty would soon be sold,”
- failed to move the stock with those posts,
- sent some activist emails and LinkedIn messages to Getty asking it to sell itself and saying Murray wanted a board seat,
- failed to move the stock with those messages,
- put out [a press release](#) with an open letter to Getty from his investment vehicle, Trillium Capital LLC, asking it to sell itself and demanding a board seat, with “a financial valuation that gave the

superficial impression of a detailed investment-banking analysis in support of a \$12.58 stock price valuation for Getty,”

- moved the stock a little bit with that press release,
- started to sell some stock and options,
- put out some more press releases urging Getty to sell itself,
- failed to move the stock much with those,
- “faced a total unrealized loss of more than \$790,000 on his Getty investments,”
- put out [another press release](#), at 8:30 a.m. on April 24, 2023, announcing “a non-binding proposal to acquire Getty Images” at \$10 per share (roughly \$4 billion total), a nearly 100% premium to its previous closing price of \$5.06 per share,
- succeeded in moving the stock with that announcement,
- sold all of his stock within “less than an hour after the market opened,” and
- then talked to me and other journalists about how the takeover offer wasn’t fake at all, what are you even talking about, he just needed access to due diligence before he could get committed financing.

The order of those last two items is wrong: If you are going to do a fake takeover, you have to hold your stock as long as you are actively pretending to do the takeover; once you’ve sold the stock, you have to stop telling everyone about the takeover. (This is the furthest possible thing from legal advice.) As long as you hold the stock, you have some *possible* argument that you are, correctly or delusionally, planning to buy the company. Once you’ve dumped the stock, it’s a pump-and-dump.

Here’s my 2023 column, and I am pleased to say that I implied, without quite saying it, *both* that it was a fake takeover offer *and* that he had already sold his stock. It was a fake takeover and he had already sold his stock. Murray settled with the SEC and agreed to plead guilty to the criminal charges.

That said, though, my 2023 column was not *entirely* unsympathetic to Murray. I sort of figured there were three possibilities:

- 1. He was *lying*: He was trying to make news to pump up the stock so he could sell. The takeover offer was fake.
- 2. He was *serious*: He really wanted to buy the company, and he hoped that, by making his case publicly, he could make it happen. He could get the board to engage with him, and once he had a deal in the works, he could get some financing sources — lenders and co-investors — to give him the money to do the deal. And he had the dealmaking skills and Wall Street contacts that would allow him to do this. The takeover offer was real.

- 3. He was *delusional*: Same as Option 2 except that he didn't have the skills or contacts or any realistic hope of finding \$4 billion. The takeover offer was fake, but he did not know that. And then the stock went up, Getty kept ignoring him, and he changed his mind and sold.

Option 1 is securities fraud, and Option 2 is not. Option 3 is ... debatable, I think? If he was genuinely trying to buy the company, but had no *actual* hope of doing so, that's probably not fraud.

Anyway it's not Option 2. "Murray previously has been Chief Financial Officer (CFO), Chief Executive Officer (CEO), and director of publicly traded companies," notes the SEC, but otherwise this was a pretty slapdash effort:

- The bid was made on behalf of Trillium, but Murray "appears to be the only individual affiliated with or employed by the company," and Trillium's brokerage account "held no securities, and its cash balance never exceeded \$17.32." (He did all the trading in personal accounts.)
- Getty is largely controlled by a few big insider shareholders, so Murray's activism was unlikely to work even if he was serious.
- "Murray did not engage an investment bank or other competent financial advisor to prepare or consult on his analysis" supposedly valuing Getty at \$12.58 per share, and he "never contacted an investment banker or advisor to secure or even discuss financing before releasing the fake proposal to acquire Getty."
- The headline of the merger press release was, as the SEC quotes it, "TRILLIUM CAPITAL ISSUES [sic] PROPOSAL TO ACQUIRE GETTY IMAGES FOR \$10 PER SHARE." The extra "S" in "ISSUES" is for SECURITIES FRAUD.

All of those points *suggest* fraud, but they *could* just be incompetence and overconfidence. Other bits are worse, though. Selling the stock immediately after announcing the proposal: bad fact. Talking to reporters all day (not just me!), *after* selling all the stock, and insisting that the bid was still real: bad fact. Also he was texting a friend throughout all of this, urging her to buy Getty stock. That in itself is not *necessarily* bad — he could have just been tipping her off to his real plans so that she could profit from his bid — but this seems bad:

On December 6, 2023, agents from the Federal Bureau of Investigation ("FBI") approached the Friend to ask about her Getty trading. She agreed to call Murray on a recorded line under the pretext of having received a SEC subpoena for her Getty trading records and all communications with Murray concerning Getty.

During the call, Murray told his Friend to let him draft a response. And even though Murray and his Friend had communicated about Getty stock Murray told her to lie about their communications and “just say there were none.”

The SEC quotes some of that recorded conversation:

Friend: When I respond to them, should I tell the truth?

Murray: Let me write the response. Okay? Let me write the response. ...

Murray: Because all I ever sent you were texts.

Friend: Yeah.

Murray: And I always delete my texts at the end of the day. You should delete all my texts from you. Because then they can't come back.

Friend: Yeah, okay.

Murray: Delete all my texts.

Friend: Okay.

Murray: I delete them at the end of the day. ... I delete yours at the end of every day ... I do. And, and, they, you can't get them back. Like once a text is, it's like virginity, once you get, once you delete your virginity you ain't getting it back, that's how it works.

Even by the low, low standards of a transcript of a phone call recorded by the FBI, that's a terrible metaphor.

Skydance

We have talked before about the basic trouble facing anyone who might want to acquire Paramount Global:

- Paramount has about 655 million shares outstanding.
- Of those, 31.5 million shares — less than 5% — are owned by Shari Redstone's company, National Amusements.
- But Paramount has a dual-class share structure and most of its shares have no voting rights; Redstone's 31.5 million shares control 77% of the vote.
- So, to get any deal done, you need Redstone's support, and her 31.5 million shares.
- But Paramount has a board of directors that is responsible to all shareholders, and the board has a special committee tasked with making sure that any possible deal is fair to the nonvoting shareholders.
- So if you are willing to pay \$X for Paramount, how do you allocate the value? Redstone has 5% of the shares, but she has the only voting rights you need. To get Redstone's support, you need to give her most of the value; to get the board's support, you need to give public shareholders something like 95% of the value.

There's no great answer, and Paramount seems to be somewhat stuck between an offer from David Ellison's Skydance Media (which would cash out Redstone at a premium while leaving the public shareholders in place) and one from Apollo Global Management (which would cash out the public shareholders at a premium but would give Redstone less). Presumably there is room for compromise: *Mostly* cash out Redstone, say, but give the shareholders *something*. The Wall Street Journal [reported today](#):

Skydance Media's revised offer to buy Shari Redstone's family company National Amusements and merge with Paramount Global gives the entertainment conglomerate's nonvoting shareholders an option to cash out at a premium, according to people familiar with the matter.

Last week, David Ellison's Skydance made a sweetened offer to buy up to a certain number of nonvoting Paramount shares at roughly \$15 each, while also giving shareholders the option to roll into the new deal, the people said. The price per share, which could change, represents a 26% premium from where the stock closed Friday.

Under the proposed deal, Skydance and its backers would contribute funds to buy out National Amusements, inject at least \$1.5 billion in cash into Paramount's balance sheet and allow nonvoting

shareholders to cash out some of their holdings.

Redstone would be bought out at a premium, and most of the regular shareholders would just continue to hold stock in the combined company, but *some* of them would get cash at a premium, which might make it more palatable to the board. Apparently [it worked](#):

Paramount and Skydance have agreed to terms of a merger, CNBC's David Faber reported Monday. A deal could be announced in the coming days, he said.

A Paramount special committee and the buying consortium — David Ellison's Skydance, backed by private equity firms RedBird Capital and KKR — agreed to the terms. The deal is awaiting signoff from Paramount's controlling shareholder, Shari Redstone, who owns National Amusements, which owns 77% of class A Paramount shares, Faber said Monday. ...

"We received the financial terms of the proposed Paramount/Skydance transaction over the weekend and we are reviewing them," said a National Amusements spokesperson.

I suppose this could still end up not being good enough for Redstone, but realistically she'll have to give the public shareholders something if she wants a deal.

Synthetic PIK

Imagine that you are a bank, and a company asks you for a \$10 million loan. "What do you need the money for," you ask. "Well," they reply, "we borrowed \$400 million from another bank last year, and we've got our \$10 million quarterly interest payment for that loan coming up. It turns out we don't have \$10 million. So what we'd like to do is borrow \$10 million from you, so we can pay interest to them."

Would you say yes? Oh, I kid, I kid, the answer to that question is pretty much always "well there's a price." At some price, you'd say yes.

I suppose the trade is better if you do it all at once:

Direct lenders including Blue Owl Capital Inc. have pitched deals in recent weeks that include a

“synthetic PIK,” a feature that lets companies make some of the interest payments with additional borrowing without having to count the debt as being serviced “in kind,” according to people with knowledge of the matter.

“Payment in kind” lets borrowers make some or all of their loan interest payments by increasing the principal amount rather than using cash. That flexibility is in high demand as the Federal Reserve’s policy-tightening cycle has made it more difficult for heavily indebted companies to service their debt. Private credit funds are well-positioned to provide PIKs, and they’ve often used them to beat out banks when competing to provide financing to companies.

But there are limits. Big banks that help fund the lending activities of private credit firms typically cap the amount of such PIK deals they will finance. Synthetic PIKs are a workaround to those constraints.

...

In a synthetic PIK, lenders provide a company two separate pieces of debt: the main loan the company planned to borrow in the first place, plus a smaller delayed-draw term loan that sits at the same level in the capital structure and has similar terms. Delayed-draw means a borrower has access to the full amount of that loan when the deal closes, but can choose to actually borrow the money at a later date.

When interest on the first loan needs to be paid, the company taps the delayed-draw term loan. This allows the company to pay the interest in cash, but it’s technically doing so through adding more debt to its balance sheet.

I love it. Notice the *reason* for the synthetic PIK, as opposed to a regular PIK. The private credit fund doesn’t care: Paying interest in the form of more debt, or paying interest in cash while simultaneously borrowing more, are exactly identical transactions as far as its credit risk is concerned. What matters is that the private credit fund has some contract with somebody else that says “we promise not to do too many PIK deals,” and a synthetic PIK deal is not *technically* a PIK deal. It’s a cash interest payment plus a separate loan.

