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<https://www.wsj.com/us-news/law/supreme-court-rejects-purdue-pharma-deal-to-shield-sackler-family-7870205a>

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Supreme Court Rejects Purdue Pharma Deal to Shield Sackler Family

Justices ruled that the Purdue Pharma owners can't use the drugmaker's bankruptcy to settle opioid lawsuits without plaintiff consent

By [Alexander Gladstone](#) [Follow](#) and [Jan Wolfe](#) [Follow](#)

Updated June 27, 2024 11:12 am ET



Purdue Pharma headquarters in Stamford, Conn. PHOTO: JOHN MOORE/GETTY IMAGES

WASHINGTON—The Supreme Court rejected a bankruptcy plan for OxyContin-maker Purdue Pharma that would have allocated billions of dollars from wealthy Sackler family members to combat opioid addiction in exchange for shielding them from civil lawsuits over their alleged role in fueling the drug epidemic.

The 5-4 decision marks a victory for the minority of opioid victims who voted to reject the settlement plan because they want to continue pressing lawsuits against the Sackler family members who own Purdue, and a loss for the majority of opioid victims and state and local governments who voted to accept it.

Justice Neil Gorsuch wrote for the court, joined by Justices Clarence Thomas, Samuel Alito, Amy Coney Barrett and Ketanji Brown Jackson. Justice Brett Kavanaugh filed a dissent, joined by Chief Justice John Roberts and Justices Sonia Sotomayor and Elena Kagan.

Thursday's ruling—among the highest-profile bankruptcy decisions ever from the high court—weakens the ability of corporations and their insiders to use bankruptcy to resolve mass litigation alleging they harmed consumers.

The court said that U.S. bankruptcy law doesn't allow for a release of the Sacklers' opioid-related liabilities without the consent of all the people who have legal claims against them. While the Sacklers themselves didn't file for bankruptcy or make all their assets available, they seek what amounts to a full discharge of their legal liabilities, the court said.

“The Sacklers seek greater relief than a bankruptcy discharge normally affords, for they hope to extinguish even claims for wrongful death and fraud, and they seek to do so without putting anything close to all their assets on the table,” Gorsuch wrote in a 20-page opinion. “Describe the relief the Sacklers seek how you will, nothing in the bankruptcy code contemplates (much less authorizes) it.”

The decision blocks a planned chapter 11 reorganization of Purdue that depends on a multibillion contribution from the Sacklers, who had required a full release of all opioid claims against them in return.



Protesters at Purdue Pharma headquarters in 2018. PHOTO: JESSICA HILL/ASSOCIATED PRESS

Kavanaugh, writing for the dissenters, said the decision “is wrong on the law and devastating for more than 100,000 opioid victims and their families.”

The majority, Kavanaugh said, “rewrites the text of the U.S. Bankruptcy Code and restricts the long-established authority of bankruptcy courts to fashion fair and equitable relief for mass-tort victims.”

Purdue introduced OxyContin in the late 1990s and made billions selling the prescription painkiller. By 2019, the closely held company was facing thousands of opioid lawsuits from individuals and governments and filed for chapter 11 protection—though members of the Sackler family didn’t file for bankruptcy themselves. By then, they had moved much of their wealth to offshore trusts largely beyond the reach of U.S. courts.

The Sacklers, who have owned a controlling share of Purdue since 1952, agreed in bankruptcy court to pay \$6 billion to settle civil claims that they pushed the company’s flagship drug on pain patients while playing down its addictive risks. Family members have denied wrongdoing in connection with their ownership of Purdue and said their settlement offer is the best way to get money to communities to combat addiction.

Under the chapter 11 reorganization plan for Purdue that was approved by a New York bankruptcy court in 2021, the Sacklers would release funds from their offshore trusts while ceding the company and its remaining assets to its creditors. Most of the money would go to state and local governments to fund opioid-related programs, while about \$750 million would be shared among roughly 130,000 individual opioid claimants.

Nearly all the claimants who voted on the bankruptcy plan agreed to accept the money in exchange for dropping potential claims against the Sacklers. In bankruptcy court, some individuals who lost loved ones to addiction said they hoped the settlement would provide some measure of compensation as well as help fund programs to prevent or mitigate opioid abuse.

But Purdue’s plan would require the small minority of claimants who objected to accept it anyway. It contains a provision that would provide immunity to the Sacklers for both ongoing and future civil opioid litigation for their conduct

related to Purdue, and is binding on all claimants, regardless of whether they voted for or against.

The minority who voted against the plan generally oppose this immunity provision, known as a “third-party release.” These dissenters generally view the money offered in the settlement—\$3,500 to \$48,000 per claim, minus legal fees—as insufficient to compensate them for injuries they or their loved ones blame on OxyContin, and they want to preserve their right to sue Sackler family members.

The Justice Department also emerged as a critic of Purdue’s plan, arguing that the release given to the Sacklers would illegally extinguish the rights of people who may want to pursue lawsuits in the civil justice system.

Last year the Justice Department’s Office of the U.S. Trustee, which monitors the nation’s bankruptcy courts, appealed to the Supreme Court, arguing that Purdue was giving the Sacklers “a release from liability that is of exceptional and unprecedented breadth.”

Allowing the plan to go forward “would leave in place a road map for wealthy corporations and individuals to misuse the bankruptcy system to avoid mass tort liability,” government lawyers said in a brief to the Supreme Court.

Since the Sacklers themselves never filed for bankruptcy and didn’t make all their assets available to creditors, the government argued they shouldn’t enjoy the powerful protections offered by the bankruptcy code.

Lawyers for Purdue argued that the third-party release is allowed under U.S. bankruptcy law and that eliminating the Sacklers’ civil liability related to the company was the only way to get them to agree to pay \$6 billion.

Purdue lawyer Gregory Garre said during December arguments before the Supreme Court that if the government succeeded in blocking the settlement, the billions of dollars it allocates for opioid abatement and compensation “will evaporate.”

“Creditors and victims will be left with nothing, and lives literally will be lost,” Garre said.

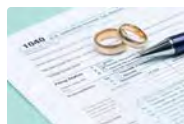
Purdue pleaded guilty in 2007 to a felony criminal charge of misbranding a drug with the intent to defraud or mislead. In 2020, the company again pleaded guilty to three felony counts related to illegal kickbacks and misrepresentations to the Drug Enforcement Administration. The Sacklers haven't faced criminal charges, though in 2020 they agreed to pay \$225 million in civil penalties to the federal government.

Write to Alexander Gladstone at alexander.gladstone@wsj.com and Jan Wolfe at jan.wolfe@wsj.com

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Supreme Court Opioid Ruling Upends Purdue Pharma Case, Bankruptcy Law

Published: Thu Jun 27 11:25:29 EDT 2024

By Noah Feldman

(Bloomberg Opinion) --

So much trouble

Photographer: Eric Baradat/AFP/Getty Images

In a surprising twist to America's ongoing opioid crisis, the Supreme Court has thrown out a legal settlement that would have paid billions of dollars to victims of over-prescription as well as all 50 state governments. Along the way, the court made it much harder than it has ever been before to settle large, complex mass tort cases with a bankruptcy agreement.

The court held that, while a bankrupt company like Purdue Pharma L.P. can be released from further liability under such a settlement, a bankruptcy settlement can't release non-company parties like the Sackler family, the owners of Purdue, from future liability. That substantially removes the incentive of such parties to agree to a settlement — a problem likely to occur in many similar situations in the future.

The 5-4 decision deviated from the more familiar ideological breakdown: Liberal Justice Ketanji Brown Jackson provided the fifth vote for a majority opinion by arch-conservative Justice Neil Gorsuch, while the dissent by Justice Brett Kavanaugh was joined by his fellow moderate conservative Chief Justice John Roberts as well as liberal justices Elena Kagan and Sonia Sotomayor.

The best explanation for the vote breakdown is that the four justices in dissent are all pragmatists. Without releases for parties like the Sackler family, the bankruptcy system can't resolve major mass tort cases. The five justices in the majority are all more formalistic or, in Jackson's case, idealistic.

Gorsuch wrote that the text of the bankruptcy code doesn't specifically allow the bankruptcy court to release parties like the Sacklers from future liability. The ruling leaves the Purdue case unsettled and would require a new law from Congress to fix both this situation and other future situations like it.

The legal issues in any major bankruptcy case are complicated, but the background and the basic issue before the court can be summarized with just a little oversimplification. Purdue, the maker of

OxyContin, got into serious trouble in 2007 when one of its affiliate companies was convicted criminally for misrepresenting the drug as less addictive and susceptible to abuse than other opioids. That led to thousands of lawsuits, each seeking to hold the company — and potentially its owners, the Sackler family — civilly liable for the opioid epidemic in which some 247,000 people lost their lives from overdoses over 20 years.

As the lawsuits mounted, the Sackler family took about \$11 billion out of the company, and then the company filed for bankruptcy. In the proposed settlement, Purdue's creditors, including people and states that had damage claims against the company, were going to be paid the money that was still in the company plus another approximately \$4.3 billion that the family agreed to put into the kitty.

It's normal that in a bankruptcy settlement, the creditors can't get any more money from the bankrupt company than the parties have agreed to. In order to sign on the dotted line, the Sacklers demanded the same protection for the family: They would pay the \$4.3 billion and give up their company, but that was supposed to be it. Without such a guarantee, the Sacklers had little incentive to settle, because they could be sued in the future by other parties outside the bankruptcy agreement. All 50 state attorneys general had agreed to the deal, as did most, but not all of the individuals with damage claims against Purdue and the Sacklers.

Enter textualism, the theory of statutory interpretation that says all that matters is the words of the law. In this theory, the purpose of the law is irrelevant to its application and courts shouldn't pay attention to the consequences of their rulings.

The rhetoric of Gorsuch's opinion pointed to the implicit injustice of the Sackler family not ceding all the money it took out of Purdue before the bankruptcy. But the core of the opinion reasoned that the Sacklers, who have not themselves declared bankruptcy, cannot benefit from the guarantees a bankruptcy court can give because the Bankruptcy Act doesn't say so. This was an exercise in textualism's stubborn refusal to consider that the whole point of the law — here, bankruptcy law — is to help address real-world problems.

As it turns out, there is a paragraph in the bankruptcy statute that says a bankruptcy plan may "include any other appropriate provision not inconsistent with the applicable provisions" of the law. The US Court of Appeals for the Second Circuit thought this language was broad enough to cover the guarantee the Sacklers wanted.

And Kavanaugh's dissent, which called the bankruptcy plan in this case "a shining example of the bankruptcy system at work," agreed. The majority opinion, Kavanaugh went on, "makes little legal, practical, or economic sense." That language is the hallmark of pragmatism, the idea that the best measure of law is whether it works in practice.

It's noteworthy that Jackson cast the deciding vote to tip the scales in favor of Gorsuch's opinion. Maybe she was influenced by the apparent injustice of the Sackler family not having to declare bankruptcy and staying rich, if not as rich as they were before. Jackson is not usually a textualist. But she is emerging as an idealist, one who thinks the court should do the right thing by her lights, not compromise in order to keep the wheels of the legal system spinning so the business can proceed as usual.

With her vote, the majority has now taken the bankruptcy system into uncharted territory with respect to resolving mass torts. The system may grind to a halt unless Congress steps in.

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To contact the author of this story:

Noah Feldman at nfeldman7@bloomberg.net

To contact the editor responsible for this story:

Sarah Green Carmichael at sgreencarmic@bloomberg.net

Massive bankruptcy plan to end OxyContin lawsuits rejected by U.S. Supreme Court

 legalnewsline.com/stories/661322219-massive-bankruptcy-plan-to-end-oxycontin-lawsuits-rejected-by-u-s-supreme-court

June 27, 2024

Gorsuch | <https://www.supremecourt.gov/>

WASHINGTON (Legal Newsline) - A split U.S. Supreme Court has invalidated the bankruptcy plan of OxyContin-maker Purdue Pharma, which hoped to resolve crushing opioid litigation with a multibillion-dollar plan funded partly by former owners the Sackler family.

Finding it lacked the consent of affected claimants, Justice Neil Gorsuch wrote for the 5-4 majority that the Sacklers' plan led to vast numbers of existing and potential claims being wiped away without placing "anything approaching their total assets on the table for their creditors."