The somebody else, specifically, is the banks: “Big banks that help fund the lending activities of private credit firms typically cap the amount of such PIK deals they will finance.” As a general matter, I like to make the point that private credit is structurally *safer* for the financial system than traditional banking is. Private credit funds have locked-up, long-term capital that is not really subject to run risk, so if private credit loans go bad, they are less likely to cause a crisis than if regular bank loans go

bad.

The main counterargument to that is that private credit firms are not lending *solely* their own money, from their own long-term locked-up investors. They also sometimes get some leverage from banks: You might raise a \$2 billion fund, borrow \$1 billion from a bank, and invest the full \$3 billion in private loans. (And presumably get paid a lot more on the private loans than you pay to the bank.) A 2023 Federal Reserve [Financial Stability Report](#) noted that, while “most private credit funds are unlevered,” some do borrow money from banks.

The Fed is not particularly worried about this as a stability risk, but you could tell a scary story. Private credit will keep getting hotter, private credit funds will keep reaching for returns by leveraging up, and banks, pushed out of other lucrative leveraged finance business lines by private-credit competition, will at least want to make some money by financing private credit funds. So leverage will go up and banks will have more exposure to private credit. And the banks will want to keep their investments safe by making sure that the private credit funds are only making reasonably good loans. “No PIK deals of course,” the banks will say. And the private credit funds will say “oh no, no, no PIK deals, of course not.” But what is a PIK deal anyway?

Elsewhere in private credit interest payments

Well, here's an example of my hypothetical question in the previous section:

Vista Equity Partners ... bought Pluralsight Inc., a technology workforce development company, in 2021 for about \$3.5 billion. The leveraged buyout was supported by over \$1 billion of debt financing by direct lenders.

In the years since, borrowing costs have soared, pushing the rate on the company's debt well into the double digits. Vista recently wrote off the entire equity value of the investment, the people familiar with the situation said.

In an effort to make a \$50 million interest payment coming due, the company moved intellectual property into a new subsidiary and used those assets to obtain additional financing from Vista, the people said. The new loan weakens existing lenders' claims against the IP, they added.

Pluralsight owed its private credit lenders \$1 billion, and it came to a new lender asking to borrow \$50 million. What for? To pay interest to the old lenders. Was this a good trade for the new lender? Well, I guess so, given that:

- 1. The new lender is Vista, which also owns Pluralsight's equity.
- 2. The new lender gets seniority — in the form of a secured claim on that intellectual property — over the old ones.

Before this deal, Vista owned equity in Pluralsight, but it valued that equity at zero, and Pluralsight was in danger of running out of money, defaulting on an interest payment and presumably crystallizing that zero equity value. After this deal, Vista has a \$50 million claim that is apparently better secured than the other lenders, and its equity is also presumably worth more, since it was able to keep Pluralsight alive for a bit longer for a chance to turn itself around.

Things happen

NYSE Fixes Issue That Showed 99% Drops, Triggered Trading Halts. [Elon Musk and Jamie Dimon Are Making Peace](#). Bill Ackman's Pershing Square Sells 10% Stake for \$1.05 Billion. Ex-Millennium Trader Megia Debuts Hedge Fund With \$5 Billion. Do [Exchange-Traded Products](#) Improve Bitcoin Trading? MicroStrategy and Its Co-Founder Saylor Will Pay \$40 Million to Settle DC Tax Fraud Lawsuit. (Earlier.) Dr Pepper [Ties Pepsi](#) as America's No. 2 Soda. Chobani Billionaire Acquires Shuttered Anchor Steam Brewery. They Spent Their [Life Savings on Life Coaching](#). Anguilla gets 20% of its government revenue from [.ai domain registrations](#). “‘In finance, there are gorillas, there are apes, and there are chimps,’ he was told. ‘Chimps want to be apes, and apes want to be gorillas.’”

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- 1. Or exercise and sell. Or, of course, unless the stock falls below \$20 and the options expire worthless, but that's obviously not the goal here!
- 2. Consider Elon Musk's bid to buy Twitter Inc.: When he first announced a public bid, he did not have financing to pay for it, and Twitter did not want to sell to him. But (1) it worked out for him in the end and (2) given his wealth, connections, etc., it was *entirely reasonable* for him to think that it would.
- 3. Again, though: Musk and Twitter!
- 4. Which I think would be legal? Not legal advice!

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FTX Creditor Sued by Silver Point for Reneging on Sale of Claim

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0576](#)

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FTX Creditor Sued by Silver Point for Reneging on Sale of Claim

By Mike Leonard 2024-05-31T13:20:25000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0576](#)

A Silver Point Capital LP affiliate is suing an FTX crypto creditor for allegedly backing out of the heavily discounted sale of a \$10.5 million bankruptcy claim after getting a higher offer.

FPG Inc. reneged on the \$1.3 million transaction, which valued the claim at 13 cents on the dollar, in response to an approach by Svalbard Holdings Ltd., a Cayman Islands holding company managed by London-based Attestor Ltd. that has “extensive experience in the secondary market for FTX claims,” according to the lawsuit filed Thursday in Delaware’s Chancery Court.

The suit by Silver Point, a leading distressed-debt investor that has been buying up FTX bankruptcy claims, comes about three weeks after the disgraced cryptocurrency exchange disclosed it had recovered enough assets to repay creditors in full, a virtually unheard-of result for a US corporate bankruptcy. The news May 8 sent the value of FTX claims above their face value.

After FPG broke the deal, “the claim skyrocketed in value—which Silver Point always anticipated would happen and which is precisely why Silver Point sought to purchase the claim in the first place—resulting in an undeserved windfall to Svalbard,” the lawsuit says. “Silver Point, not Svalbard, is entitled to the claim’s appreciation in value.”

Attorneys for Svalbard didn’t immediately respond to a request for comment Friday. FPG couldn’t be reached.

According to the complaint, Silver Point plans to keep its FTX creditor claims through the conclusion of bankruptcy proceedings, which means the cost of the contractual breach can't be measured by their value on the secondary market. "The only way to put Silver Point in the position it would have been in if FPG-CI had not breached is specific performance," the suit says.

The complaint seeks an order enforcing the original deal. It also targets Svalbard, saying the offshore investment firm knew about the transaction between Silver Point and FPG when it opted to interfere with the deal.

Svalbard brought a similar case of its own in January, filing suit in New York state court against Panama-based Lemma Technologies Inc., which allegedly tried to walk away from selling its FTX claim to Svalbard. That dispute is ongoing, court records show.

Silver Point is represented by Prickett, Jones & Elliott PA and Pryor Cashman LLP. FPG and Svalbard haven't yet made court appearances. Svalbard is represented in New York by Morgan, Lewis & Bockius LLP.

The case is SPCP Grp. LLC v. Floating Point Group Int'l LLC , Del. Ch., No. 2024-0576, complaint filed 5/30/24 .

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Boeing executives unlikely to be charged over 737 MAX crashes, source says

 [reuters.com/business/aerospace-defense/boeing-executives-unlikely-be-charged-over-737-max-crashes-source-says-2024-06-01](https://www.reuters.com/business/aerospace-defense/boeing-executives-unlikely-be-charged-over-737-max-crashes-source-says-2024-06-01)

Mike Spector

Item 1 of 2 A Boeing 737 MAX 7 aircraft piloted by Federal Aviation Administration (FAA) Chief Steve Dickson lands during an evaluation flight at Boeing Field in Seattle, Washington, U.S. September 30, 2020. REUTERS/Lindsey Wasson/File Photo

[1/2]A Boeing 737 MAX 7 aircraft piloted by Federal Aviation Administration (FAA) Chief Steve Dickson lands during an evaluation flight at Boeing Field in Seattle, Washington, U.S. September 30, 2020. REUTERS/Lindsey Wasson/File Photo [Purchase Licensing Rights](#) , opens new tab

New York, June 1 (Reuters) - Boeing executives are unlikely to be criminally charged over fatal crashes in 2018 and 2019 that killed 346 people as the statute of limitations has likely passed, U.S. Justice Department officials told victims' family members in a meeting.

Details were corroborated by a person familiar with the gathering on Friday and correspondence reviewed by Reuters.

The deadline for prosecuting most federal crimes is five years.

The Justice Department found in mid-May that Boeing violated a 2021 deferred prosecution agreement (DPA) that had shielded the company from a criminal charge arising from the fatal crashes.

Officials agreed to ask a judge to dismiss the charge of conspiring to defraud the U.S. Federal Aviation Administration (FAA) as long as Boeing abided by the terms of the agreement over a three-year period ending Jan. 7, 2024.

But an in-flight blowout two days before the agreement expired exposed ongoing safety and quality issues. A panel blew off a new Boeing 737 MAX 9 jet during a Jan. 5 Alaska Airlines flight.

Boeing has until June 13 to outline any disagreements with the department's finding that it violated the 2021 agreement. The Justice Department has until July 7 to inform a federal judge in Texas of its plans.

Boeing has said it believes it has "honored the terms of the agreement" and looks forward to responding to the Justice Department.

The Justice Department did not immediately respond to a request for comment.

The department is weighing several options, including whether to prosecute Boeing or extend the DPA by a year. Officials could also enter into a new DPA or reach a non-prosecution agreement that does not involve court supervision.

Officials could also seek to negotiate a plea deal with Boeing over the 2021 fraud charge or take the company to trial over it.

Boeing could also face charges over its behavior during the three-year term of the DPA, though officials have not found evidence of any felonies committed during that period, prosecutors told the victims' families, according to the source familiar with the meeting.

Victims' family members are discussing asking officials to seek an enhanced sentence should Boeing be prosecuted and convicted, the source told Reuters.

In the meeting, Justice Department officials said they believe they are unable to prove cases of federal manslaughter or fraud involving aircraft parts beyond a reasonable doubt, the person added.

(This story has been refiled to correct the grammar in paragraph 7, and to add dropped word 'the' in paragraph 12)

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Reporting by Mike Spector in New York; Additional reporting by Chris Prentice and Allison Lampert; Editing by Richard Chang and Daniel Wallis

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Mike Spector
Thomson Reuters

Mike Spector is a correspondent at Reuters covering corporate crises that span bankruptcy, mass tort litigation and government investigations. He was the first to expose Johnson and Johnson's plan to offload into bankruptcy lawsuits alleging its iconic Baby Powder caused cancer. He later revealed in an investigative series how J&J and other businesses and nonprofits use the bankruptcy system to escape liability for lawsuits over deadly products and sexual abuse while avoiding filing for Chapter 11 themselves. Mike has also contributed to an award-winning Reuters series on pervasive secrecy in American courts that covers up evidence of deadly products. Mike previously worked at The Wall Street Journal, where he covered bankruptcy and private equity on the paper's mergers and acquisitions team, and also the automotive industry. He has been part of award-winning teams that covered the government-brokered rescue and bankruptcy of General Motors; insider trading and related

bankruptcy debt-trading issues; and emerging concerns with Tesla's self-driving car technology. He has a master's degree from Columbia University's journalism school and an undergraduate degree from Johns Hopkins University.

Toyota Motor Corp

Japan's top carmakers caught in widening testing scandal

Transport ministry uncovers faulty data at several companies including world's largest auto group
Toyota



Toyota chair Akio Toyoda: 'I extend my sincerest apology to our customers, car fans and all stakeholders' © Franck Robichon/EPA-EFE/Shutterstock

David Keohane, Kana Inagaki and Leo Lewis in Tokyo 9 HOURS AGO



A government investigation has uncovered faulty testing data at five of Japan's leading carmakers including Toyota and Honda in a widening scandal that has forced the suspension of some vehicle shipments.

Akio Toyoda, chair of the world's largest carmaker, was forced on Monday to apologise for [the second time this year](#) following the transport ministry's investigation of 85 companies in the industry.

The results of the probe, which were released on Monday, found fault with Toyota, Honda, Mazda, Suzuki and Yamaha Motor. The investigation was triggered by a string of improper testing incidents that hit Toyota subsidiaries, including Daihatsu Motor.

“As someone responsible for the Toyota group, I extend my sincerest apology to our customers, car fans and all stakeholders,” said Toyoda, who has put himself front and centre of the deepening scandal.

At a separate news conference on Monday, Toshihiro Mibe, the chief executive of Honda, said there was no intention to falsify the testing data to misrepresent the performance of its cars. “It was a lack of awareness in the area of compliance,” he added.

Japan’s transport ministry said the problems were found in applications to certify models. In the case of Toyota, they related to issues such as pedestrian safety tests and luggage displacement tests, while engine control software was an issue for Mazda.

“It is extremely disappointing that we have discovered new improper behaviour,” the transport ministry said, adding that the improper data would “shake the very foundation” of the certification system.

Authorities are expected to raid various carmakers as soon as Tuesday, according to people familiar with the matter.

The companies involved said that the faulty data did not affect the safety of their cars and that they involved a small number of certification issues out of thousands.

A total of six models, three of which are Toyota’s, have had shipments and sales suspended in Japan. Toyota’s share price closed down 1.8 per cent and Mazda fell 3.3 per cent.

The widening scandal is expected to increase pressure to overhaul Toyota’s governance structure. Despite the company making record profits, Toyoda faces a significant haemorrhaging of shareholder support at the carmaker’s annual meeting later this month.

Last week, the world’s two most influential proxy advisers — ISS and Glass Lewis — recommended a vote against the reappointment of Toyoda to hold him accountable for the issues that had already come to light with vehicle testing and emissions data at the group’s subsidiaries.

In its report, ISS said that although Toyota had claimed that it was reforming its corporate culture, there was a suspicion that everything was “business as usual”.

“The company’s propensity to preserve its corporate culture is in fact suspected, and Toyoda should be held accountable for that,” ISS noted.

Toyota said in response that it was “aware that US proxy advisory firms, Glass Lewis and ISS, recommended against our proposal for the election of directors. We plan to respond to their opinion in due course.”

Several fund managers have told the Financial Times that they plan to vote against the reappointment of Toyoda, and had intended to do so before the proxy advice was issued.

Toyoda has already seen backing from shareholders erode. Toyoda’s received support from 85.7 per cent of investors last year, down from 96 per cent in 2022.

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Opinion **Lex**

Toyota's safety scandal will dent its hybrid renaissance

Japanese government probe puts at risk opportunity to capture market share worldwide



Japan's transport ministry said Toyota submitted faulty data during pedestrian-safety tests for three current models, and used modified test vehicles for collision-safety tests for some past models © Bloomberg

9 HOURS AGO



What is worse for a carmaker's reputation: rigging emissions tests or collision safety tests?

A Japanese government investigation has found that [Toyota Motors](#) falsified data and skirted impact-safety tests for seven past and current vehicles, adding to the scandal engulfing the automaker. A decade after rival [Volkswagen's emissions scandal](#), where it admitted fitting cars with devices to help beat official tests, its reputation has yet to fully recover.

Safety, you would think, is of more immediate interest to the drivers of cars on the road than emissions data. And for Toyota, this widening controversy puts at risk a key opportunity to capture market share around the world.

Japan's transport ministry said on Monday that Toyota submitted faulty data during pedestrian-safety tests for three current models, and used modified test vehicles for collision-safety tests for some past models. Toyota admitted it had provided inadequate data in occupant and pedestrian protection tests for some models including one sold under the Lexus luxury brand. It has temporarily halted shipments and sales of three cars made in Japan.

This is a reputational nightmare. The latest findings come soon after other similar scandals. In January, Toyota Industries Corp suspended all engine shipments after an investigation revealed it had falsified power-output figures. Last year, its wholly owned subsidiary Daihatsu was found to have distorted collision safety test results, dating back as far as 1989. In 2022 another subsidiary, Hino Motors, said it had systematically falsified emissions data, dating back as far as 2003.

This latest scandal has hit after Toyota posted a record profit for the year to March driven by an unexpected [surge in its hybrid car sales](#). It reaped the rewards of its reputation as a hybrid pioneer: nearly 40 per cent of its sales in April were petrol-electric hybrids. Awkwardly, the company uses its safety features — including its pre-collision detection and driver-assist systems which it markets as features designed to protect drivers and passengers — as key selling points for its cars.

Toyota shares are down 14 per cent from a March peak. Yet even after the decline, its shares trade at more than 10 times forward earnings, at nearly triple the valuation of German rival VW.

Its troubles don't appear to be over yet. Officials will be carrying out an onsite investigation of Toyota's headquarters this week. There is a limit to how often a company can pledge to tighten oversight before it loses credibility with investors and customers alike.

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Legal Threats to Wall Street's Self-Regulators May Upend Markets

By Martina Barash

- Under-the-radar regulatory organizations provide key functions
- Issues, pending in different circuits, could go to top court

Bloomberg Law News 2024-06-03T10:21:04960316657-04:00

Legal Threats to Wall Street's Self-Regulators May Upend Markets

By Martina Barash 2024-06-03T05:00:01000-04:00

- Under-the-radar regulatory organizations provide key functions
- Issues, pending in different circuits, could go to top court

Looming circuit court rulings on the constitutionality of FINRA and other Wall Street self-regulatory groups have attorneys and law professors concerned about a potential shock to the American securities trading system if the bodies that police the market are rendered powerless.

The clashes over those self-regulatory organizations, some little known outside the financial industry, are playing out in the shadow of US Supreme Court cases over the power of government agencies. A ruling is expected soon in one of the agency cases, *SEC v. Jarkesy*, on the Securities and Exchange Commission's use of in-house judges, known as administrative law judges.

"What's interesting from an industry perspective is what happens with these SROs," said Maxim Nowak of Herrick, Feinstein LLP in New York. "If *Jarkesy* curtails the SEC's ability to use ALJs, SROs may be in trouble too," he said. "The logic extends to them."

But if broker-dealer and clearing firm Alpine Securities Corp. succeeds in its constitutional arguments against the non-governmental enforcement power of the Financial Industry Regulatory Authority, the Depository Trust and Clearing Corp., and two DTCC subsidiaries, the practical effects could be significant.

"In my view, the worst-case scenario is a judicially created financial crisis," said Benjamin Edwards, a professor at the William S. Boyd School of Law at the University of Nevada, Las Vegas. Edwards submitted a friend of the court brief supporting FINRA in an Alpine case at the US Court of Appeals for the District of Columbia Circuit, which was argued in February.

Since then, the appeals court has asked for additional briefing. The action suggests it's taking seriously the Salt Lake City-based firm's challenge to FINRA's role as a regulator of brokers, he said.

The case could go to the Supreme Court, he said.

Firm Fights Its Tormentors

FINRA pursued Alpine, once a major clearinghouse for penny-stock trades, for alleged misconduct related to customer accounts. The DTCC, meanwhile, said the firm lacked sufficient capital for clearing under new rules. Both organizations reached in-house decisions against Alpine—with FINRA expelling it from membership and the National Securities Clearing Corp., a DTCC subsidiary that oversees transaction clearing, refusing services.

Alpine challenged the SROs' constitutionality in a pair of suits. Its first step was to ask the courts to stop the groups from putting Alpine out of business—imposing what it called the “corporate death penalty”—while the court cases proceeded. Its arguments fell flat in the US District Court for the District of Columbia against FINRA and—in the District of Utah—against the DTCC, the NSCC, and another related entity, the Depository Trust Co.

But an initial panel of D.C. Circuit judges sided with Alpine in granting a pause during the pendency of its appeal.

A slightly different three-judge panel at the D.C. Circuit heard arguments encompassing the constitutional merits of the challenge in February. At oral argument, the judges grappled with Alpine's fate and the potential implications of a ruling in its favor.

The issue ultimately seems headed for the Supreme Court, Edwards said. A case reviewing FINRA sanctions is currently at the Fourth Circuit, creating a path for a potential circuit split.

Consequences

“The brokerage industry has been fighting for self-regulation since the 1980s,” said Adam Gana, managing partner of Gana Weinstein LLP, which represents investors in disputes with investment advisers and broker-dealers. “To now say it's unconstitutional is laughable at best.”

If courts rule for Alpine, “the ramifications are beyond the scope of what I can imagine,” Gana said. “Every enforcement decision since 1988 is void? Barred brokers can rejoin?”

UNLV's Edwards also said he's concerned about “a potentially catastrophic outcome for American markets” if FINRA is declared unconstitutional. In his amicus brief, he argued that FINRA's absence would render most brokerage activity unregistered and therefore illegal; favor institutional over retail investors, and take away other necessary infrastructure.

Nowak pointed to potential procedural burdens on regulators and the courts. "Are enforcers really going to be required to bring standalone actions in federal court every time there is an enforcement action?" he asked. "Will the enforcers and the courts be provided with the needed increased resources that change might require?"

But Marc Indeglia, a partner at Glaser Weil Fink Howard Jordan & Shapiro LLP in Century City, Calif., and president of the Small Public Company Coalition, says the potential effect on capital markets wouldn't necessarily be negative. Securities enforcement "is like any other law enforcement," sometimes in need of a "hard look." A win for Alpine could provide "a level of due process that FINRA isn't accustomed to offering," or the president might need to appoint its hearing officers, he said.

The NSCC and DTC also have essential roles, attorneys say.