Purdue Pharma filed for bankruptcy in 2019 as lawsuits by state and local governments, individuals, Native American tribes, hospitals, unions and others for pushing sales of OxyContin and majorly contributing the nation's addiction crisis.

The plan originally would have had the Sackler family paying \$4.5 billion over a decade and relinquishing ownership of the company, which would be reorganized into a new company. The plan also created a fund that would have paid some drug addiction victims anywhere between \$3,500 and \$48,000.

A discharge in the plan sought to end the growing number of lawsuits against the Sacklers by ending current lawsuits and preventing future ones.

"And it proposed to end all these lawsuits without the consent of the opioid victims who brought them," Gorsuch wrote, in a statement disputed by the four dissenting justices.

In bankruptcy, creditors are invited to vote on reorganization plans. But in the Sacklers' case, less than 20% participated, while thousands of opioid victims voted against it.

Objections came from eight states, D.C., and cities in Canada, among others. The plan was confirmed by the bankruptcy judge, rejected by a district judge, then confirmed again by the Second Circuit. That led to the appeal to the U.S. Supreme Court.

It is noted that SCOTUS's ruling could unravel Purdue Pharma's reorganization plan entirely and send the company and the Sacklers to open court to battle claims.

"As the people's elected representatives, Members of Congress enjoy the power, consistent with the Constitution, to make policy judgments about the proper scope of a bankruptcy discharge," Gorsuch wrote.

"Someday, Congress may choose to add to the bankruptcy code special rules for opioid-related bankruptcies as it has for asbestos-related cases. Or it may choose not to do so.

"Either way, if a policy decision like that is to be made, it is for Congress to make. Despite the misimpression left by today's dissent, our only proper task is to interpret and apply the law as we find it; and nothing in present law authorizes the Sackler discharge."

Clarence Thomas, Amy Coney Barrett, Samuel Alito and Ketanji Brown Jackson voted with Gorsuch.

Justice Brett Kavanaugh wrote a dissenting opinion, joined by John Roberts, Sonia Sotomayor and Elena Kagan. He said the decision was "wrong on the law and devastating for more than 100,000 opioid victims.

Citing additional payments from the Sacklers to get the plan approved, Kavanaugh said the plan guaranteed compensation to more than 100,000 opioid victims while providing funding for treatment programs.

"The plan was a shining example of the bankruptcy system at work," he wrote. "Not surprisingly, therefore, virtually all of the opioid victims and creditors in this case fervently support approval of Purdue's bankruptcy plan. And all 50 state attorneys general have signed on to the plan - a rare consensus."

Bankruptcy law allows the release of victims and creditors' claims without their consent against a bankrupt company, he said.

"Yet the Court today says that a plan can never release victims' and creditors' claims against non-debtor officers and directors of the company - here, against the Sacklers," Kavanaugh wrote.

ORGANIZATIONS IN THIS STORY

U.S. Supreme Court

Bloomberg Law News 2024-06-27T11:43:23172719855-04:00

Supreme Court Ends OxyContin Settlement, Cracking Sackler Shield

By Greg Stohr2024-06-27T11:33:18103-04:00

The US Supreme Court tossed Purdue Pharma LP's \$6 billion opioid settlement, nixing a deal that would have funded opioid epidemic relief efforts in exchange for protecting the company's billionaire owners from lawsuits alleging they helped fuel the addiction crisis.

The 5-4 [ruling](#) opens a new chapter of uncertainty for Purdue by ruling that the accord would improperly shield its owners, members of the billionaire Sackler family. They had agreed to give up ownership of the company — the maker of painkiller OxyContin — and pay as much as \$6 billion.

More broadly, the ruling upends a key tool used by bankrupt companies to settle lawsuits spawned by harmful or toxic products. The tool, known as a non-consensual third-party release, forces holdout plaintiffs to settle with companies if an agreement has support from most of the victims. A Justice Department unit monitoring bankruptcy courts opposed the Sackler settlement, arguing such mechanisms are unlawful.

Congress authorized similar maneuvers decades ago in bankruptcies related to asbestos lawsuits. Over time, though, lawyers and judges have used the approach to address an array of corporate wrongdoing. Similar deals have ended mass litigation over dangerous products and waves of sex abuse claims against Catholic dioceses, the Boy Scouts of America and USA Gymnastics.

"Someday, Congress may choose to add to the bankruptcy code special rules for opioid-related bankruptcies as it has for asbestos-related cases," Justice Neil Gorsuch wrote for the majority. "Or it may choose not to do so. Either way, if a policy decision like that is to be made, it is for Congress to make."

Purdue's settlement won overwhelming support from opioid crisis victims who voted on it. But a vocal contingent remained bitterly opposed to letting Purdue's billionaire owners put the lawsuits behind them.

Proponents have said victims won't get more money from the Sacklers by taking them to trial; the Justice Department has said ending the settlement could force the owners to shell out more money for victims. Members of the Sackler family have denied wrongdoing and said the settlement avoids expensive litigation that may not succeed.

In dissent, Justice Brett Kavanaugh said Thursday's decision is devastating for more than 100,000 opioid victims and their families.

"Opioid victims and other future victims of mass torts will suffer greatly in the wake of today's unfortunate and destabilizing decision," Kavanaugh said. "Only Congress can fix the chaos that will now ensue."

Chief Justice John Roberts and Justices Sonia Sotomayor and Elena Kagan joined Kavanaugh's dissenting opinion.

Purdue said after the ruling that the company will reach back out to its creditors "and renew our pursuit of a resolution that delivers billions of dollars of value for opioid abatement and allows the company to emerge from bankruptcy."

The company said it is continuing to operate without interruption to its business.

During arguments in December, lawyers representing Purdue and the largest group of victims each said the company could be forced to liquidate if the settlement is invalidated. A Justice Department lawyer said the sides could return to the negotiating table to hammer out a deal that doesn't force objectors to give up their claims against the Sacklers.

The Justice Department contended federal bankruptcy courts lack power to insulate the Sacklers from lawsuits since they haven't filed for protection themselves.

The Supreme Court in August halted implementation of the settlement while the justices heard the appeal.

Representatives for members of the Sackler family didn't immediately respond to requests for comment Thursday.

The case is *Harrington v. Purdue Pharma*, 23-124.

(Updates with additional details throughout.)

To contact the reporters on this story:

Jonathan Randles in New York at jrandles5@bloomberg.net;

Greg Stohr in Washington at gstohr@bloomberg.net

To contact the editors responsible for this story:

Elizabeth Wasserman at ewasserman2@bloomberg.net

Jeremy Hill

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Purdue Pharma LP

US Supreme Court rejects plan to shield Sacklers in Purdue bankruptcy

Members of OxyContin maker's founding family had fought to uphold protections from \$6bn opioid bankruptcy settlement



The maker of OxyContin, Purdue Pharma, filed for bankruptcy in 2019 © Reuters

Stefania Palma in Washington and **Sujeet Indap** and **Amelia Pollard** in New York 2 HOURS AGO



The US Supreme Court has invalidated a measure in Purdue Pharma's bankruptcy that would shield members of the company's founding Sackler family from future civil liability in exchange for a \$6bn contribution, in a closely watched case involving the maker of the opioid OxyContin.

The Department of Justice had sought to invalidate the comprehensive liability releases granted to the Sacklers, ruling that they could not get the benefits of the bankruptcy code without filing for bankruptcy themselves, unless potential creditors agreed to the arrangement. The Supreme Court on Thursday agreed in a closely divided 5-4 ruling in the case, *Harrington vs Purdue Pharma*.

"[N]othing in present law authorises the Sackler discharge," the majority opinion said. Neil Gorsuch wrote the majority opinion, joined by Justices Clarence Thomas, Samuel Alito, Amy Coney Barrett and Ketanji Brown Jackson.

Purdue, which had filed for federal bankruptcy protection in 2019, struck a deal with tens of thousands of victims of the opioid crisis as well as dozens of states and municipalities after lengthy negotiations.

According to the terms, the Sackler family would contribute up to \$6bn to fund opioid abatement programmes and make direct payments to victims. But the family insisted that the deal ended forever any litigation against them.

The company had told the court that virtually every creditor had signed on to the deal and that if settlement was upended, victim compensation would be delayed by years while a new deal was struck by Purdue and the founding family.

“Opioid victims and other future victims of mass torts will suffer greatly in the wake of today’s unfortunate and destabilising decision,” Justice Brett Kavanaugh wrote in dissent, which was joined by Chief Justice John Roberts and Justices Sonia Sotomayor and Elena Kagan. “Only Congress can fix the chaos that will now ensue.”

So-called “non-debtor” third-party releases have been used by US bankruptcy lawyers as a bargaining chip in recent years: if an entity can meaningfully improve creditor recoveries, their potential liabilities could be extinguished in exchange, even if they are not in bankruptcy themselves.

Companies such as Purdue and organisations like Boy Scouts of America that face a mountain of product liability or misconduct lawsuits have turned to US bankruptcy courts to streamline settlement payments, but often in deals that rely on shielding individuals or other entities.

Bankruptcy judges had initially extended special powers granted to them by Congress in asbestos bankruptcies to grant releases for other kinds of companies, a practice the Supreme Court has now rejected.

“In each of these ways, the Sacklers seek to pay less than the code ordinarily requires and receive more than it normally permits,” Gorsuch wrote for the majority. “Contrary to the dissent’s suggestion, plan proponents cannot evade these limitations simply by rebranding their discharge a ‘release’.”

However, the high court’s majority stressed that its decision was a “narrow one” that did not “call into question consensual third-party releases offered in connection with a bankruptcy reorganisation plan”, where every creditor signs on to a restructuring plan that wipes future liability for alleged wrongdoers.

Purdue could now ask the Sacklers to increase their contribution to the settlement in order to secure approval from a handful of holdout creditors.

“There’s going to be chaos until parties figure out how to address the linchpin issue,” said Samir Parikh, a law professor at Wake Forest University, referring to the consequences of ending the practice of non-consensual releases in Chapter 11 bankruptcies.

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Supreme Court blocks Purdue Pharma opioid settlement, threatening billions of dollars for victims

 [nbcnews.com/politics/supreme-court/supreme-court-blocks-purdue-pharma-opioid-settlement-rcna139066](https://www.nbcnews.com/politics/supreme-court/supreme-court-blocks-purdue-pharma-opioid-settlement-rcna139066)

WASHINGTON — The Supreme Court on Thursday blew up the massive bankruptcy reorganization of opioid maker Purdue Pharma, finding that the settlement inappropriately included legal protections for the Sackler family, meaning that billions of dollars secured for victims is now threatened.

The court on a 5-4 vote on nonideological lines ruled that the bankruptcy court did not have the authority to release the Sackler family members from legal claims made by opioid victims.

As part of the deal, the family, which controlled the company, had agreed to pay \$6 billion that could be used to settle opioid-related claims, but only in return for a complete release from any liability in future cases.



A pharmacist holds
prescription painkiller
OxyContin, made by
Purdue Pharma, at a local
pharmacy in Provo, Utah,
on April 25. George Frey /
Reuters file

Justice Neil Gorsuch, writing for the majority, said the Sacklers could have declared bankruptcy but instead sought to piggyback on the company's own bankruptcy proceedings in an effort to resolve pending legal claims.

"They obtained all this without securing the consent of those affected or placing anything approaching their total assets on the table for their creditors," Gorsuch wrote.

"Nothing in present law authorizes the Sackler discharge," he added.

Recommended

Justice Brett Kavanaugh dissented, citing the impact of the decision on those who would benefit from the settlement.

"Today's decision is wrong on the law and devastating to the more than 100,000 opioid victims and their families," he wrote.

As a result of the ruling, "opioid victims are now deprived of the substantial monetary recovery that they long fought for and finally secured after years of litigation," he added.

The ruling means settlement talks would have to begin again, with the possibility of no deal being reached.

Purdue Pharma described the ruling as "heart-crushing" because of the impact on victims, but pledged to move forward with efforts to negotiate a new settlement.

"The decision does nothing to deter us from the twin goals of using settlement dollars for opioid abatement and turning the company into an engine for good," the statement said.

A statement issued by members of the Sackler family said they "remain hopeful about reaching a resolution that provides substantial resources to help combat a complex public health crisis."