If Alpine's suit removes enforcement powers from the NSCC and the DTC, "then who is going to actually be policing this?" asked Cornell University law professor Charles K. Whitehead, who specializes in corporate law and securities and financial regulation. "Well, presumably it's going to be the SEC or some other regulatory body," he said. "That's a lot less efficient."

The litigation "goes to the guts of the DTC system," which is central to how securities transactions are settled, he said. If the organization can't police participants in its system, "it raises real questions about the ability of DTC to continue to operate" as it has been, he said.

Alpine's Attorney

But Maranda Fritz, a solo attorney for Alpine, says the DTC's underlying action against her client "is part of a continuing effort by regulators, especially FINRA, to shut down the microcap markets."

"These aggressive actions by regulators directed at the microcap markets cause real damage to the small and emerging companies that are a vital part of our economy because small companies need access to the markets to obtain financing and services," Fritz said in an email.

"As is too often the case, the largest companies and the wealthiest continue to thrive while those with fewer resources are deprived of the ability to access capital," the New York-based lawyer said.

Tea Leaves

The D.C. Circuit's request for additional briefing offers a clue about what the court is grappling with.

"The provision the Court asked about allows the SEC to exempt brokerages from the mandatory requirement that they join a national securities association in order to trade," Edwards said. If FINRA is "vaporized," brokerages would be left without a required membership, and many would likely rush to get an exemption from the SEC, he said.

That focus "suggests the court may be considering how the SEC might manage if FINRA were declared unconstitutional," Edwards said.

But the appeals court might simply be looking at the SEC's ability to grant exemptions while it reviews FINRA expulsion actions, Edwards said. "It's always hard to know what a court is thinking."

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Live Nation confirms Ticketmaster hack that may affect millions of users

 [10news.com/science-and-tech/data-privacy-and-cybersecurity/live-nation-confirms-ticketmaster-hack-that-may-affect-millions-of-users](https://www.10news.com/science-and-tech/data-privacy-and-cybersecurity/live-nation-confirms-ticketmaster-hack-that-may-affect-millions-of-users)

Taylor O'Bier

June 3, 2024

A federal filing confirmed Ticketmaster fell victim to a cyberattack that may have breached the data of millions of users, days after multiple reports said there was an investigation.

Ticketmaster's parent company, Live Nation, confirmed the hack in a recent filing with the U.S. Securities and Exchange Commission. It "identified unauthorized activity within a third-party cloud database environment containing company data" on May 20.

Live Nation said it subsequently launched an investigation to learn what happened. On May 27, a "criminal threat actor" had offered to sell the data it allegedly stole from Ticketmaster on the dark web, according to the federal filing.

The New York Times and other outlets said a hacking group known as the ShinyHunters is claiming to be responsible for stealing the information, which reportedly includes users' credit card information.

"We are working to mitigate risk to our users and [Ticketmaster], and have notified and are cooperating with law enforcement," said Live Nation. "As appropriate, we are also notifying regulatory authorities and users with respect to unauthorized access to personal information."

As of Monday, Live Nation and Ticketmaster have yet to post information regarding the hack on their websites for their users. Neither company has responded to Scripps News' request for comment.

Live Nation said in the filing that the incident had not affected its business operations or finances.

"We continue to evaluate the risks and our remediation efforts are ongoing," the company said.

It's unclear exactly when the hack took place, but Live Nation said it noted the "unauthorized activity" just days before the U.S. Justice Department sued the companies, alleging they have monopolized the music and live entertainment industry.

U.S. Attorney General Merrick Garland said in a statement, "It is time to break up Live Nation-Ticketmaster."

In response to the lawsuit, Live Nation said that the DOJ will "lose in court because it ignores the basic economics of live entertainment."

Concert ticket caution: Woman's \$45 tickets end up costing over \$125 each



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FirstEnergy Denied Bid To Boost Objection To Discovery Order

By **Katryna Perera**

Law360 (May 31, 2024, 11:27 PM EDT) -- An Ohio federal judge on Friday denied FirstEnergy Corp.'s objections to not having a chance to further support its bid to shield internal investigative documents from a class of investors and two of its indicted former executives, saying the objections are moot because they've already been overruled.

According to a **two-page order** issued by U.S. District Judge Algenon L. Marbley, FirstEnergy filed a motion on April 30 seeking to file supplemental authorities to support its objections to a special master's order that the company produce documents and testimony related to a pair of internal investigations.

The company argued that the sought-after documents contain privileged legal advice given in the wake of a \$1 billion bribery scandal. FirstEnergy on May 22 also asked the court to stay the order to turn over the documents until the Sixth Circuit **could weigh in**.

But the special master denied FirstEnergy's motion to file supplement authorities earlier this month, and the court later overruled the company's objections to the special master's order.

"FirstEnergy now objects to an order denying them leave to file supplemental authority in support of objections that have already been overruled," Friday's order states. "Because this court ruled on the internal investigation objections, the objections are moot and overruled."

The internal investigations at the heart of the dispute were initiated in the days **following the arrest** of the former speaker of the Ohio House of Representatives, Larry Householder, who was charged with and **later convicted of accepting bribes** from FirstEnergy in exchange for his support of a \$1 billion bailout of two of the company's nuclear plants.

FirstEnergy argued that the work performed by attorneys for Jones Day and Squire Patton Boggs LLP during those investigations is privileged because the firms were providing legal advice in response to the government investigations and private litigation that grew out of the bribery scandal.

In his order overruling FirstEnergy's objections to sharing information about the internal investigations, Judge Marbley said the company had not shown those investigations were primarily motivated by legal reasons rather than for business reasons such as making decisions over whether to fire executives.

FirstEnergy was trying to shield the documents from the suing class of investors and from ex-CEO Chuck Jones and former Senior Vice President of External Affairs Michael Dowling, who had also moved to compel their production.

Aside from being defendants in the class action suit, both men have also **been indicted** on allegations they played a role in the bribery scheme, and FirstEnergy said they "no doubt intend to use [the materials] to assist in their defenses."

The underlying class action was **filed in 2020**, claiming that investors sustained massive losses when the scandal broke. Investors accused the Ohio-based utility company of lying to cover up how it was dealing with the financial problems surrounding its nuclear power plants.

The **class was certified** by Judge Marbley last year, though that **decision is on appeal** before the Sixth Circuit.

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

The investors are represented by Darren Robbins and Mark Solomon of Robbins Geller Rudman & Dowd LLP and Joseph Murray of Murray Murphy Moul + Basil LLP.

Jones is represented by Carole Rendon, Daniel Warren, Douglas Shively, Jeremy Steven Dunnaback, Rachael Israel, Albert Lin and George Stamboulidis of BakerHostetler and William Scherman and Jennifer Mansh of Vinson & Elkins LLP.

Dowling is represented by John McCaffrey, John Favret and Hannah Smith of Tucker Ellis LLP and Dan Webb, Steven Grimes and A. Matthew Durkin of Winston & Strawn LLP.

FirstEnergy is represented by Robert Giuffra, Sharon Nelles, David Rein, Beth Newton, Nicholas Menillo, Hilary Williams, Tasha Thompson and Kamil Shields of Sullivan & Cromwell LLP and Paul Schumacher and Richard Silk of Dickie McCamey & Chilcote PC.

The case is In re: FirstEnergy Corp. Securities Litigation, case number 2:20-cv-03785, in the U.S. District Court for the Southern District of Ohio.

--Additional reporting by Jessica Corso. Editing by Michael Watanabe.

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Ohio's Jailed Ex-Speaker Denies Misusing Campaign Funds

By **Ryan Harroff**

Law360 (May 31, 2024, 3:49 PM EDT) -- Former Ohio House Speaker Larry Householder on Friday pled not guilty to misappropriating his campaign funds to cover legal fees for the notorious bribery scandal that landed him a 20-year prison sentence.

The Ohio politician, who appeared at his arraignment remotely from federal prison, is accused of improperly using more than \$750,000 in campaign donations to cover legal fees arising from his prior criminal proceedings in Ohio federal court. According to a Friday **journal entry** from Judge Emily Hagan of the Cuyahoga County Common Pleas Court, Householder appeared with counsel via Zoom and pled not guilty to the state-level charges against him.

Householder was **indicted by an Ohio grand jury** in March on 10 counts of aggravated theft, theft in office, money laundering, telecommunications fraud and tampering with records. The indictment alleged he used campaign funds he got from fundraising group Citizens for Larry Householder to pay his legal fees in the federal-level criminal case brought against him by Ohio Attorney General Dave Yost, who accused the ex-speaker of taking \$60 million in bribes to help bail FirstEnergy Corp. out of its nuclear power losses.

While he fights the charges related to campaign funds, Householder is **also appealing** the 20-year federal prison sentence he received for pushing a \$1.3 billion taxpayer-funded bailout of FirstEnergy's nuclear energy program into law as part of his bribery scheme with multiple other state officials and FirstEnergy executives.

Householder was **sentenced for his bribery conviction** in June 2023 and **filed his appeal** with the Sixth Circuit in February, arguing that the Southern District of Ohio judge who presided over the federal case was biased against him and should have recused himself. The former Ohio House speaker has asserted his innocence consistently throughout his federal and state-level criminal proceedings.

Multiple other key figures in the FirstEnergy scandal have either been convicted or are **still facing charges** related to the scheme, including the former chair of Ohio's energy regulator Samuel Randazzo, who **died by an apparent suicide** in April. FirstEnergy **admitted to its part** in the scheme in 2021.

All 10 of the charges against Householder in the campaign funds case are felonies. They were initially brought by the Cuyahoga County Prosecutor's Office, which then appointed the Ohio Attorney General's Office to prosecute the matter.

Counsel for Householder did not immediately respond to requests for comment. A representative of the Ohio Attorney General's Office declined to comment.

Householder is represented by Kevin M. Spellacy of Quinlivan & Hughes PA and Thomas E. Shaughnessy of Thomas E. Shaughnessy & Associates.

The state is represented by Carol O'Brien and Matthew Meyer of the Ohio Attorney General's Office.

The case is The State of Ohio v. Householder, case number CR-24-690479-A, in the Cuyahoga County Court of Common Pleas.



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WWE Investor Attys Enter Battle Royal To Lead Merger Suit

By **Sydney Price**

Law360 (May 31, 2024, 10:27 PM EDT) -- Two groups of shareholders have filed competing pitches for the lead plaintiff role in a consolidated class suit seeking damages from World Wrestling Entertainment founder Vincent McMahon and others in connection with WWE's \$21 billion merger with Endeavor Group, both arguing they have most successfully pursued the suit's claims.