"While we are confident that we would prevail in any future litigation given the profound misrepresentations about our families and the opioid crisis, we continue to believe that a swift negotiated agreement to provide billions of dollars for people and communities in need is the best way forward," they added.

During oral arguments in December, a lawyer representing some of the victims told the justices that there was "no viable path" to victims receiving compensation if the deal including the Sackler agreement was not upheld.

The case drew further attention to the lingering effects of the opioid crisis and the role that Sackler-owned Purdue played in creating it.

As part of the proposed deal, which the Supreme Court put on hold last year when it took up the case, the Sackler family had agreed to pay around \$6 billion that could be used to settle opioid-related claims, but only in return for a complete release from any liability in future cases.

The settlement, including assets held by Purdue, would be worth significantly more, with the reorganized company set to dedicate itself to tackling the impact of opioid abuse.

No Sacklers have had any involvement in the company since 2019.

Purdue made billions from OxyContin, a widely available painkiller that fueled the opioid epidemic. The company's tactics in aggressively marketing the drug came under increasing scrutiny as thousands of people died from opioid overdoses.

As the company's fortunes nosedived, it sought bankruptcy protection, but the Sackler family members did not. Instead, they negotiated a separate deal with Purdue and plaintiffs in pending lawsuits that would allow the company to reinvent itself to address the opioid crisis.

The New York-based 2nd Circuit U.S. Court of Appeals last year approved the plan over the objection of William Harrington, the U.S. government trustee monitoring the bankruptcy. The Justice Department's trustee program is aimed at ensuring that the bankruptcy system operates as required under law.

Harrington objected to the release of additional claims against the Sacklers, saying it would be unfair to potential future plaintiffs.

Purdue criticized Harrington's role, saying that groups representing thousands of plaintiffs have signed on to the settlement, which could not have happened without the Sackler family contribution.

At the Supreme Court, various groups representing plaintiffs backed Purdue, including one that includes 1,300 cities, counties and other municipalities and another representing 60,000 people affected by the opioid epidemic.

Canadian municipalities and Indigenous First Nations were among those objecting to the settlement.

Purdue flourished under brothers Mortimer and Raymond Sackler, who died in 2010 and 2017, respectively. The family reaped billions and spent lavishly, including on splashy charitable projects.

The family told the Supreme Court that it continues to back the settlement.

In a brief filed on behalf of the relatives of Mortimer Sackler, most of whom are based overseas, lawyers warned of "significant litigation costs and risks" in seeking to enforce any foreign court judgments against the family if the settlement were thrown out.



Lawrence Hurley

Lawrence Hurley covers the Supreme Court for NBC News.

Sackler family immunity shield nixed by Supreme Court, thwarting \$6 billion opioid settlement

[courthousenews.com/sackler-family-immunity-shield-nixed-by-supreme-court-thwarting-6-billion-opioid-settlement](https://www.courthousenews.com/sackler-family-immunity-shield-nixed-by-supreme-court-thwarting-6-billion-opioid-settlement/)

Kelsey Reichmann



Jen Trejo from California holds a sign that reads "SACKLERS KILLED MY SON" during a protest with other advocates for opioid victims outside the Department of Justice, Dec. 3, 2021, in Washington.

Trejo's son Christopher was 32 when he died. A federal judge has rejected OxyContin maker Purdue Pharma's sweeping deal to settle thousands of lawsuits over the toll of opioids. U.S. District Court Judge Colleen McMahon in New York found flaws in the way the bankruptcy settlement protects members of the Sackler family who own the company from lawsuits. (AP Photo/Carolyn Kaster)

WASHINGTON (CN) — The Supreme Court on Thursday set fire to the Sackler family's \$6 billion opioid settlement, allowing the government to object to the deal over an immunity provision.

Members of the wealthy family helmed OxyContin maker Purdue Pharma as it entered infamy for aggressively marketing opioid painkillers, sparking an epidemic credited with the deaths of over 700,000 Americans — 300,000 from prescription opioid overdoses alone.

Purdue and the Sacklers faced thousands of lawsuits on claims they pushed the painkiller on patients. Victims of opioid overdoses, local governments, Native American tribes, and several states sought over \$40 trillion from the company and family.

The company filed for bankruptcy, agreeing to a settlement that turned Purdue into a public-benefits company focused on opioid abatement. Purdue's remaining assets would go towards compensating victims and the communities hit hardest by opioid addiction.

But the Sackler family did not file for bankruptcy, instead agreeing to a \$6 billion deal that gave them immunity from future lawsuits. Although the family handed over a hefty sum to tackle opioid abatement, the government claimed victims are owed much more.

In a briefing before the court, the government accused the Sacklers of a “milking” scheme that removed \$11 billion from Purdue’s profits into private trusts and holding companies. The Sacklers argued 40% of these funds went toward mandatory taxes.

The government said the scheme devalued the company ahead of bankruptcy proceedings. By including an immunity provision within the bankruptcy settlement, the government said the Sacklers further shielded these funds from accountability.

Under the settlement, individual victims and families could receive anywhere between \$3,500 and \$48,000 and tribes, cities and states would get billions. But anyone who did not sign onto the deal — or any future victims — would be prevented from suing the Sacklers

By upholding nonconsensual releases from future lawsuits, the government claimed the lower court deprived these individuals of their rights.

Purdue argued that the settlement was the best option to help the most people. The company said one lawsuit could drain available funds, but under the settlement, all the plaintiffs got a piece of the pie.

This is a developing story and will be updated.

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Rite Aid seeks bankruptcy court approval to cut \$2 billion debt

 [reuters.com/business/healthcare-pharmaceuticals/rite-aid-seeks-bankruptcy-court-approval-cut-2-billion-debt-2024-06-27](https://www.reuters.com/business/healthcare-pharmaceuticals/rite-aid-seeks-bankruptcy-court-approval-cut-2-billion-debt-2024-06-27)

Dietrich Knauth

A Rite Aid store at 1841 North Western Avenue is shown at in Los Angeles, California, U.S., January 21, 2020. REUTERS/Mike Blake/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, June 27 (Reuters) - Rite Aid will ask a U.S. bankruptcy court to approve its restructuring plan on Thursday, seeking to cut \$2 billion in debt and turn over control of the company to a group of its lenders.

One of the largest U.S. pharmacy chains, Rite Aid has said in court filings that the restructuring is the best way to pay its creditors and emerge from bankruptcy. It will ask U.S. Bankruptcy Judge Michael Kaplan to sign off on its Chapter 11 plan at a court hearing in Trenton, New Jersey.

Rite Aid used its bankruptcy to close hundreds of stores, sell its pharmacy benefit company Elixir, and negotiate settlements with its lenders, drug distribution partner McKesson, and other creditors, including individuals and governments that have sued it for allegedly contributing to the deadly U.S. opioid epidemic.

If the bankruptcy plan is approved, Rite Aid will emerge from Chapter 11 under the ownership of a group of lenders including investment funds Brigade Capital and HG Vora.

Rite Aid's restructuring would provide \$47.5 million to junior creditors, including individuals and local governments that have sued the company over its opioid sales.

Before it filed for bankruptcy, Rite Aid faced 1,600 opioid lawsuits, including one by the federal government alleging that the company ignored red flags when filling suspicious prescriptions for addictive opioid pain drugs.

Rite Aid's bankruptcy proposal still faces several objections from its insurers, the state of Maryland, and certain opioid claimants, all of which focus on the pharmacy chain's treatment of the opioid lawsuits.

Maryland and some opioid claimants argue that Rite Aid should not be able to pay off certain of its lenders while sweeping opioid lawsuits under the rug, and the insurers say Rite Aid is leaving them on the hook for future opioid litigation.

Kaplan will consider those objections before ruling on the bankruptcy plan.

The company stumbled under its high debt, revenue declines, increased competition, and opioid litigation, according to its court filings. It filed for bankruptcy in October 2023, after reporting \$750 million in losses and \$24 billion in revenue for the past fiscal year.

Rite Aid, which operated 2,000 pharmacies at the time of its bankruptcy, expects to emerge from Chapter 11 with a smaller retail footprint. It closed nearly 600 locations since filing for bankruptcy, including all of its locations in Ohio and Michigan.

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Reporting by Dietrich Knauth, Editing by Alexia Garamfalvi and Bill Berkrot

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Judges' Antitrust Scrutiny Grows With Nixed Visa-Mastercard Deal

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A \$30 billion settlement between Visa Inc., Mastercard Inc. and retailers to cap credit-card swipe fees is the latest antitrust deal to be shut down by a judge, underscoring the high standards courts use to ensure fair compensation for plaintiffs.

The Tuesday decision from Judge Margo Brodie of the US District Court for the Eastern District of New York thwarts a proposal sharply criticized by many merchants saying the settlement, despite its hefty dollar figure, didn't go far enough to impose systemic changes to the way Visa and Mastercard operate, especially with small businesses.

The judge's refusal to sign off on what appeared to be a substantial monetary win for retailers that accept Visa or Mastercard debit or credit cards as payment is among a string of recent court findings criticizing antitrust settlements, showcasing judges' increasing skepticism over whether plaintiffs are fairly compensated.

Brodie wasn't convinced the settlement was sufficient in light of the claims, Steig Olson, attorney with Quinn Emanuel Urquhart & Sullivan LLP, said.

"It's not like the judge is saying, 'This is close,'" Olson said. "My read of the court is that she thinks these cases are ready for trial."

While a trial could be on the horizon, Visa and Mastercard may also try to rework the deal with the knowledge that their \$30 billion attempt—which didn't impose a permanent cap on the fees—fell short. Brodie ordered the parties to confer and respond to the ruling by June 28.

Convincing the Judges

Brodie's decision comes after a series of similar rulings rejecting companies' proposals to resolve antitrust litigation.

Judge James Donato in California rejected a \$700 million settlement brokered by Alphabet Inc.'s Google and state attorneys general over the Google Play app in March. He was unsatisfied with the deal's proposed payout to consumers and how it would essentially release the Google Play Store from any legal claims for the next seven years.

Another federal judge this week denied deals worth \$38.5 million in a case accusing Formosa Plastics Corp., Westlake Chemical Corp. and other defendants of price-fixing. And a Nevada federal judge voiced concerns this month over some aspects of the Ultimate

Fighting Championship's \$335 million settlement with fighters pursuing suppressed wages claims. Judge Richard Boulware will hold a hearing on the UFC case July 12.

"Judges are looking at settlements and expecting them to provide real relief," said Christine Bartholomew, a law professor at the University at Buffalo.

"Any settlement [with Visa and Mastercard] that is going to pass muster before a court is going to have to show a significant impact on the actual fees, and it can't just be for a limited duration," she added.

Bartholomew and others weren't surprised the proposed swipe fee deal tanked, saying merchants long complained it didn't go far enough largely because nothing stands in the way of the companies raising the fees again. The deal would cap swipe fees for five years, during which time Visa and Mastercard can't go above rates that existed at the end of 2023.

"The terms of the settlement were going to be somewhat of an uphill battle," Bartholomew said.

The judge raised concerns at a June 13 hearing on the proposed settlement, saying she was "troubled" by the deal and that "nothing that I've heard today has changed my mind that, in fact, this settlement should be approved."

The credit card companies had previously said they were disappointed by the judge's stated intention to reject the deal.

Visa and Mastercard might try to renegotiate the deal with disgruntled merchants, said George A. Hay, professor of law and economics at Cornell Law School and who previously served as director of economics at the Justice Department's Antitrust Division.

"They will go back and talk to the merchants who complained and say, 'What can we do to make this right?' How can we sweeten the pot?" Hay said. "The alternative is to say 'OK, we'll litigate.' I don't think anybody wants to litigate the whole thing."

Brodie's decision received praise from the Merchants Payments Coalition, a Washington, D.C.,-based group of retailers advocating for competition in the payments market that believes the deal would have been bad for small business merchants and their customers.

"We're glad to see that the judge recognized the inadequacies of the settlement," said Doug Kantor, member of the coalition's executive committee. "There is really no relief from the central claims of the case. It didn't change the central tenets of how Visa and Mastercard do business."

The case is *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, E.D.N.Y., No. 1:05-md-01720, 6/25/24 .