Individual shareholder Dennis Palkon and the Laborers' District Council and Contractors' Pension Fund of Ohio filed a motion on Thursday to co-lead the suit. They are represented by Bernstein Litowitz Berger & Grossmann LLP and Block & Leviton LLP, who seek an appointment as co-counsel.

A competing motion was filed by City of Pontiac Reestablished General Employees' Retirement System, which was accompanied by a co-lead counsel bid by Robbins Geller Rudman & Dowd LLP and Prickett Jones & Elliott PA.

The consolidated suit is the result of **merged litigation** filed by the three parties pursuing lead counsel appointment.

Palkon and the Ohio Laborers say in their lead plaintiff bid that they began their investigations on behalf of the WWE's stockholders shortly after the merger. They claim that the Pontiac retirement system previously "caused unwarranted delay" in the suit by requesting unnecessary documents and then filed a plenary complaint against the WWE with additional claims.

"Regardless of Pontiac's motivations, the Palkon/Ohio complaint is more targeted and cohesive while the Pontiac complaint obscures the core theory in favor of secondary allegations that neither impact the chances of surviving a dispositive motion, nor increase the value of the claims pled," Palkon and the Ohio Laborers argue.

The Pontiac retirement system contends, however, that its added claims make for a stronger suit and that it has actively pursued claims while its competitor "watched from the sidelines."

"In sum," it adds, "Pontiac's complaint is superior because its counsel 'worked the case up more thoroughly and aggressively.'"

The consolidated litigation filed on behalf of WWE stockholders seeks relief for breaches of fiduciary duty by the named defendants in connection with the WWE's merger with mixed martial arts franchise the Ultimate Fighting Championship.

The claims arise from a deal first announced last April and closed in September 2023. Under the agreement, existing WWE shareholders rolled all existing equity into TKO Group Holdings — which formed when the WWE merged with Endeavor — the UFC's parent company. Endeavor then stated it will own 51% of the combined entity while WWE stockholders will own 49%. The deal combined two of the world's largest professional fighting sports and entertainment organizations.

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

Dennis Palkon and the Laborers' District Council and Contractors' Pension Fund of Ohio are represented by Jason M. Leviton, Joseph Kiefer, Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax and Robert Erikson of Block & Leviton LLP, and Jeroen van Kwawegen, Edward G. Timlin, Margaret

Sanborn-Lowing, James Janison, Gregory V. Varallo and Andrew E. Blumberg of Bernstein Litowitz Berger & Grossmann LLP.

City of Pontiac Reestablished General Employees' Retirement System is represented by Randall J. Baron, David A. Knotts, Lion Wintemute, Christopher H. Lyons and Tayler D. Bolton of Robbins Geller Rudman & Dowd LLP, and Marcus E. Montejo, Corinne Elise Amato, Kevin H. Davenport, John G. Day and Seth T. Ford of Prickett Jones & Elliott PA.

The case is In re World Wrestling Entertainment Inc. Merger Litigation, case number 2023-1166, in the Court of Chancery of the State of Delaware.

--Editing by Kristen Becker.

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9th Circ. COVID 'Cure' Case Shows Perks Of Puffery Defense

By **John MacGregor, Jason Rozbruch and Ryan Maloney** (May 31, 2024, 5:40 PM EDT)

On March 25, the U.S. Court of Appeals for the Ninth Circuit **affirmed** the dismissal of securities fraud claims against biopharmaceutical company Sorrento Therapeutics Inc., CEO Henry Ji and Vice President Mark Brunswick based on allegedly false and misleading statements about the company's potential COVID-19 cure.[1]

In a unanimous decision in *Andrew Zenoff v. Sorrento Therapeutics Inc.*, the Ninth Circuit held that Sorrento's statements did not violate Section 10(b) of the Securities Exchange Act of 1934 or the U.S. Securities and Exchange Commission's Rule 10b-5, because the statements were not materially false or misleading when considered in their full context, and the complaint failed to sufficiently plead scienter.[2]



John MacGregor

Factual and Procedural Background

On May 15, 2020, Sorrento Therapeutics, a clinical-stage biopharmaceutical company that develops treatments for cancer, pain and COVID-19, announced in a press release and to the media that Sorrento had developed an antibody known as STI-1499 to treat COVID-19.[3]

According to a Fox News article, Ji said, "We want to emphasize there is a cure. There is a solution that works 100 percent. ... If we have the neutralizing antibody in your body, you don't need the social distancing. You can open up a society without fear."



Jason Rozbruch

The Fox News article also quoted Brunswick as saying

As soon as [the antibody] is infused, that patient is now immune to the disease ... for the length of time, the antibody is in that system. So, if we were approved [by the U.S. Food and Drug Administration] today, everyone who gets that antibody can go back to work and have no fear of catching COVID-19.[4]

In a BioSpace article, Ji was quoted as saying "what we've done is identified an antibody that recognizes the COVID-19 virus and completely inhibits its binding to the specific receptor." [5]



Ryan Maloney

On the day of the announcement, Sorrento's stock traded at almost 78 times its daily average volume.[6] Following the announcement, Sorrento's stock price rose to a high of \$9 per share, which was 243.5% higher than the prior close of \$2.62.[7]

Notwithstanding the optimistic statements and high trading volume, the antibody at the center of the potential cure was still in early preclinical testing and had not been FDA-approved or tested on humans.[8]

In the week following Sorrento's announcement, news stories and articles from investment research firms scrutinized the company's claims that it had developed a COVID-19 cure.[9] On May 22, 2020,

Sorrento clarified that the antibody "might be" or "potentially" could be a cure, and that it could not "cure late-stage patients." [10] Sorrento's stock price then dropped to \$4.67 per share. [11]

On May 26, 2020, Sorrento investor Andrew R. Zenoff filed a class action complaint in the U.S. District Court for the Southern District of California on behalf of all purchasers of Sorrento stock between May 15 and May 21, 2020, alleging violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5, which prohibit material misstatements or omissions in connection with the purchase or sale of a security. [12]

Zenoff alleged that Sorrento misled investors by falsely claiming it had developed a COVID-19 cure in order to improve the company's stock price and financial position. [13] Under Section 10(b) and Rule 10b-5, Zenoff had to show that Sorrento made a material misrepresentation or omission with scienter; that there was a connection between the misrepresentation or omission and the purchase of the stock; and that he relied on the misrepresentation or omission, which caused him economic loss. [14]

On April 11, 2022, the district court granted Sorrento's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. [15]

First, the district court held that Zenoff failed to plead with particularity how each of Sorrento's statements was false or misleading. [16] It found that Sorrento's statements were nonactionable "corporate optimism," or "puffery," and that they were not misleading when examined against the full context of the publications in which they appeared. [17]

Second, the district court held that Zenoff failed to establish a strong inference of scienter (i.e., that Sorrento intended to deceive, manipulate or defraud). [18] Zenoff attempted to allege scienter by showing that Sorrento needed to raise funds to retire high-interest debt. [19] But the court found such "generalized assertions of motive based on potential profit" insufficient. [20]

Ninth Circuit's Decision

On appeal, the Ninth Circuit affirmed, holding that (1) Sorrento's statements were not materially false or misleading, and (2) Zenoff failed to establish the requisite strong inference of scienter. [21]

Sorrento's statements were not materially false or misleading.

Under Section 10(b) and Rule 10b-5, plaintiffs must allege each materially false or misleading statement "with particularity" and explain "the reasons why [they are] misleading." [22] The Ninth Circuit found that Sorrento's statements, while "enthusiastic," were not materially misleading when examined "in context," because the publications in which they appeared clarified that the antibody was in early preclinical testing. [23]

The court found that, upon a "fair reading" of the publications, Sorrento did not "promise ... an immediate 100% cure," and that a "reasonable person reading the articles" would not believe that the antibody, "without further testing, was an immediate cure for COVID-19." [24]

The court noted that Zenoff also attempted to utilize the fact that there is still "no cure for COVID-19" to show that Sorrento "could not, in good faith, have thought that [the antibody] was a cure." [25]

But the Ninth Circuit rejected this argument, finding that "many initially promising discoveries do not survive the testing required for FDA approval," and that such "failure to survive testing is hardly evidence" that "initial enthusiasm was unwarranted or inherently false at the time." [26]

Zenoff failed to show that Sorrento acted with scienter.

To sufficiently allege scienter under Section 10(b) and Rule 10b-5, plaintiffs must state "with particularity[,] facts giving rise to a strong inference that the defendant acted with the required state of mind." [27]

The opinion stated that Zenoff attempted to demonstrate scienter "through the combination" of

Sorrento's CEO and vice president having access, in their "management roles," to data concerning the antibody; the "blatant falsity" of their statements to the press; the "extremely short time period" between the statements and Sorrento's subsequent "admission of falsity"; and Sorrento's "dire financial situation," according to the Ninth Circuit opinion.[28]

The Ninth Circuit rejected Zenoff's argument.

First, there was no "indication or allegation" that Sorrento's CEO and vice president had access to nonpublic information about the antibody through their roles, the court found.

Second, the court found that Sorrento's statements were not false when viewed in context, and later clarifications by Sorrento were "consistent elaborations of what was initially stated" rather than an "admission of falsity." [29]

Third, the court found that even if Sorrento's financial position benefited from the announcement of the development of the antibody, Zenoff "identifie[d] no individual stock sales at all," and thus failed to make the "requisite showing of trading history necessary to raise an inference of scienter." [30]

Conclusion

The Sorrento litigation is the latest in a series of securities lawsuits against biotechnology and pharmaceutical firms arising from public statements about potential COVID-19 vaccines. Plaintiffs have had mixed results in these cases.

In *Nandkumar v. AstraZeneca PLC*, the U.S. Court of Appeals for the Second Circuit last year affirmed the dismissal of Section 10(b) and Rule 10b-5 claims against AstraZeneca PLC and several of its executives.[31]

The claims concerned public statements the defendants made about AstraZeneca's vaccine candidate, AZD1222. The plaintiffs alleged that the statements were misleading because they omitted information about a supposed dosing error that affected certain participants in the clinical trial.[32]

The claims were rejected, however, because, as in *Sorrento*, the plaintiffs failed to adequately plead "falsity or facts giving rise to a strong inference of scienter." [33] The Second Circuit also noted, among other things, that plaintiffs failed to plead any "conscious misbehavior" by the defendants that would give rise to the requisite strong inference of scienter.[34]

On the other hand, in *Sinnathurai v. Novavax Inc.* in 2022, the U.S. District Court for the District of Maryland found that the plaintiffs sufficiently alleged falsity and scienter in a putative class action against a biotechnology company and several of its officers arising from statements the defendants made while seeking emergency use authorization from the FDA for its vaccine candidate.[35]

The court found that the statements, which conveyed that the company was on track to receive FDA approval, may have constituted material omissions because the company knew manufacturing delays were expected, and disclosure of those delays would have "significantly altered the total mix of information" available to a reasonable investor.[36]

The court also found that the plaintiffs' allegations were "collectively sufficient to support a strong inference of scienter" because the plaintiffs alleged that:

- Company executives were told about the manufacturing problems by other company personnel and the FDA;
- Relevant FDA reports about the manufacturing problems were required to be escalated to the executives;

- The vaccine was a "core operation" of the company and "critical" to the company's success; and
- Executives sold company stock just before announcing the manufacturing delays.[37]

Given the extensive efforts made by biotechnology and pharmaceutical firms during the pandemic to create an effective COVID-19 vaccine, it is possible additional securities lawsuits in this arena are yet to come.