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Securities Law News

June 26, 2024, 2:18 PM PDT

Robinhood Wins as 11th Cir. Affirms 'Meme Stock' Suit Dismissal

By Katie Arcieri

- Robinhood, Citadel accused of agreement to freeze stocks
- Lower court dismissed the suit for failure to state claim

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Robinhood Wins as 11th Cir. Affirms 'Meme Stock' Suit Dismissal

By Katie Arcieri 2024-06-26T17:18:16000-04:00

- Robinhood, Citadel accused of agreement to freeze stocks
- Lower court dismissed the suit for failure to state claim

Financial trading platform Robinhood Markets Inc. prevailed in a suit alleging it agreed to freeze trades of highly shorted GameStop stock options after the 11th Circuit affirmed a lower court's dismissal of the case.

The US Court of Appeals for the 11th Circuit in a Wednesday opinion held that investor plaintiffs failed to plausibly allege an unreasonable restraint of trade because they didn't allege harm to a relevant market.

The case hands a win to Robinhood, which has faced several legal challenges around the "short squeeze" in early 2021, when stocks rose sharply and distressed short positions.

Plaintiffs had alleged harm in two markets— one consisting of companies that pay brokerage firms to route their clients' trades to firms like global market maker Citadel as well as the "no-fee" brokerage market where Robinhood competes.

"While reduced stock price and supply of the relevant securities may be a cognizable injury, plaintiffs have not connected that injury to anticompetitive effects in either of their defined relevant markets," the appellate court said.

Investor plaintiffs had sued Robinhood with antitrust claims that it and Citadel formed an illegal agreement to freeze trades of highly shorted GameStop stock options and other “meme” stocks—including AMC Entertainment Holdings Inc. and Bed Bath & Beyond Inc.—bought by retail investors during a social media-fueled trading frenzy. The alleged agreement forced investors to sell at a loss, but allowed Citadel to recoup its massive short positions.

In 2022, Chief Judge Cecilia Altonaga of the US District Court for the Southern District of Florida dismissed the plaintiffs’ amended complaint, stating it failed to plausibly allege that Robinhood and Citadel froze trading through an illegal agreement. The plaintiffs appealed the decision to the 11th Circuit.

Lucas Moskowitz, general counsel for Robinhood Markets Inc., said he the company stands by its actions and is “pleased with the court’s decision “affirming the dismissal of this baseless lawsuit.

The plaintiffs are represented by firms including Joseph Saveri Law Firm, LLP, Brannock Berman & Seider, and Hach Rose Schirripa & Cheverie LLP. Robinhood is represented by law firms including Cravath, Swaine & Moore LLP and Farella Braun & Martel LLP.

The case is Angel Guzman, et al v. Robinhood Markets, Inc , 11th Cir., No. 22-11873, 6/26/24 .

To contact the reporter on this story: Katie Arcieri in Washington at karcieri@bloombergindustry.com

To contact the editor responsible for this story: Catalina Camia at ccamia@bloombergindustry.com

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June 26, 2024, 5:20 AM PDT

Nova Southeastern Retirement Plan Fee Lawsuit Gets Class Status

By Jacklyn Wille

- University retirement plan covered about 6,300 people in 2021
- Case challenges 11th Cir.'s unusual approach to ERISA disputes

Bloomberg Law News 2024-06-27T09:34:35072872761-04:00**Nova Southeastern Retirement Plan Fee Lawsuit Gets Class Status****By Jacklyn Wille 2024-06-26T08:20:44000-04:00**

- University retirement plan covered about 6,300 people in 2021
- Case challenges 11th Cir.'s unusual approach to ERISA disputes

Litigation over Nova Southeastern University Inc.'s retirement plan fees and investment options will cover a certified class of thousands of people after a Florida federal judge blessed the parties' agreement.

Judge William P. Dimitrouleas on Tuesday certified a class covering all Nova retirement plan participants and beneficiaries since June 2016. His order comes five days after the parties said in a court filing that they'd reached an agreement on class certification.

The lawsuit says Nova's plan, which covered about 6,300 people and held more than \$430 million as of 2021, offers poorly performing and expensive investments while overpaying for administrative services. Dimitrouleas last year declined to give Nova an early win in the case, calling the school's motion for summary judgment "premature."

Unique Approach

The case, which is pending in the US District Court for the Southern District of Florida, could present an opportunity for the US Court of Appeals for the Eleventh Circuit to examine its unusual approach to administrative exhaustion in cases filed under the Employee Retirement Income Security Act.

Nova recently sought permission to appeal a court order declining to limit the scope of discovery allowed to take place in the case's early stages. Nova had argued that only discovery into its potential conflicts of interest was appropriate, but the court disagreed, saying instead that the plaintiffs could "inquire as to the rationales and justifications underlying the decisions at issue."

Nova wants this order to get immediate review in the Eleventh Circuit, given the circuit's distinct approach to ERISA litigation. Unlike other appeals courts, the Eleventh Circuit requires plaintiffs alleging statutory violations on behalf of a proposed class to exhaust their internal remedies before going to court—a requirement typically reserved for individual lawsuits challenging benefit denials.

The purpose of this requirement is to produce an administrative record for the presiding judge to review, according to Nova. Allowing wide-ranging discovery beyond what's allowed in an individual benefits lawsuit would undercut that goal, the school said.

The Labor Department recently called on the Eleventh Circuit to disavow its "unique" approach to administrative exhaustion, which the department says "has no basis in ERISA's text, its purposes, or sound policy."

Jackson Lewis PC and Panza, Maurer & Maynard PA represent Rzepkoski. Wenzel Fenton Cabassa PA and Michael McKay of Scottsdale, Ariz., represent the plan participants.

The case is Rzepkoski v. Nova Se. Univ., Inc. , S.D. Fla., No. 0:22-cv-61147, 6/25/24 .

To contact the reporter on this story: Jacklyn Wille in Washington at jwille@bloomberglaw.com

To contact the editor responsible for this story: Drew Singer at dsinger@bloombergindustry.com

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Probe Finds Byju's Failed Investors But Didn't Commit Fraud (1)

By Anto Antony and Sankalp Phartiyal

- Inspectors find no evidence of fraud or accounting malpractice
- Yet firm's broader problems remain as it tries to bounce back

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Probe Finds Byju's Failed Investors But Didn't Commit Fraud (1)

By Anto Antony and Sankalp Phartiyal2024-06-26T14:23:09984-04:00

- Inspectors find no evidence of fraud or accounting malpractice
- Yet firm's broader problems remain as it tries to bounce back

An India government investigation found lapses in the corporate governance of Byju's, but cleared the struggling online-education startup of financial fraud.

The yearlong probe by the Ministry of Corporate Affairs found no evidence of wrongdoing such as siphoning of funds or manipulation of financial accounts, people familiar with the matter said. Still, it discovered governance shortcomings that contributed to the startup's mounting losses, the people said, asking not to be named as the investigators' report isn't public yet.

The findings offer some support for once-celebrated founder **Byju Raveendran**, who's been accused of mismanagement by disgruntled investors. Three shareholders including Prosus Ventures and Peak XV Partners, formerly Sequoia Capital India, left the board of Byju's last year over differences with Raveendran on issues such as business processes and internal controls. The report also ends, at least temporarily, the possibility of any new scrutiny on the company by Indian officials on issues already probed.

Byju's, Peak XV and Prosus didn't respond to requests for comment.

The Ministry of Corporate Affairs denied that the company had been cleared of financial fraud and said media reports stating the opposite are "incorrect and misleading."

The proceedings are “still on going and no final conclusion should be drawn in this matter at this stage,” the ministry said in a statement late Wednesday.

The report doesn't directly address whether Raveendran personally is at fault for the governance lapses or whether he is qualified to run the company. The disgruntled investors have sought his removal, citing management and compliance failures.

The report also does little to stave off the company's broader problems. The unprofitable startup's quick expansion led to a cash crunch and a plunge in its valuation, and it's now fighting multiple lawsuits in India and the US.

The probe found that weak corporate governance and compliance practices, along with a change in the funding environment, contributed to its ballooning losses, the people said. Investigators also concluded that that startup failed to bring in professionals to oversee finances and compliance, which led to the losses, the people said.

The report establishes that Byju's didn't disclose full details of acquisitions with all directors and that meetings to approve such deals were called at short notice. But it acknowledges the founders' rationale that some directors were also investors at rival companies, according to the people.

Read More: Prosus Writes Off Investment in Indian Edtech Startup Byju's

The ed-tech company was valued at \$22 billion at its peak. Business surged during the two years of the Covid-19 pandemic but as infections subsided and classrooms resumed, its cash pile shrunk. It's now battling several bankruptcy cases in India and overseas. Though Byju's has managed to raise more than \$100 million from existing investors through a fresh issuance of shares, an Indian court has barred it from using that money.

As former teacher Raveendran struggles to rebuild his company's core business, he's also seeking to leverage the next big bandwagon in education: generative artificial intelligence for so-called hyper-personalized learning for every student according to their needs. He's also been pulling all stops in his fight to keep the company afloat and to ease financial pressures, including raising personal debt.

(Updates with ministry's comment from fifth paragraph)

--With assistance from **Peter Elstrom**.

To contact the reporters on this story:

Anto Antony in Mumbai at aantony1@bloomberg.net;

Sankalp Phartiyal in New Delhi at sphartiyal@bloomberg.net

To contact the editors responsible for this story:

Edwin Chan at echan273@bloomberg.net

Ville Heiskanen, Jeanette Rodrigues



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NEWS

Billing Rate Hikes 'Not Slowing Down,' With Pricing Surges Expected in 2024

About 86% of large firms in the U.S. and U.K. expect to increase billing rates over the next 12 months, according to new survey results.

June 26, 2024 at 03:00 PM

Lawyer Rates and Arrangements



Andrew Maloney
Editorial



The original version of this story was published on [The American Lawyer](#)

What You Need to Know

- New survey results show 86% of large firms in the U.S. and U.K. expect to increase billing rates over the next 12 months.
- Most firms increased prices last year, probably to offset increased costs such as higher interest rates and salary increases.
- Industry observers and leaders say they don't expect rates to slow down, as some firms play catch-up.

Last year was a banner year for law firm billing rates. And as litigation demand remains strong and deal-work optimism grows, don't expect firms to throttle back. Industry sources and new law firm survey data suggest Big Law will continue to escalate rates at similar or higher levels in 2024.

New survey results show 86% of large firms in the U.S. and U.K. expect to increase billing rates over the next 12 months, with nearly a fifth of respondents expecting them to increase by between 41% and 60%.

That coincides with findings last month that [standard or "rack" rates](#), as well as the [agreed-upon or worked rates](#), across the Am Law 200 continued to climb faster than ever.

"I don't have a crystal ball, but I think you'll probably see 5% to 9% raises from our peer and aspirational firms," said Bill O'Neil, Chicago office managing partner for Winston & Strawn, in an interview this week. "It feels like that train is not slowing down."

To be sure, legal industry observers have been predicting ["significant"](#) billing rate growth in 2024 for months. Wells Fargo's Legal Specialty Group, for example, [noted](#) in November that Big Law leaders said they expected "similar" increases in 2024 relative to 2023, with observers adding that "we're not seeing a let-up on the pedal."

Wells Fargo found in Q1 this year that standard rates had increased by 9% across the industry, which was up from the 8.3% increase the bank observed for the entirety of 2023. And for Am Law firms ranked 1 through 50 in its sample, billing rates had increased 9.8% in the first quarter.

As a result, some clients have been taken aback by the rate increases, especially if they were not warned in advance.

“The increases have been astounding. And even if they don’t have a conversation that would accommodate negotiation, they don’t give some form of communication prior to sending a bill. You just always see it on the bill,” said Richard Parr, general counsel of AEG Vision, speaking to Law.com’s Corporate Counsel, [which reported this week](#) on legal departments’ frustration over the lack of law firm transparency.

‘Playing Catch-Up’

The latest survey data about future billing rate growth provides additional texture, however. Those data figures, published this week, were collected from more than 800 senior legal professionals from firms with 100 or more lawyers across the U.S. and U.K. by legal software provider BigHand.

It noted that about 91% of respondents said they increased prices last year, concluding that law firms did it “most probably to offset increased costs” such as higher interest rates and salary increases.

About 86% of respondents said they expect to increase rates by some amount within the next year, with nearly a fifth (19%) of them saying they expected increases of somewhere between 41% to 60%. (These are proportional increases, rather than industry-wide, year-over-year averages. For example, 11% of respondents said they expect to increase their rates by 100%, so they’re saying they expect to double their rates this year.)

Almost the same percentage of respondents (18%) said they expect to increase their rates by between 61% and 80%.

Compared with last year, the survey results suggest “firms are expecting similar price rises year on year,” said Briana McCrory, chief marketing officer for BigHand. In addition to rising costs, she also noted that some firms could be playing catch-up after holding prices down during the pandemic.

“We saw the largest firms make this leap earlier, whereas many others were slower while they assessed the market/client dynamics and are now playing catch-up,” she added in an email.

Some analysts noted that even as billing rate increases began accelerating over the last couple of years, clients seemed to acknowledge they expected the increases because of widespread inflationary pressures.

“It’s undoubtedly a trend many firms are taking advantage of right now, and will continue to do as long as they can,” added Tim Corcoran, a law firm consultant, in an interview this week.

McCrory, of BigHand, said, “It seems to be year-on-year price hikes [are] at an unprecedented level” but noted that realization has declined and that law firms overwhelmingly told her researchers they are looking at utilizing more value-based pricing, AFAs and fixed-fee setups moving forward.

O’Neil, the Winston office leader in Chicago, noted they are “absolutely” continuing to invest in personnel and software to that effect. He noted that in his practice, he does a lot of litigation related to M&A deals, and having better access to data and pricing setups for previous matters has helped him and others construct fixed-fee-by-phase pricing—setting rates for discrete stages of a litigation dispute—for instance.

“The days where everything is just on an hourly basis with a discount are less and less frequent,” he said. “So, we all have to get more sophisticated.”

Historic Rate Increases

Corcoran said he’s heard from a number of midsize and Second Hundred firms that they’ve raised billing rates higher over the last couple of years than they’ve ever done in the past. For Second Hundred firms specifically, Wells Fargo found standard rate increases of nearly 7% in Q1 this year.

The authors of the Thomson Reuters Law Firm Financial Index report also noted last month that industry-wide worked billing rate growth used to be more along the lines of 3.5%. Now, it’s been more than 6% industry-wide for multiple quarters.

“And more than a few [firms] have said they never heard a peep from clients, which clearly suggests they’ve been underpriced,” Corcoran said. “But also, the market acknowledges in inflationary times, prices for goods and services increase. So I think it’s a trend that some firms have sort of woken up to because their cost base has gotten higher. ‘We’ve gotta generate more revenue, and we can’t just always bill more hours.’”

Corcoran noted that even as firms are broadly becoming savvier and more nuanced in their pricing, relying more and more on data collection and analysis, they still tend to be more reactive than proactive.

Right now economic prognosticators expect the U.S. Federal Reserve to cut interest rates later this year, but Corcoran said firms will most likely see how that shakes out before changing their rate approach in the rest of the year.

“So something like the Fed cutting rates is noteworthy and newsworthy and may prompt firms to adjust accordingly,” Corcoran said. “But by and large, they’re going to react to what their clients do after the fact, and I think in that case, it’s going to be a variable reaction.”

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Lawsuits Targeting 'Climate Washing' Becoming More Frequent (1)

By Katharine Gemmell2024-06-27T06:37:19819-04:00

- New report says climate litigation on rise in Global South
- Some 233 new environmental claims were filed worldwide in 2023

Companies accused of misrepresenting their progress on tackling climate change are increasingly finding themselves the target of litigants, as activist groups look to hold some of the world's worst polluters to account.

As many as 47 new climate washing cases were filed in 2023 against companies and governments around the globe, according to a new report from the London School of Economics' Grantham Research Institute on Climate Change and the Environment.

Around 70% of the cases concluded between 2016 and 2023 ended in the claimants' favor, according to the report. Regulators around the world have also been trying to clamp down on the climate washing. The annual report analyzes a database of 2,666 climate litigation cases compiled by the Sabin Center for Climate Change Law at Columbia.

Litigation is a crucial part of the toolkit to force companies and governments to account for their climate promises and to galvanize action to slow global warming. Rulings in favor of claimants can have a far-reaching impact far beyond the specific case.

A landmark ruling from the European Court of Human Rights this year found that Switzerland failed to protect its citizens from the ravages of climate change, following a case brought by a group of elderly Swiss women.

Elsewhere, the UK government's net zero strategy was found lacking for the second time by a London judge in May. The same month the German government was told for a second time its climate program doesn't fully meet legal requirements.

On Thursday, German's top court ruled against a confectioner, which called its candy "climate

neutral.” The judges said that in the area of environmental advertising — like with health claims — the risk of misleading is particularly high. Companies need to explain what’s backing the claim and whether they reduce emissions or simply offset them.

“Reducing and offsetting emissions aren’t equivalent for achieving climate neutrality,” the German judges said. “Reduction takes priority over offsetting.”

Read More: What’s ‘Greenwashing’? How Can I Steer Clear of It?: QuickTake

Over 2023 some 233 new climate-related cases were filed worldwide, with cases in the Global South gaining traction. A ruling by the Supreme Court of India [established](#) a new constitutional right to be free from the adverse effects of climate change.

“Whether climate litigation is advancing or hindering climate action remains difficult to determine,” said Catherine Higham and Joanna Setzer, the authors of the report. “Some types of cases, such as government framework cases, have already had lasting impacts on domestic climate governance.”

(Updates with German top court ruling in seventh paragraph.)

--With assistance from **Upmanyu Trivedi**.

To contact the reporters on this story:

Katharine Gemmell in London at kgemmell2@bloomberg.net;

Karin Matussek in Berlin at kmatussek@bloomberg.net

To contact the editors responsible for this story:

Jeremy Hodges at jhodges17@bloomberg.net

Tasneem Hanfi Brögger

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NFL Floated Wide Sunday Ticket Alternative, Jury Told

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Broader distribution of out of market football games was considered by National Football League leaders, a lawyer for Sunday Ticket subscribers said Wednesday, pointing to a 2017 memo analyzing a “less restrictive alternative” to premium access while wrapping up a weeks-long trial with \$21 billion in damages on the line.

The NFL’s current strategy is pro-competitive, attorney Beth Wilkinson, of Wilkinson Stekloff LLP, countered to a jury during the closing arguments in the US District Court for the Central District of California, because it allows networks to invest in high-quality broadcasts and lends to revenue sharing between teams.

“The proof is in the ratings,” Wilkinson said, pointing to testimony from broadcasting executives who said it would be “financially and economically irresponsible” to widely air all out-of-market games.

The class action is based on claims that Sunday Ticket purchasers have been overcharged. The NFL’s agreement with its broadcast partners — CBS and Fox and DirecTV — allows the league to charge a premium price by limiting distribution, the plaintiffs say.

Throughout the trial, league and network leaders who testified before the Los Angeles jury repeatedly said from the stand that DirecTV sets prices independently. That’s a “company line,” attorney Bill Carmody of Susman Godfrey LLP said on Wednesday, representing Sunday Ticket purchasers, urging the jury not to believe it.

A distribution model that replicates Sunday Ticket on basic cable would double the average game distribution Carmody said.

“Forget about my overcharge, you liked it—that’s not a defense,” Carmody said.

CBS and Fox are not part of the litigation. DirecTV, which was named as a defendant and has denied wrongdoing, got the claims against it moved into arbitration in 2021.

The NFL could have to pay an estimated \$21 billion if it loses the jury trial because damages are tripled under federal antitrust law.

Emails and memos

Carmody pressured the NFL on Wednesday to address emails between its executives, broadcast partners, and DirecTV that allegedly show the companies agreed to price the subscription high, saying the documents weren’t addressed during trial because “it doesn’t come up well” for the league.

He pointed to messages such as one from a DirecTV leader that said the league “pushed back hard” on DirecTV’s proposed pricing, and others that said Sunday Ticket was a “premium product” and should be priced accordingly.

There is “no dispute that this was a premium product,” Wilkinson said, adding that the business model, disclosed to the Federal Communications Commission and discussed publicly, “was never a secret, never a surprise.”

Judge Spat

Judge Philip S. Gutierrez addressed an “ambiguity” he said he may have created during a Tuesday conference over which numbers the plaintiffs’ attorneys could present to the jury. His comments came Wednesday in open court, out of the jury’s presence.

At issue is the per-subscriber damages figure Carmody presented to the jury during closing arguments. Carmody said subscribers paid \$233 for Sunday Ticket during the class period, but the NFL’s attorneys have repeatedly contested the figure, saying it doesn’t account for Sunday Ticket holders who received the product at a discount. The actual per-subscriber price is much lower, around \$100, the NFL maintains.

The judge has blocked Carmody from using the \$233 figure before, Wilkinson argued. “I think they should pay a price for doing that,” she said, referring to Carmody’s mention of it during closing arguments.

Tensions between Gutierrez and attorneys for the plaintiffs have been high throughout the trial. Gutierrez admonished an attorney June 17 for wasting time.

But during a conference on Tuesday, in a conversation that was also tied to a different damages theory, Gutierrez said “you can do the math” he recounted from the bench on Wednesday.

He denied Wilkinson’s request to tell the jury to disregard Carmody’s figure.

Susman Godfrey LLP, Hausfeld LLP, and Langer Grogan & Diver PC are among the firms representing the plaintiffs. Wilkinson Stekloff LLP and Covington & Burling LLP are among the firms representing the league.

The case is In Re National Football League’s Sunday Ticket Antitrust Litigation, C.D. Cal., No. 2:15-mj-02668, 6/26/24 .

To contact the reporter on this story: Maia Spoto in Los Angeles at mospoto@bloombergindustry.com

'Inflated, overcharged': How plaintiffs hope to convince jurors the NFL gave viewers a bad deal

DJ [dailyjournal.com/articles/379494-inflated-overcharged-how-plaintiffs-hope-to-convince-jurors-the-nfl-gave-viewers-a-bad-deal](https://www.dailyjournal.com/articles/379494-inflated-overcharged-how-plaintiffs-hope-to-convince-jurors-the-nfl-gave-viewers-a-bad-deal)

Jun. 27, 2024

"This case matters because we are here to hold accountable the owners of the 32 teams who got together with DirecTV to overcharge their most loyal fans and limit Sunday Ticket distribution," attorney William C. Carmody told jurors.

LOS ANGELES - Despite the National Football League's contention that DirecTV was the sole price setter for its "Sunday Ticket" broadcast package, evidence shown during a month-long trial proved the opposite, a plaintiffs' attorney told jurors Wednesday. The league is accused of scheming to stifle broadcast competition with the package deal, violating antitrust laws, in a case which could cost it billions.

"Right now, it's lights out. ... The anticompetitive effects here - high prices on Sunday Ticket to limit its viewership so all Sunday Ticket subscribers pay more at an inflated, overcharged price - that is not outweighed at all by any pro-competitive justification. There's zero evidence of any pro-competitive justification," Susman Godfrey LLP partner William C. Carmody said during closing arguments. *In re: National Football League's Sunday Ticket Antitrust Litigation*, 2:15-ml-02668 (C.D. Cal., filed Dec. 10, 2015).

A chart that calculated the NFL's media earnings throughout the class period, 2011 to 2023, showed Sunday Ticket hauled in roughly \$15 billion for the league, while FOX & CBS networks made \$23 billion. Prime time games encompassing Monday, Thursday and Sunday night matchups generated roughly \$38 billion.

Throughout the trial, some of the named plaintiffs in the case testified that the main reason why they had to back out of the package was because it became "too expensive."

Throughout the class period, Sunday Ticket subscribers were asked to fork out between \$300 to \$400 per season for the service.

"The NFL knew 35 million of its most loyal fans were underserved. They were priced out of Sunday Ticket," Carmody said.

"This case transcends football. This case matters because we are here to hold accountable the owners of the 32 teams who got together with DirecTV to overcharge their most loyal fans and limit Sunday Ticket distribution. We want to hold them accountable for violating the antitrust laws of the United States," he said. "The antitrust laws of the United States of America empower you to send the message and tell the 32 team owners it's not ok to compete on the field but collude off the field."

Throughout the trial, jurors were shown several internal emails and memos between executives at the NFL, FOX, CBS and DirecTV that canvassed concerns about the pricing of the Sunday Ticket during two renegotiation stages that occurred during the class period.