More generally, the Sorrento case may encourage defendants in the Ninth Circuit and elsewhere to assert so-called puffery defenses in securities fraud cases, particularly in those involving optimistic statements about new, breakthrough drugs that are still to be tested.

The Ninth Circuit's decision also reaffirms that courts must examine statements in their full context to assess their falsity and to distinguish between enthusiasm and falsehood.

The court's holding on puffery and the importance of contextual analysis may help defendants defeat complaints at the motion to dismiss stage and avoid the financial and resource costs associated with discovery.

As a general matter, courts have held that a statement constitutes puffery when it is so vague it merely offers optimistic opinions and is too general for a reasonable investor to rely on.[38]

John MacGregor is a partner, and Jason D. Rozbruch and Ryan M. Maloney are associates, at Cahill Gordon & Reindel LLP.

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[1] *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2024 WL 1245342, at *7 (9th Cir. Mar. 25, 2024).

[2] *Id.* at *1, *7.

[3] *Id.* at *3, n.3; *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2022 WL 22609807, at *1,*5–6 (S.D. Cal. Apr. 11, 2022), *aff'd sub nom.*, 2024 WL 1245342 (9th Cir. Mar. 25, 2024).

[4] *Id.*

[5] *Id.*

[6] *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2024 WL 1245342, at 2.

[7] *Id.*; *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2022 WL 22609807, at *1.

[8] *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2024 WL 1245342, at *2,*4; *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2022 WL 22609807, at *1.

[9] *Id.*

[10] *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2024 WL 1245342, at *2,*6; *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2022 WL 22609807, at *1.

[11] *Id.*

[12] *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2024 WL 1245342, at *1–2; 15 U.S.C. § 78j(b); 17

C.F.R. § 240.10b-5.

[13] See *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2024 WL 1245342, at *3.

[14] *Id.* at *4 (quoting *Matrixx Initiatives, Inc. v. Siracusano* , 563 U.S. 27, 37-38 (2011)).

[15] *Id.* at *3; *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2022 WL 22609807, at *5,*6.

[16] *Id.*

[17] *Id.* The publications in which the statements appeared disclosed that the antibody was still in preclinical testing. *Id.*

[18] *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2024 WL 1245342, at *3-4.

[19] See *id.* at *4; see also *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2022 WL 22609807, at *6-7.

[20] See *id.*

[21] *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2024 WL 1245342, at *1.

[22] *Id.* at *3-4. Further, under Federal Rule of Civil Procedure 9(b), a party must "state with particularity the circumstances constituting fraud or mistake," even though "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." See also *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2022 WL 22609807, at *3 ("In other words, the complaint must set forth what is false or misleading about a statement, and why it is false.").

[23] *In re Sorrento Therapeutics, Inc. Sec. Litig.*, 2024 WL 1245342, at *5.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at *4.

[28] *Id.* at *5.

[29] *Id.* at *6.

[30] *Id.* at *6-7.

[31] *Nandkumar v. AstraZeneca PLC* , 2023 WL 3477164 (2d Cir. May 16, 2023).

[32] *In re AstraZeneca plc Sec. Litig.* , 2022 WL 4133258, at *4 (S.D.N.Y. Sept. 12, 2022), *aff'd sub nom.*, *id.*

[33] 2023 WL 3477164, at *1.

[34] *Id.* at *3-4.

[35] *Sinnathurai v. Novavax* , 645 F. Supp.3d 495, 520, 525-29 (D. Md. 2022).

[36] *Id.*

[37] *Id.* at 525-29.

[38] See, e.g., *In re Synchrony Fin. Sec. Litig.* , 988 F.3d 157, 170 (2d Cir. 2021) (holding that "[v]ague positive statements regarding a corporate entity's risk management strategy, asset quality,

and business practices are "too general to cause a reasonable investor to rely upon them and therefore are precisely the type of puffery that this and other circuits have consistently held to be inactionable"); *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.* , 759 F.3d 1051, 1060 (9th Cir. 2014) (holding that "vague statements of optimism like 'good,' 'well-regarded,' or other feel good monikers, are not actionable because professional investors, and most amateur investors as well, know how to devalue the optimism of corporate executives").

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Musk, Tesla Board Face Suit Over Insider Trades, SEC Order

By **Jeff Montgomery**

Law360 (May 31, 2024, 7:55 PM EDT) -- A Tesla stockholder has launched a derivative lawsuit in Delaware's Chancery Court seeking damages from co-founder Elon Musk and seven company directors over Musk's sales of more than \$7.5 million in shares in late 2022, accusing the billionaire of leveraging insider information and flouting a six-year-old federal consent agreement.

In a complaint filed Thursday, investor Michael Perry alleged Musk and the Tesla board failed to follow a consent agreement with the U.S. Securities and Exchange Commission that obliged Musk to step down in 2018 as the electric-vehicle maker's chair and required the firm to comply with agency regulations, including insider trading prohibitions.

"E. Musk possessed material, non-public information of Tesla, and used that information improperly in selling Tesla stock because he was motivated, in whole or in part," by the information, "and acted with scienter," the filing read.

After Musk's equity sale, "Tesla stock declined materially from the prices at which he sold. Tesla's fourth quarter decline of approximately 33% was particular to Tesla: Ford and GM declined only 5%, while the Nasdaq was down only about 1%," according to the complaint.

The investor's claims stem from an Oct. 16, 2018, consent agreement prompted by a post Musk made on Twitter in August that year. In it, Musk said he was "taking Tesla private at \$420" per share, a substantial premium at the time. Musk added that funding for the deal was "secured" and only a shareholder vote remained, despite his failure to discuss the transaction with financing sources.

The misleading statements caused Tesla's stock to jump by more than 6% in value on Aug 7, 2018, and diluted markets. Enforcement action that followed cost Musk and Tesla \$20 million apiece, and prompted the formation of a company disclosure controls committee.

Fast-forward to October 2022, when Tesla Chief Financial Officer Zachary Kirkhorn reported that the EV giant would fall just short of its 50% annual production and delivery growth goal.

On Oct. 19, 2022, however, Musk said Tesla's board thought it might make sense to buy back stock and would do a "meaningful" buyback in mid-November that year.

"Musk himself was responsible for the market expectations that were disappointed by the January 2, 2023, announcement" that Tesla missed the delivery forecasts by some 100,000 vehicles, Perry wrote.

"A change in Tesla's production and delivery logistics made it even more likely" that in mid-November 2022, Musk had material nonpublic information regarding fourth-quarter production, the stockholder went on.

Tesla's disclosure control committee members "were derelict in their duties when it came to E. Musk and failed to fulfill either the spirit or the letter of Tesla's consent judgments with the SEC. In effect, they deviated from the SEC order having force of law and were disloyal to Tesla," the complaint said.

"In causing or allowing Musk to sell shares in November and December 2022, the company failed to maintain adequate internal controls and procedures related to insider trading," the document

continued. It also failed to assure that the SEC's 2018 consent judgment and amendments in 2019 "were followed to prevent Musk from profiting from" the material nonpublic information, according to the suit.

Michael Perry and the proposed class are represented by P. Bradford deLeeuw of deLeeuw Law LLC, Lee Squitieri of Squitieri & Fearon LLP and Fletcher Moore of Moore Law PLLC.

The parties did not immediately respond to requests for comment Friday.

Counsel information for Tesla was unavailable.

The case is Perry v. Musk et al., case number 2024-0560, in the Court of Chancery of the State of Delaware.

--Editing by Covey Son.

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Nigerian Fintech's Execs Sued Over Alleged Company Fraud

By **Katryna Perera**

Law360 (May 31, 2024, 9:58 PM EDT) -- The current and former top brass of Nigerian fintech company Tingo Group Inc. have been hit with a derivative suit in New Jersey federal court over revelations of fraud at the company, which has led to other litigation, including actions launched by the U.S. Securities and Exchange Commission and the U.S. Department of Justice.

Plaintiff Jia Cheng **filed a complaint** Thursday against Tingo's founder, interim CEO, chief financial officer and several board members, alleging the conduct of the individual defendants cost stockholders "substantial sums" of money.

Cheng said Tingo has been described as a "worthless and brazen fraud that should serve as a humiliating embarrassment for all involved."

According to the complaint, Tingo is a holding company that claimed to be a leader in African financial technology and agricultural financial technology. However, Cheng said Tingo's rise was built on a series of lies engineered by its founder Dozy Mmobuosi.

The complaint states that beginning in 2019, Mmobuosi, who is originally from Nigeria, began positioning one of Tingo's entities, Tingo Mobile, to access U.S. capital markets. He eventually achieved success in 2021 when a public company named iWeb Inc. acquired Tingo Mobile and renamed itself Tingo Inc. and then later Agri-Fintech Holdings Inc.

According to the complaint, Mmobuosi has been the CEO and controlling stockholder of Agri-Fintech Holdings since August 2021. Tingo Group was later formed in 2023, following another merger, and it traded on Nasdaq until it was delisted from the exchange in March this year, the complaint states.

Cheng alleged that from October 2022 through September 2023, the individual defendants made several misleading and false statements and omissions. Cheng said Mmobuosi lied about his background, education and achievements, including about receiving a Ph.D.

Cheng alleged the company's financials and projections were inflated and fabricated, including representations to investors that Tingo's agricultural export business was on track to deliver \$1.34 billion in exports by the company's third quarter of 2023.

The complaint also alleges the company used Photoshop to advertise "nonexistent success," including "passing pictures from a different point of sale system operator's website off as its own by photoshopping its own logo over those pictures and Mmobuosi urging customers on social media to fly with an airline business he claimed to have launched."