Carmody said these documents showed the collusion between the NFL and DirecTV and paid TV agreements were not exempt from antitrust law.

One email that Carmody reminded jurors of was sent by Sean McManus, the former head of CBS Sports, who expressed concerns to an NFL executive: "We will need clarification on the premium pricing for 'NFL Sunday Ticket' and any other such packages. The concept here has always been that these packages are sold at a premium, thereby limiting distribution."

McManus took the stand during the trial. When he was asked if CBS and the NFL agreed to a premium price of "Sunday Ticket," his answer was: "We agreed. Yes."

Carmody suggested this went against the NFL's contentions that the league had "zero" control over the pricing and the idea of locking out-of-market games to a premium price "within itself, was anticompetitive."

"The NFL is saying 'I have no control over pricing,' but somehow by happy coincidence, it seems to always happen that DirecTV charges such a high price that it restricts output and limits viewership. That's not competition," he said.

During deposition testimony, Robert Kraft, the owner of the New England Patriots, was asked if ensuring a premium price was a priority for the NFL, to which he responded: "Yes." When asked how offering the package at a lesser value would impact over-the-air broadcasts," he answered: "I think it would devalue our over-the-air partner packages. And then they wouldn't be incentivized to continue to pay us the way they pay us."

However, Wilkinson Stekloff LLP partner Beth A. Wilkinson for the NFL told jurors Carmody's "theories" and "stories" had nothing to do with the evidence and the crux of the allegations that the NFL orchestrated a conspiracy by arranging broadcast agreements in a scheme to restrict fans and limit out-of-market viewership.

"We're done with the stories. We're done with the little fantasy of what he thinks this would be ... or how this fantasy world would have worked if [the NFL] took away the contracts with DirecTV," Wilkinson said.

During the trial, a sports economist brought by the plaintiffs - Daniel Rascher - told jurors the NFL could feasibly mirror the NCAA's Saturday football broadcast model, where games are licensed to free, over-the-air networks by conference. However, Wilkinson said testimony from McManus and Larry Jones, the former vice president of FOX Sports, refuted Rascher's analysis.

"You heard from Mr. Jones and Mr. McManus that exclusivity is essential to the business," Wilkinson recalled.

Wilkinson reinforced the NFL's position that Sunday Ticket was always a complimentary add-on package that broadened fans' watching options and "added choice" on Sunday afternoons.

"I don't know why counsel spent all that time acting like, 'Oh my goodness, they admitted it's a premium product and would have a premium price.' That was never a dispute in this case because none of this was secret. None of it is a surprise. Nobody in this broadcast world thinks there's anything wrong with it. ... The only person who said this was not proper conduct was one guy: Dr. Rascher, a paid expert."

She reminded jurors that the price of Sunday Ticket was not at the forefront of the case and that they had to determine if the NFL acted in a conspiracy to gauge the price at an "unreasonable" level that stifled competition.

Part of the NFL's defense is that because they offer several other lower-priced and free broadcasting options - such as the radio or NFL RedZone - in addition to the handful of select out-of-market teams that are chosen to air locally for free on CBS and FOX, the league were within the legal limits of the law to charge for a premium product.

Wilkinson compared the Sunday Ticket model to that of a fan who chose seating at a live game. "You can sit in the end-zone and pay one price, or you can sit at the 50-yard line and pay another. Why are there different prices? Because people value them differently."

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E-Discovery Hyperlinks Debate Won't Resolve Technical Challenges

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Welcome to the latest debate in electronic discovery: whether embedded hyperlinks to cloud-based files in emails and other communications should be treated as “modern attachments.”

Of course, Word documents, PDFs, and other forms of email attachments are usually discoverable. Calling hyperlinks in emails modern attachments is loaded terminology that argues for making those resources discoverable as well. For neutrality’s sake, we use the variations on the term “hyperlinks” here.

Typically, proponents of treating them as modern attachments are plaintiff-oriented requesting parties, and opponents are defense-oriented producing parties. “It’s evidence,” requesting parties claim. “It’s not proportional,” producing parties claim. And so it goes.

No matter which side wins, technical challenges persist, and these challenges often reemerge with each new data source. Still, understanding the legal backdrop, recent court cases can help you assess the issues.

Cloud

Historically, emails and loose files have been the primary source of discoverable electronically stored information, or ESI, in litigation. When e-discovery became a more prevalent discipline, most electronic evidence was also located on-premise.

More recently, organizations have begun to move mission-critical systems to cloud platforms. The average number of cloud applications organizations use worldwide grew from eight in 2015 to 130 by 2022. The push to reduce redundant data, combined with centralized storage of data files in the cloud, has created a need to share files within the cloud instead of embedding them within messages.

While that practice has significant information governance benefits—including reduced redundancy of sharing the same file to multiple recipients—it can cause significant e-discovery challenges. One of the biggest is that the file to which the sender linked may have been edited or deleted since it was sent. A copy of the file sent might not be available for discovery purposes.

Though sending emails or other communications with hyperlinks has always been a consideration for e-discovery, those hyperlinks weren’t common until about five years ago. Because embedded hyperlinks have replaced embedded attachments in many cases, some

practitioners consider them to be modern attachments, while others don't consider them to be attachments at all.

Courts

Case law rulings, and commentary on those rulings, have intensified the debate over embedded hyperlinks. The decisions in *Nichols v. Noom* in 2021 and *In re StubHub Refund Litigation* last year were determined by the ESI protocol the parties agreed to.

In the *Nichols* case, the court ruled the defendants didn't have to treat the linked files as attachments because there was no agreement to do so, whereas the court ruled in *StubHub* that they did have to produce them as attachments because there was an explicit agreement to do so.

The plot thickened with *In re Uber Techs. Passenger Sexual Assault Litigation*, decided in April. The matter also involved a linked files dispute between the parties attempting to agree on an ESI protocol, but this time, the court provided an in-depth discussion of the issues.

The court addressed the technical challenges of retrieving the correct version of the document, noting Google Vault's inability to collect the contemporaneous versions of hyperlinked documents and the limitations on doing so for Google Drive documents.

But the court also noted the importance of the evidence and agreed with the plaintiffs that the definition of "attachments" should include "modern attachments, pointers, internal or non-public documents linked, hyperlinked, stubbed or otherwise pointed to within or as part of other ESI."

Other recent cases also reference technical and manual limitations with some tools around discovery, such as collection and export capability, and managing the relationship between files linked to messages. Some third-party companies provide solutions, but there's no "easy-button" solution for the collection of linked files that can support all the requirements a discovery team may have.

Regardless if linked files should be treated as modern attachments, providers of platforms where the data is stored are clearly trying to address the challenges associated with a modern-attachments approach. Third-party tools are also continuing to improve and add features to help automate collection of linked files. In any event, legal professionals who understand the state of the technology and the courts stand to come out ahead.

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Author Information

David Greetham is vice president of digital forensics at Level Legal.

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To contact the editors responsible for this story: Daniel Xu at dxu@bloombergindustry.com; Melanie Cohen at mcohen@bloombergindustry.com

<https://x.com/AnnMLipton/status/1806344989531636084>



@annmlipton@esq.social

@AnnMLipton

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Section 14(e) out here asking if it's chopped liver

supremecourt.gov/opinions/23pdf...

The three antifraud provisions are Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Section 206 of the Investment Advisers Act. Section 17(a) prohibits regulated individuals from “obtain[ing] money or property by means of any untrue statement of a material fact,” as well as causing certain omissions of material fact. 15 U. S. C. §77q(a)(2). As implemented by Rule 10b–5, Section 10(b) prohibits using “any device, scheme, or artifice to defraud,” making “untrue statement[s] of . . . material fact,” causing certain material omissions, and “engag[ing] in any act . . . which operates or would operate as a fraud.” 17 CFR §240.10b–5 (2023); see 15 U. S. C. §78j(b). And finally, Section 206(b), as implemented by Rule 206(4)–8, prohibits investment advisers from making “any untrue statement of a material fact” or engaging in “fraudulent, deceptive, or manipulative” acts with respect to investors or prospective investors. 17 CFR §§275.206(4)–8(a)(1), (2); see 15 U. S. C. §80b–6(4).

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Speaking as a former plaintiff side securities litigator I am really, really upset that Scotus just kind of casually puts all kinds of prohibitions on misrepresentation in the category of "antifraud"



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...

Why? Because sometimes only negligence is required, and sometimes you need a showing of intent. And that matters a helluva lot for private plaintiffs in terms of pleading standards.



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How will this decision affect the SEC no-action process under 14a-8?



27



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...

not even a little.



21



Peter A. Roselle @PhenomenalPoto · 1h

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Serious question:

At some point does lack of enforcement on public figures act as a defense when a less influential individual uses the same playbook?



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Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/06/jarkesy-decision-limits-use-of-sec-aljs.html

Thursday, June 27, 2024

Jarkesy Decision Limits Use of SEC ALJs

By Benjamin P. Edwards

The Supreme Court's Jarkesy decision is out. Unsurprisingly, it hands the SEC yet another loss and rules that it cannot pursue relief for securities fraud claims before its administrative law judges because the Seventh Amendment entitles defendants to a jury trial.

Functionally, this significantly impairs the SEC's ability to enforce the securities laws and drives much enforcement activity into federal district courts. One of the benefits to having a specialized ALJ hear securities claims is that the process becomes much swifter for two reasons. First administrative adjudication is more efficient. Second, the SEC doesn't need to explain what securities fraud is to a court used to hearing these claims. Now, the SEC will have to spend more time and treasure on run-of-the-mill enforcement actions. As the SEC has limited resources, this will substantially reduce how much they can do.

Much of the opinion revolves around the scope of the "public rights" exception to the Seventh Amendment. The exception allows administrative tribunals to handle matters that historically could have been resolved by the executive and legislative branches. The opinion recognizes that the public rights exception at least includes "the collection of revenue; aspects of customs law; immigration law; relations with Indian tribes; the administration of public lands; and the granting of public benefits."

What about securities fraud claims? The SEC argued that in creating federal securities fraud claims, Congress created "new statutory obligations enforceable through civil penalties and g[a]ve administrative agencies the power to identify violations and impose those penalties." It also argued that even though "many violations of the federal securities laws could also give rise to common-law fraud claims", it "does not alter th[e] conclusion" that the claims fall within the exception.

The Supreme Court majority, led by Chief Justice Roberts, disagreed and found that "[i]f a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." As it also found that "[t]he SEC's antifraud provisions replicate common law fraud," it held that the claims must be heard by an Article III court with a right to a jury trial. It also found that the SEC's civil damages claims were "designed to punish and deter, not to compensate. They are therefore 'a type of remedy at common law that could only be enforced in courts of law.'"

Much of the dispute centered around how to interpret a 1977 Supreme Court case, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*. There, the Supreme Court found that when "Congress new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" (syllabus).

The Roberts opinion distinguished the *Jarkesy* situation from *Atlas* on the ground that "[b]ecause the public rights exception as construed in *Atlas Roofing* does not extend to these civil penalty suits for fraud, that case does not control."

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Matt Levine's Money Stuff: Berkshire Was Too Low, Then Too High

By Matt Levine

Opinion

Bloomberg Law News 2024-06-27T09:36:37348469867-04:00

Matt Levine's Money Stuff: Berkshire Was Too Low, Then Too High

By Matt Levine 2024-06-26T13:43:56173-04:00

Don't use market orders!

There are two ways to buy stock: market orders and limit orders. A limit order says: "I would like to buy 100 shares of Amalgamated Widgets at \$20 or less." If the stock is available at \$20 or less, you get your shares. If it's not, you don't. You don't know for sure if your order will be executed, but you do know the maximum price. A market order says: "I would like to buy 100 shares of Amalgamated Widgets at whatever price I can get." You know the order will be executed, but you don't know at what price.

Market orders are famously risky, because occasionally prices surprise you. So 99.99% of the time, what happens is that you see Amalgamated Widgets stock trading at \$20 per share, and you say "I would like some of that," and you put in an order to buy 100 shares of Amalgamated Widgets at whatever the market price is, and by the time you press the button on your order and it runs through your broker's systems and gets to the trading venue and gets filled, the price is, like, \$20.01, or \$20.02, or \$19.98 or whatever, and you get your shares at a slightly different price from the one that you saw on the screen, and you say "ah that's fine" or "oh well, slippage," and you understand that pressing the buttons on your retail brokerage's website is not an exact science but it's good enough.

And then 0.01% of the time, what happens is that you see Berkshire Hathaway Inc. Class A shares trading at \$185 per share, and you say "I would like some of that," and you put in an order to buy 100 shares of BRK/A at whatever the market price is, and by the time the order gets filled, uh, 90 minutes later, the price is \$741,971.39 per share, and you get a bill for \$74 million instead of the \$18,500 you expected:

On the morning of Monday, June 3, 2024, at approximately 9:50 am EDT, the price of Berkshire Hathaway Class A shares ("BRK A") suddenly plummeted in the space of a few seconds from approximately \$622,000 per share to approximately \$185 per share. This occurred as part of an unspecified technical issue at the New York Stock Exchange ("NYSE"). This technical issue and dramatic price event led NYSE to promptly halt BRK A from trading.

News of BRK A's anomalous price drop quickly spread across social media. Some of the clients of the various brokerage subsidiaries of Interactive Brokers Group, Inc. (together with its subsidiaries, the "Company"), in an apparent attempt to take advantage of this "opportunity," submitted market buy orders during the trading halt, presumably expecting those orders to be filled at approximately \$185/share when trading resumed.

Without any further notice and without addressing a substantial order imbalance that developed during the halt, NYSE resumed trading of BRK A at approximately 11:35:54 am EDT at a price of \$648,000. Over the next 98 seconds, the price of BRK A rose to as high as \$741,971.39 per share. Many of the Company's clients that had placed market buy orders during the trading halt were filled at various prices during this run-up, including some who were filled at the peak price.

Incredible stuff. The main point to make here is that, while \$741,971.39 is in some sense the "wrong" price for BRK/A — Berkshire Hathaway Inc.'s extremely high-priced main share class — it is much, much, much closer to the "right" price than \$185 is. The stock has traded in the low \$600,000s all month, other than the June 3 anomalies, and of those anomalies \$185 was considerably more anomalous than \$741,971.39. But what seems to have happened is something like this:

1. For glitch reasons, the price fell from \$622,000 to \$185.
- 2. Recognizing the glitch, NYSE halted trading.
- 3. It took almost two hours to restart trading.
- 4. During that time, NYSE kept taking orders to trade BRK/A, which would execute upon the reopening.
- 5. Many of those orders came from professional market makers, high-frequency trading firms, etc.
- 6. Those professional orders would normally take the form of limit orders on both sides of the market, a sort of schedule of supply and demand. A market maker might put in orders like "I'd buy 2 shares at \$621,000, and I'd buy 10 more at \$620,000, and I'd buy 20 more at \$619,000, or I'd sell 2 shares for \$623,000, and I'd sell 10 more for \$624,000, and I'd sell 20 more for \$625,000." And the exchange would build up an order book of limit orders around what market makers figured was the fair price, with some orders right around that fair price (the "midpoint price") and others further away.
- 7. Also, though, during that time, people "across social media" saw that BRK/A had traded at \$185, a 99.97% discount to its real value.
- 8. They thought "ah, super, a sale on BRK/A."
- 9. So they put in limit orders to buy the stock at a price no higher than, say, \$190 per share, a bit above where it last traded.
- 10. No, I'm kidding. I mean, maybe some of them did. Maybe some investors put in limit orders to buy BRK/A during that halt, with limit prices of \$185 or \$190 or \$200 or \$1,000. And none of those orders were

executed, because by the time the stock reopened it was trading at \$648,000. Which is fine. You saw BRK/A trading at \$185, you thought “ah, that would be a good deal, *if I could actually get it*,” you put in an order saying “if I can really get BRK/A at these prices, I'd like to,” and you were slightly disappointed but surely not surprised that you couldn't.

- 11. But at least some Interactive Brokers customers instead put in *market* orders to buy BRK/A at whatever price it traded at when it reopened. Which was *obviously* not going to be \$185. It was going to be \$622,000.
- 12. Except it wasn't \$622,000 either: *So many* people apparently put in market orders to buy BRK/A, because they saw it trading at a discount, that “a substantial order imbalance ... developed during the halt.” And so the professional market makers, seeing that there were more buyers than sellers in the order book, raised *their* limit orders, so that the new midpoint price was closer to \$648,000. And even so, the imbalance of market buy orders ate through the order book, so that all of the market makers' sell orders were executed until the stock traded at \$741,971.39, and some of those retail orders were filled at that price.
- 13. And then, once all the retail market orders were executed, the stock went back to normal. BRK/A was trading around \$628,000 by 12:15.

In some sense, if you tried to buy Berkshire Hathaway A stock using market orders because you read on social media that you could get it at a 99.97% discount to fair value, and instead you ended up getting it at almost a 20% premium to fair value, that is your fault and you deserve what you get. These people, Interactive Brokers presumes, were not steamrolled by market volatility while they were trying to buy Berkshire Hathaway at a normal price: They were trying to take it from people who were accidentally selling it at a discount, and they deserved to get steamrolled.

But in some other sense, that's not good customer service, and it's also kind of risky. (What if you really did have \$20,000 in your account and tried to buy 100 shares? How is your broker going to get \$74 million out of you?) So that Interactive Brokers press release that I quoted goes on:

The Company determined to take over a substantial portion of these trades as a customer accommodation. The Company also promptly filed claims for compensation with NYSE. On June 25, 2024, NYSE notified the Company that it had denied those claims in full. As a result, the Company has realized losses (including losses on certain hedge transactions) in the amount of approximately \$48 million.

If you did this dumb trade, Interactive Brokers fixed it for you: They took over the trades and ended up buying a lot of BRK/A stock for roughly \$48 million more than it was worth. Interactive Brokers also “filed a clearly erroneous execution (‘CEE’) petition with NYSE and certain other U.S. exchanges, seeking to bust the trades that had occurred at anomalously high prices during the disorderly market that followed the resumption of trading.”

But the exchanges declined to bust the trades, apparently on the reasoning that those trades were *not* clearly erroneous. Paying \$648,000, or even \$741,971.39, for BRK/A shares is not crazy. Paying \$185 is. The customers *tried* to buy the stock at clearly erroneous prices, but they ended up buying it at regular prices. Erroneously. *They* made the error, not the market.

Archegos tapes

Here is some elite investment bank chief executive officer performance:

Jefferies calls CEO Rich Handler, who is on holiday in Turks and Caicos with a spicy margarita on the way. They tell him Archegos isn't answering their calls. Handler says he's going to get his cocktail and he wants Archegos positions gone and a tally of losses by the time he comes back. It was one of the few banks that escaped with minimal losses.

Perfect. When your underlings call you up and say "hey we have a big trading counterparty that lost a lot of money, we're sending margin calls and they're not answering the phone," the correct answer is "liquidate them immediately," but the *stylish* (and equally correct) answer is "liquidate them by the time my margarita arrives." Handler handled Archegos way better from his vacation than Credit Suisse handled it at the office.

That anecdote is from Ava Benny-Morrison and Sridhar Natarajan's hair-raising minute-by-minute account of the final days of Archegos Capital Management, Bill Hwang's family office, which blew up in 2021. Hwang is now on trial for market manipulation and fraud, and the trial features a lot of his bankers testifying about how they were tricked into lending him tons of money to finance his big stock bets, and more particularly how they let him *keep* the money for a few extra hours or days in March 2021 while Archegos was imploding.

The essential problem was this. Archegos had a portfolio of giant leveraged bets on about a dozen stocks. In some cases, it was the biggest single owner of those stocks, but since it owned the stocks through total return swaps at a bunch of different banks, that was not apparent: As far as anyone could tell from public data, each bank had a reasonably sized position in each of those stocks (to hedge its swaps to Archegos); there was no single large owner. But then some of the stocks went down, Archegos got margin calls on its big leveraged swap bets, it couldn't meet the margin calls, and all the banks had to seize and sell the stocks at the same time. This drove down the prices of the stocks, evaporated Archegos (which went from a net worth of \$36 billion to zero) and left some banks with big losses.

Not Jefferies, though, or not so much. The trick is that if you *immediately* seized Archegos's stocks and sold them, you got out at a decent price and didn't lose money. If you waited too long, the prices melted down and you lost money. Handler, at the swim-up bar, grasped the essential issue and blew out Archegos's positions at Jefferies.

Others did not, because they didn't realize how bad things were for Archegos, because — the government alleges — Archegos misled them about its actual positions. In the government's telling, each bank *thought* that Archegos had a portfolio of (1) big leveraged bets on a dozen stocks at *that* bank plus (2) boring, straightforward investments in household-name stocks at all the *other* banks.

So at 3 p.m. on Wednesday, March 24, 2021, a UBS Group AG risk manager sent colleagues an email about Archegos's 20+% losses on some of its swaps with UBS, which would lead to a large margin call the next day. "No immediate concern," the risk manager wrote, "given the excellent performance in the past year and they are giving back the gain."

Archegos's deal with UBS seems to have been that it needed to post margin each day based on the previous day's prices. So that Wednesday, Archegos was flush with cash, because all of its trades were profitable *as of Tuesday*. In fact, it was so flush with cash that it had an extra \$173 million in its UBS account: Based on Tuesday's prices, it could demand \$173 million of margin *back* on Wednesday. Of course by Wednesday afternoon, UBS and Archegos both knew that on *Thursday*, Archegos would have to post a lot more margin, to reflect its losses on Wednesday.

But Archegos asked for the money anyway: It asked UBS to send it \$173 million on Wednesday afternoon, understanding that it would have to send back \$500 million or so on Thursday. Somewhat crazily, in hindsight, UBS was like "sure fine here you go." There's a snippet of taped conversation between UBS risk manager Bryan Fairbanks and Scott Becker, Archegos's head of risk, at 3:15 p.m. Wednesday:

Fairbanks: This is Bryan.

Becker: Hey Bryan, it's Scott from Archegos, how are you?

Fairbanks: Hey Scott, how are you doing?

Becker: Doing well. Sorry I took a while to get back to you, I apologize.

Fairbanks: No problem, no problem. I just wanted to give you guys a heads up, obviously there'll be a sizeable call tomorrow.

Becker: Yeah, that makes sense, thank you.

Fairbanks: Um I was to be honest a little surprised you guys put in the wire today for the excess since you've been leaving with us for a while.

Becker: Yeah, would that — would that be okay?

It would not be okay, it turns out! But Fairbanks approved the wire; there's an email from him at 7:23 p.m. to his colleagues, saying:

I spoke with client; he knows that there is a sizable call tomorrow and confirmed that their losses are mostly at UBS as their bigger positions are relatively flat (Amazon, Google, etc.). I approved the wire so expecting ~\$500m call tomorrow. Client agreed to acknowledge and pay promptly and we'll of course watch very closely tomorrow and send a note out once we collect.

The story here was that Archegos had big losses *at UBS*, which would require it to post \$500 million of margin on Thursday, but it would have no problem doing that, because its positions *at other* banks were "relatively flat (Amazon, Google, etc.)." In fact, its positions at other banks were the same as its positions at UBS, it was going to get margin calls from all of them, and it was withdrawing \$173 million from UBS on Wednesday to have a chance at meeting some other margin calls on Thursday. Bad!

By 9:57 *that night*, Archegos's co-chief executive officer, Andy Mills, told UBS:

Frankly, you know, we don't see how we're gonna be able to meet those margin calls fully by tomorrow evening at 6 o'clock, and so I wanted to get ahead of that and just describe what we are doing so that you know where we're coming from on this, and to give you our assurance that we will get through this very quickly. The first thing I want to say is this is a liquidity issue, not a solvency issue.

That turned out to be wrong, but that's not the point. The point is that that call is *two and a half hours* after the UBS risk manager emailed his colleagues to say he wired Archegos \$173 million, despite knowing he'd be asking for \$500 million the next day, because the client assured him they would meet the margin call. And now they said they would not.

It got considerably worse the next day. At 6:43 a.m. on Thursday, Archegos trader William Tomita did a call with Fairbanks and Ashley McLucas at UBS:

McLucas: How common are those names across your other providers, you know in terms of, what we see, is that very similar to what you'll be seeing across all your providers, or is it quite different?