According to the complaint, Mmobuosi later admitted to never owning any aircraft. The images used to show "Tingo Airlines" showed airplanes with the Tingo logo "photoshopped onto pictures of airplanes it did not own."

The company also publicized sham expansion projects, Cheng said, such as leading investors to believe it was breaking ground on a \$1.6 billion food processing plant and that it was making "significant progress" on the facility's construction "even though the purported progress in reality consisted of six cinderblocks and a plaque."

Additionally, Cheng said Tingo did not have relationships with two farming cooperatives it claimed to have and that the company lacked effective controls over accounting and financial reporting.

The truth about Tingo started coming to light in June 2023, the complaint states, when investment research firm Hindenburg Research published a report titled "Tingo Group: Fake Farmers, Phones, and Financials — The Nigerian Empire That Isn't." The report revealed, among other things, the company was an "exceptionally obvious scam with fabricated financials" and had made continuous, false representations about its business, operations and prospects.

A second report, titled "Tingo Forges Ahead With Its Brazen Scam as a \$725 Million in Claimed Cash Disappears From its Balance Sheet in One Quarter," was published last August, and in December, the SEC launched its suit against the company alleging Mmobuosi had engaged in a multiyear scheme to inflate the financial performance metrics of Tingo and its entities to defraud investors worldwide.

According to the Cheng, shortly after filing its complaint, the SEC obtained a temporary asset freeze, restraining order and other emergency relief against the company, which was in place until March 15 of this year.

The DOJ also announced in January it had indicted Mmobuosi on charges of securities fraud, conspiracy and falsifying SEC reports.

Cheng said the defendants' alleged misconduct has significantly harmed the company and investors since Tingo's stock price has plummeted roughly 56% since last year. On Friday, Tingo's stock was trading around \$0.42.

The suit seeks damages, attorney fees and a jury trial. Cheng's complaint follows another stockholder action filed in March in Delaware Chancery Court over Tingo's alleged refusal to **voluntarily release documents** related to the business and Mmobuosi.

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

Cheng is represented by Melissa A. Fortunato and Badge Humphries of Bragar Eagel & Squire PC.

Counsel information for the defendants was not available Friday.

The case is Cheng v. Benton et al., case number 2:24-cv-06567, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Jeff Montgomery. Editing by Lakshna Mehta.



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Del. Chancellor Questions 'Rush' To Amend Corporation Law

By **Jeff Montgomery**

Law360 (May 31, 2024, 3:16 PM EDT) -- Weeks before the Delaware State Bar Association sent state lawmakers a draft bill explicitly allowing corporations to broadly cede some governance rights to chosen stockholders, Chancellor Kathaleen St. J. McCormick of Delaware Chancery Court made an unprecedented, direct appeal to think twice.

In a seven-page April 12 letter that became widely public only this week, the chancellor told members of the DSBA's executive committee that "there is no justification for the rushed nature of the proposal nor the unfair decision now being foisted" upon the committee in the waning weeks of Delaware's six-month legislative session.

Triggering the chancellor's letter on April 12 was a then-draft bill that two Harvard professors recently summed up as empowering corporations to make sweeping contracts with current or prospective stockholders to "(a) not do something, (b) do something only with permission, and (c) make sure something is done (or not done)."



Chancellor Kathaleen St. J. McCormick

Driving some pressure for the DSBA amendment package: a ruling by Vice Chancellor J. Travis Laster in late February that **found "facially invalid"** most of a Moelis & Co. agreement that gave founder Kenneth Moelis board-trumping power over the global investment bank's business.

Alarm over Moelis was amped up by two other recent rulings, by Chancellor McCormick, in cases that found boards must approve "execution ready" agreements, rather than summaries, and a finding that narrowed the freedom of a target company to seek lost stockholder premiums as damages after a buyer's breach in a busted merger.

Unprecedented, light-speed pushback against all three found its way into S.B. 313, **introduced May 23** in the state Senate, little more than five weeks before the end of the state General Assembly session.

"The proposal has moved forward at a pace that forecloses meaningful deliberation and input from diverse viewpoints. It reflects the broadest set of substantive amendments since the 1960s. It is controversial. It preempts the Delaware Supreme Court's opportunity to act as the final arbiter of Delaware law," the chancellor wrote.

"So why the rush?" she asked.

Jill E. Fisch, the Saul A. Fox distinguished professor of business law at the University of Pennsylvania Carey Law School, said she believed there was more dissension this year than typically associated with the nearly annual Delaware General Corporation Law proposal.

"And obviously, a Chancery Court judge weighing in, even in her individual capacity, as far as I can tell is unprecedented," Fisch said.

"I think the point is, there's often some movement between what happens at the Chancery Court level and what the Delaware Supreme Court does," she said. "It's not unheard of for the Delaware

Supreme Court to take account of the sort of public reaction to a Chancery Court decision."

One risk, Fisch said, is the weight that the DSBA's approach imposes on the judges handling corporate and complex commercial law disputes, particularly in Chancery Court.

"One doesn't like to think of trial court judges, in general, and Chancery Court judges in particular, having to keep one eye on what the council is doing," Fisch said, referring to the DSBA's Council of the Corporation Law Section. "Let's face it. Delaware has a distinctive process in which the legislature gives what the council says a lot of weight, a lot of trust. But the council isn't exactly the same as a legislature."

Chancellor McCormick found support for her concerns from the Chancery Court colleague who decided Moelis. Vice Chancellor Laster recently posted on his wide-ranging LinkedIn site: "This is not the annual tweaking of the DGCL. That's a cosmetic procedure by comparison. This is major surgery."

Lawrence A. Hamermesh, professor emeritus and former Ruby R. Vale professor of corporate and business law at Widener University Delaware Law School, said it was unlikely that the council would have acted so quickly if it didn't view the changes as significant.

"I think it's disappointing if the plaintiffs bar views this as a threat to their interests, because there are larger interests at stake," Hamermesh said. "Plaintiffs have an interest in fee awards from Delaware courts that have been remarkably generous. If the cases all go to Texas and Nevada, good luck."

Hamermesh added: "I think those who advocate taking more time have to offer some suggestions about how the legislation could be improved. And just letting an appeal go forward won't help, unless one thinks — which I don't — that the Moelis decision should and will be reversed."

The state bar and its corporate law council have not responded to requests for comment. Law firms active in the process, however, issued summaries of the bill and their reasons for support as the legislation emerged.

In its online rundown of the DGCL amendments, Richards Layton & Finger PA said Vice Chancellor Laster acknowledged in the Moelis ruling that "certain provisions of the stockholders' agreement could have been validly implemented by alternative means, including through the adoption of provisions of the certificate of incorporation providing for charter-based veto rights or an affirmative delegation of the powers" reserved for the board.

"Thus, the court's holding should be read to mean that there is no public policy prohibiting the types of governance arrangements set forth in the stockholders' agreement," the firm's summary said. "Rather, the court's opinion should be read to mean that the provisions were invalid solely because they had not been implemented in one of the manners that the statute expressly permits."

Among other provisions, the legislation states that some stockholder amendments contrary to certificates of incorporation can survive by way of a proposed new exception to DGCL Section 115. That section now requires a Delaware-only court or arbitration forum for claims based on a violation of a duty by a director, officer or stockholder, or for which jurisdiction is conferred upon the Court of Chancery. The amendment would allow companies to specify other states for exclusive forum and arbitration provisions under stockholder contracts.

Ann M. Lipton, Tulane University Law School's Michael M. Fleishman associate professor in business law and entrepreneurship, and associate dean for faculty research, said the provision could permit "a great deal of governance" to be controlled by contract. Even disputes regarding fiduciary duties or the requirements of Delaware law could be heard in a non-Delaware or arbitral forum, Lipton said.

Chancellor McCormick acknowledged arguments that the decisions prompting the legislation appear contrary to market practice. "That is a legitimate concern," the chancellor wrote.

But "the fact that 'Everyone is doing it' is not a reason to do something," the chancellor continued. "The question is whether everyone is doing the right thing: Is the market acting in a manner that is good for corporate law?"

Also a concern, the chancellor wrote, is the DSBA council's view that the decisions "render Delaware corporation law unpredictable." But the effect of the legislation on predictability is unclear.

The chancellor observed that the council "pushed out the proposal to the [DSBA corporation law] section in draft form on Holy Thursday, when many of our colleagues in the bar were preparing for a religious holiday, spring break, and eclipse-themed trips." Some public responses included the comment that "McCormick invited this."

Concerns ticked off in the chancellor's letter included the rapid pace of the proposed legislative overhaul, which make "the broadest set of substantive amendments" to the DGCL since the 1960s.

"It is controversial. It preempts the Delaware Supreme Court's opportunity to act as the final arbiter of Delaware law," striking at two cases still being litigated before the Court of Chancery, the chancellor wrote.

"Summing it up, did 'McCormick invite this'? No, I did not invite this dramatic departure from Delaware's esteemed tradition. To be sure, the trio of decisions raise important issues for policymakers to consider," the chancellor wrote. But "there is no justification for the rushed nature of the proposal nor the unfair decision now being foisted upon the executive committee."

Dael Norwood, an assistant professor of history at the University of Delaware, said he has been following the DGCL amendments for years because of their importance to the state's political economy. The latest round, he said, raises concerns about a "potential to threaten Delaware's unique status as the go-to venue for corporations." Supporters, he said, have branded critics as "alarmist."

"The measured critiques from other stakeholders — Chancery Court jurists, other Delaware lawyers, learned scholars, and institutional investors — should be given more consideration," Norwood said. "Why should a recent frenzy for controversial secret shareholder agreements be any different? Conferring post hoc legality to any action, however harmful, whenever the involved parties claim it was existing 'market practice' is a quick road to disaster."

Vice Chancellor Laster, in a public post, also stressed the sweep of the proposed changes and potential consequences.

"Wherever this ends up, it seems likely that a generation of corporate law professors will be able to get tenure based on research agendas tied to the legislation," the vice chancellor wrote. "The amendments raise deep questions about corporate theory and legal doctrine. They invite updated assessments of Delaware's political economy and the mechanisms used to update the DGCL."

--Editing by Robert Rudinger.



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Jilted FTX Claim Buyer Sues Crypto Trader In Chancery

By **Emily Lever**

Law360 (May 31, 2024, 7:14 PM EDT) -- An affiliate of Connecticut hedge fund Silver Point Capital has sued a crypto trading firm and a buyer of FTX bankruptcy claims in Delaware Chancery Court, alleging that they breached a sale agreement for "a highly unique and lucrative customer claim" with a face value of \$10 million in the FTX bankruptcy case.

Silver Point Capital affiliate SPCP Group LLC on Thursday sued crypto trading platform Floating Point Group International LLC and its affiliate FPG Inc., as well as Svalbard Holdings Ltd., the FTX claims holder that allegedly took advantage of FPG's desperation at the time to swoop in and buy the claim for a better price.

"Despite having a binding agreement with Silver Point, FPG-CI elected to breach the CSA and purported to sell the claim to Svalbard after Svalbard offered FPG-CI better terms than Silver Point and FPG-CI agreed to in the CSA," the complaint says.

Since the FTX bankruptcy case filing in the District of Delaware, and especially in recent months, a secondary trading market has developed for the purchase and sale of customer claims against the FTX debtors, the complaint says. Silver Point had a July agreement with Floating Point to buy a customer claim with a face value of \$10.48 million for about 13 cents on the dollar — with Silver Point to be paid for the claim once FTX's Chapter 11 plan was approved — but then sold the claim to Svalbard instead.

Svalbard may have offered FPG inducements for the claim that included paying a better price than Silver Point, agreeing to waive some due diligence and closing more quickly on the sale, according to the complaint.

Another factor in FPG's alleged breach of claim was that the fund was "desperate to close the transaction as soon as possible and receive an injection of capital," having lost over \$15 million worth of cryptocurrency from a hack in June 2023, according to the complaint. As of July 2023, FPG had laid off up to 90% of its employees, and its CEO said the organization's future was in doubt, according to the complaint.

Additionally, at the time of the alleged breach, "the market for claims being traded in the FTX bankruptcy case was not well-developed, and it was difficult for creditors looking to sell claims to find buyers, and for buyers looking to purchase claims to find creditors willing to sell them," contributing to FPG's desperation, the complaint says.

"Svalbard tortiously interfered with the contractual rights of Silver Point, entered into a distinct contract with FPG-CI for the same customer claim subject to the FTX bankruptcy case pending in the District of Delaware, filed a "transfer of claim" in the FTX bankruptcy case, and Svalbard will be paid on account of the claim only after the Delaware bankruptcy court approves a plan of reorganization," the complaint says.

Svalbard could not reasonably assert it was unaware that the claim was already spoken for, given that it is a sophisticated and experienced market participant, with respect to trading in securities generally and specifically the purchase and sale of trade claims in bankruptcy proceedings, the complaint says.

Svalbard has boasted it "has extensive experience in th[e] secondary market for FTX claims" and that "through trades in this market [it] has become one of the most substantial creditors of FTX," according to the complaint.

A cursory amount of due diligence from Svalbard would have revealed a binding and enforceable agreement applied to the claim Svalbard was buying, according to the complaint.

"Svalbard knew — or buried its head in the sand so as not to know or pretended not to know — that FPG-CI had a binding and enforceable obligation to settle on its trade with Silver Point," the complaint says.

The parties could be reached for comment Friday.

Silver Point is represented by Andrew M. Goldsmith and Erik F. Bakke of Pryor Cashman LLP and Bruce E. Jameson, Eric J. Juray and Kirsten M. Valania of Prickett Jones & Elliott PA.

Counsel information for Svalbard and FPG was not immediately available.

The case is SPCP Group LLC v. Floating Point Group International LLC et al., case number 2024-0576, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas. Editing by Drashti Mehta.

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T-Mobile Gets Investor Data Consolidation Suit Tossed In Del.

By **Katryna Perera**

Law360 (May 31, 2024, 9:29 PM EDT) -- T-Mobile US Inc. has escaped a shareholder suit claiming its board centralized customer data to enrich its corporate parent, which resulted in compromised data security and cyberattacks, with a Delaware vice chancellor saying the suit only shows that T-Mobile and its parent company centralized the data to make it easier to access and nothing more.

Delaware Vice Chancellor Sam Glasscock III issued an **opinion** on Friday saying that while the complaint, filed by T-Mobile customer Jenna Harper, adequately alleges that a majority of the T-Mobile directors lack independence from nonparty parent company Deutsche Telekom AG, the rest of the suit fails to state a claim.

The vice chancellor rejected Harper's claim that DTK "forced" T-Mobile to "'implement its unilateral business interests,' benefiting DTK at the expense of foreseeable corporate trauma to T-Mobile."

There are no specific allegations in the complaint supporting the claim that DTK instructed T-Mobile to aggregate its customer data at all, let alone in a risky way, or that T-Mobile's board considered data consolidation in disregard of its risk to the company or at DTK's direction, the vice chancellor said.

Additionally, the suit does not specifically allege that DTK used T-Mobile's aggregated data in a way that benefited the company, the opinion states, and overall, the suit is full of conclusory allegations.

"Through the record that plaintiff has established, plaintiff has merely shown that both DTK and T-Mobile centralized data to make it easier to access," the opinion states. "Further, the plaintiff has not addressed why DTK, as a majority owner, would undertake actions to put [T-Mobile] at risk, such as promoting lax data security, thus jeopardizing its majority interest in the company."

To further illustrate the rationale behind the suit's dismissal more colorfully, Vice Chancellor Glasscock said in a footnote: "The comic Bob Newhart had a routine where he played a skeptical T.V. host interviewing a man who owned 'the world's smallest horse.' He asked the owner for proof: 'How do you know he's the world's smallest horse?' Well, the owner replied, 'Just look at him!' This bald, and bold, assertion in comedy led to laughter; here, to dismissal."

The suit, filed in September 2022 and amended in April 2023, accused the named defendants of mounting a "reckless plan to hurriedly create a broad data-mining architecture that could allow the new T-Mobile to contribute to DTK's group wide machine learning and artificial intelligence apparatus."

T-Mobile allegedly acquiesced to pressure to adopt a data structure dubbed "Sharing with Caring" by DTK, which created vulnerabilities and opportunities for hackers to access vast company data troves.

In Friday's opinion, Vice Chancellor Glasscock said the "sharing is caring" moniker is "so saccharine as to arouse instant suspicion."

T-Mobile reported six major data breaches between late 2018 and late 2021, while "customers, regulators, and shareholders watched in amazement as T-Mobile appeared incapable of securing its customer data."

The company agreed in July to a \$500 million multidistrict class settlement, including \$350 million in

cash for customer claims and \$150 million for cybersecurity to end multidistrict litigation over a breach in August 2021 that exposed the data of 76.6 million people in the U.S.

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

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

T-Mobile is represented by A. Thompson Bayliss, Peter C. Cirka and E. Wade Houston of Abrams & Bayliss LLP and Roger A. Cooper and Mark E. McDonald of Cleary Gottlieb Steen & Hamilton LLP.

The case is Harper v. Sievert et al., case number 2022-0819-SG, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Jay Jackson Jr.

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Robins Kaplan Can't Escape Sanction Over Dropbox Access

By **Emily Johnson**

Law360 (May 31, 2024, 4:19 PM EDT) -- A New York state appeals court has upheld the \$156,000 sanction on litigation funding firm KrunchCash and its counsel Robins Kaplan LLP for poking through an opposing party's Dropbox database that was accidentally shared in a \$10 million suit, finding that they knew or should have known it was privileged information.

The First Department of the New York Appellate Division found Thursday that the trial court's decision to **sanction** Robins Kaplan and KrunchCash in October was not an abuse of discretion, **rejecting KrunchCash's argument** that the monetary sanction was unwarranted and should be undone, according to the two-page **order**.

"The court here correctly determined that counsel was required to notify plaintiff that it had obtained the Dropbox link inadvertently, as the link contained folders that counsel knew or should have known were confidential or privileged," the appellate court said. "Counsel's refusal to sequester the inadvertently disclosed files led to plaintiff having to file the underlying motion and incur substantial legal fees."

The plaintiff, investment vehicle Pursuit Credit Special Opportunity Fund LP, was granted a protective order and the sanctions ruling in October. The appellate court found that the state's rules about protective orders gives "broad discretion upon a court to fashion appropriate remedies to prevent the abuse of disclosure devices."

The appeals court said that Pursuit Credit's "submission of an attorney affirmation, detailing the hours reasonably expended, its counsel's professional experience, and the prevailing hourly rate for similar work in the community, was sufficient for the court to award the amount sought."

The appellate court **heard arguments** May 8 on Robins Kaplan's **challenge** to the sanction issued as part of the dispute.

In October, the judge accused Robins Kaplan of attempting to "weaponize" its accidental access to KrunchCash's internal database by demanding, among other things, that Pursuit Credit drop the case against its client. The judge said that the firm ignored professional "alarm bells" to gain the upper hand in the case.

At the time, New York Supreme Court Justice Joel M. Cohen excoriated Robins Kaplan for waiting a week before informing opposing counsel that it had gained access to the live file directory of Pursuit Credit via a Dropbox link accidentally shared with the firm by an outside party.

Pursuit Credit sued KrunchCash in 2022, accusing it of squandering a \$10 million investment that was supposed to be deposited as advances to a Maryland law firm and a Texas-based pharmaceutical company.

The investor lobbied **similar accusations** against KrunchCash in Florida, but that case was thrown out last year for lack of subject matter jurisdiction.

Counsel for Pursuit Credit, Renee Bea of Slarskey LLC, told Law360 Pulse on Friday that the appeals court's decision rightfully ensured that Pursuit Credit was reimbursed for dealing with the aftermath of Robins Kaplan accessing the investment vehicle's files.

"It's a good day," Bea said. "The appellate division affirmed that when lawyers and their clients act unethically, they will pay the costs associated with their conduct."

Bea said that the appellate court's decision "recognized that rules of professional conduct and basic rule of discovery prohibit parties from engaging in self-help and require counsel to notify an adversary in the event of an inadvertent disclosure."

"We are pleased that the First [Judicial] Department, like the trial court, recognized that our client should not have been forced to incur months of motion practice and legal fees to obtain a simple clawback," Bea said. "Defendants ran up the bill, and now they need to pay it."

Counsel for KrunchCash did not immediately respond to a request for comment Friday.

Justices Sallie Manzanet-Daniels, Barbara R. Kapnick, Llinét M. Rosado and Manuel J. Mendez sat on the panel for the First Judicial Department.

Pursuit is represented by Renee Bea, Evan Fried, Richard Weingarten and Kimberly Grinberg of Slarskey LLC.

KrunchCash is represented by Gabriel Berg of Robins Kaplan LLP and James M. Catterson of Pillsbury Winthrop Shaw Pittman LLP.

The case is Pursuit Credit Special Opportunity Fund LP v. KrunchCash LLC et al., case number 2023-04998, in the Supreme Court of the State of New York, Appellate Division, First Judicial Department.

--Additional reporting by Rachel Scharf and Jessica Corso. Editing by Dave Trumbore.

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