Tomita: I think those concentrated names, are a common one at multiple brokers, a lot of the liquid US and tail names are much more varied.

Fairbanks: So meaning you have — you said Viacom, Discovery, Tencent — you have those names away as well in size?

Tomita: In meaningful size, yep.

Again, less than 12 hours earlier, Fairbanks was emailing that Archegos had "confirmed that their losses are mostly at UBS as their bigger positions are relatively flat (Amazon, Google, etc.)." Turns out, nope, same positions everywhere, same losses everywhere. "My gut sunk," said Fairbanks in court. "I knew UBS was going to take a very large loss."

Others didn't know that yet. At 11:44 a.m., Archegos Chief Financial Officer Patrick Halligan sent an Instant Bloomberg message saying "Mufg [Mitsubishi UFG Financial Group Inc.] literally told will good luck, no big deal. Best counterparty award." You don't want to win Archegos's best counterparty award! (MUFG lost \$270 million.) You want to be the worst counterparty.

The worst counterparty was Goldman Sachs Group Inc.: As we discussed a while back, Archegos had a \$470 million collateral surplus at Goldman on Wednesday and tried to call it back. (As it did with its \$173 million at UBS.) But instead, Archegos accidentally *sent* Goldman an extra \$470 million, leaving it with \$940 million of extra collateral on Wednesday. (Though presumably with much less on Thursday, given how the positions moved on Wednesday.) Archegos asked Goldman for the money back and Goldman said "lol no." That is the correct answer! UBS was off sending Archegos every penny it asked for, which was a mistake. Goldman saw where things were going and kept the money.

Thursday was a lot of Archegos telling the banks “just sit tight, the check is in the mail,” until at 8:22 p.m. “Hwang finally speaks up in a hastily arranged call with a large group of anxious banks.” They did not like what they heard, and at 6:47 a.m. on Friday, March 26, 2021, “the default notices from banks start pouring in,” and the banks start liquidating Archegos’s stocks. Some move slowly — Credit Suisse tries to sell carefully not to spook markets — while others move quickly: Goldman shops a block trade of its ViacomCBS position, and Handler, at 1:30 p.m. on Friday, gives the “sell it all before I get my drink” order.

I once talked to a hedge fund executive about his prime brokerage relationships. Hedge funds often rely on borrowing money from their brokers, and it is important for the hedge funds to be confident that, in a crisis, the brokers will be there for them. If your positions move against you and you get a margin call from your prime brokers, you want to be able to say “give us one more day and we’re good for it,” and you want them to say “for you, sure, one more day.” How, I asked, do you manage that? What is it that gets you good treatment from prime brokers in your time of need? Is it writing ironclad contracts that give you locked-up financing? Is it being a good customer who pays them a lot of money in the good times, so they’ll keep you afloat in the bad times? Is it being nice to them personally, so they like you?

He said that what matters is that they think you’ll make it. If they think you’re going bankrupt, they are going to want to get their money out. Their personal fondness for you, your past business, all the fees you’ve paid them, even the specific terms of the contract: All of that is yesterday’s news; what matters is if you’ll be around to pay them back tomorrow. The only trick is to build a reputation for being careful, for being a survivor, for running only risks that won’t blow you up. If your prime brokers think that you’re a survivor, they’ll help you survive. If they don’t think you’re a survivor, you won’t be.

I guess this is obvious? But Archegos is, allegedly, the fraud version of it. If all your prime brokers think that you are a family office with stable long-term funding and a portfolio consisting mostly of boring positions in household-name stocks, they will each let you make a few spicy bets with *them*. And when those bets move against you and you get big margin calls, they won’t move too quickly to close you out: You have all those safe positions everywhere else, you have plenty of money, you’re good for it. And then if it turns out that your entire portfolio is spicy bets everywhere and you go to zero in three days, the banks will understandably feel defrauded.

Private equity recruiting

I have to say, if private equity firms are going to recruit new associates before they start their jobs as investment banking analysts, they shouldn’t do it in late June? Move it a few months earlier, to like April, when the future associates are second-semester college seniors and have nothing better to do but interview with PE firms. But, no:

In a surprise move that sent shockwaves throughout the junior Wall Street community on Monday, a series of leading private-equity firms kicked off recruiting for lucrative positions that won’t start for two more years.

The intense rite of passage known as “on-cycle recruiting” left some junior investment bankers scrambling to get in on a flurry of hastily arranged interviews. It marked buy-side recruiting’s earliest start date on record. The cycle had shifted progressively earlier in recent years. ...

Most first-year investment-banking analysts won’t officially start their banking roles until July. The early recruiting timeline has left most candidates with no real-life deal experience to speak of, let alone workplace experience to point to, beyond their past summer internships. ...

This year, two sources said that the unexpected start meant that some incoming junior bankers were outside New York City. Some soon-to-be bankers, they added, haven’t even moved into their New York City apartments yet.

That is from a Business Insider article that quotes a junior banker from *last* year’s PE recruiting cycle saying “honestly, it has been making me think that private equity, especially, is just such an abusive industry,” and deciding not to go into private equity at all. I suppose the counterpoint is: Yes, that’s what it’s *supposed* to do. If you’re not willing to drop everything to fly to New York ahead of your investment banking start date to do private equity recruiting, will you drop everything to fly across the country to close a deal as a private equity employee? Making recruiting stressful and inconvenient probably does make it more informative; it tells you something about the candidate’s dedication and performance under stress. And what else do the firms have to go on? It’s not like these people have done any deals.

Head of Macro

The greatest hedge fund dispute of our time rolls on:

David Einhorn’s Greenlight Capital Inc. escalated a legal battle with a former employee who claims he was head of macro trading at the firm, alleging James Fishback was actually a poor performer who resigned ahead of being fired.

In a fresh lawsuit filed Tuesday in Manhattan federal court, the hedge fund said Fishback’s claims of being responsible for \$100 million in profits and “insane” performance at Greenlight were false. It said he was never more than a research analyst with no discretion over the firm’s macro portfolio.

We talked about this battle last month, because Greenlight had sued Fishback and Fishback had sued Greenlight over whether he was the head of macro. Fishback apparently withdrew his lawsuit against Greenlight, which had claimed Greenlight defamed him by telling people he *wasn’t* the head of macro. And now Greenlight has filed a new lawsuit, which claims that Fishback is defaming Greenlight by telling people that he was. Here is the complaint; a sample:

Fishback also used false statements in his frivolous lawsuit as an improper opportunity to publicly misrepresent his role and performance at Greenlight by falsely claiming that he was “an outstanding performer at Greenlight,” “excelled in his work,” and “generated over \$100 million in profits for Greenlight from the period of February 2021 to August 2023.”

None of this is true. In fact, Fishback was such a poor performer at Greenlight that Greenlight had actually decided to terminate him for his lack of productivity and scheduled a meeting with him to do so, but he abruptly resigned when he deduced that he was about to be terminated. And, since he had absolutely no authority or discretion whatsoever over Greenlight's macro investment portfolio, he was not responsible for generating any profits, let alone "over \$100 million" of profits.

Fishback is a fairly young person who was hired at Greenlight in a somewhat unconventional way. (He "is a self-taught investment professional who successfully ran his own hedge fund for five years," said his lawsuit, and "personally consulted Greenlight's founder and CEO, David Einhorn, on macro investing beginning in early April 2019," before actually being hired at Greenlight in 2021.) He worked there as an analyst covering macro, and he claims that he is responsible for the performance of Greenlight's macro portfolio. Greenlight says that in fact Einhorn was the only person with investing discretion, Fishback just researched ideas for Einhorn, and in fact he didn't do a very good job, in part because he was distracted by his extracurricular activity of running a high school debate program. It is hard to convey, in a legal complaint, that someone was not a very good hedge fund analyst, but Greenlight tries:

Throughout 2022, Greenlight provided Fishback with clear notice that he was not meeting expectations. For instance, on April 19, 2022, Mr. Einhorn expressed disappointment with the lack of substance in an assignment that Fishback had taken six days to complete and expressed to him that he thought Fishback's "work, as shown, could be replicated in about 30 minutes."

In Fishback's formal year-end performance assessment for 2022, Greenlight also communicated to him that "[w]hen projects are assigned by David to James, they often don't get evaluated in a timely manner and sometimes not at all" (emphasis added). The assessment continued that: "[t]o summarize: we aren't sure whether the lack of work is because (a) James disagrees with the topic, so he refuses to indulge David's request in a passive/aggressive way, (b) James isn't capable of investigating these types of questions, or (c) James isn't committing enough hours to his work at Greenlight."

And Einhorn emailed him in May 2023:

We genuinely doubt you are working as a full time employee. We don't have punch clocks and you work remotely. So, the burden of proof is on you. And, it looks like your side gig is cutting into Greenlight. In fact, it really doesn't appear to me that you are doing any meaningful amount of work for Greenlight. If I didn't like you, I'd fire you now. But, you are on very, very thin ice.

And here is a tantalizing project:

Greenlight's patience with Fishback finally ran out in late July 2023. On July 26, 2023, Fishback submitted a draft essay (the "Jelly Donut Assignment") to Mr. Einhorn that he had been assigned to write in February 2023. After many delays, the draft essay was finally supposed to be delivered on July 24, 2023. Despite it being two days beyond the most recent deadline, and despite Fishback have having had months to complete the Jelly Donut Assignment, the draft essay appeared to reflect only a few hours of effort

After receiving the Jelly Donut Assignment on July 26, and determining that it did not reflect a substantial amount of work, Greenlight reviewed its computer system and discovered that Fishback had almost no work files saved on Greenlight's network drive, and had engaged in very little activity on Greenlight's computer system. This effectively confirmed that Fishback had not put any serious amount of work into the Jelly Donut Assignment, as he would have needed to have been active in the network drive during the process in order to do so.

Moreover, since this review revealed that virtually none of Fishback's work had been saved on Greenlight's network drive, Fishback must either have been saving his Greenlight work files—which would have included a vast amount of Confidential Information—on his personal devices, in direct violation of Greenlight's policies and his Employment Agreement, or he did not do any meaningful work during his entire tenure at Greenlight.

Casual Googling suggests that David Einhorn really likes jelly donuts as a macroeconomic metaphor, so I assume that that is what was going on here, but I must say that I really want to read Fishback's allegedly slapdash essay about jelly donuts. It was apparently so bad that Fishback had to pull a you-can't-fire-me-I-quit:

On Monday, July 31, 2023, Mr. Einhorn's assistant emailed Fishback at 10:48 a.m. to inform him that Mr. Einhorn wanted to schedule a Zoom call for noon that day. The unstated purpose of that Zoom call was to terminate Fishback's employment.

In response, at 10:56 a.m., Fishback requested that the Zoom call be rescheduled to 3:30 p.m. allegedly due to his travel schedule. Then, a mere 27 minutes after delaying the Zoom call, Fishback tendered his resignation to Greenlight via email, and provided notice that his last day of employment would be on August 15, 2023.

And then he went around telling everyone he was the "head of macro." In his lawsuit, Fishback proposed two bits of evidence for that: That title appeared on his bio at some conference appearances, and he had a screenshot of an email from Greenlight Chief Operating Officer Daniel Roitman describing him that way. Greenlight's lawsuit disagrees: *He* gave himself the conference titles, and "Greenlight did not know that Fishback had even registered as a speaker for the Citi Conference, let alone used the fictitious 'Head of Macro' title." And:

The screenshot was an email from Mr. Roitman to Ms. Heather Robinson, a Senior Manager of the GLG Group on May 11, 2023 (the "GLG Email"). The email thread began with Ms. Robinson contacting Mr. Roitman to promote a "Remote Roundtable" meeting her firm was hosting, and offering to "save [] a seat" for Greenlight. In response, Mr. Roitman asked Ms. Robinson to sign Fishback up for the meeting, which was relevant to Fishback's duties as a Research Analyst focused on macro positions, and introduced Fishback onto the email thread by informally remarking that he is "our head of macro."

To be clear, Mr. Roitman was not stating that this was his formal title, as is obvious from the context and lack of a proper noun. The Remote Roundtable was a GLG "Signature Event" available only to senior executives (only Mr. Einhorn and Mr. Roitman were invited), and Mr. Roitman exaggerated his description of Fishback so that GLG would allow him to attend the event.

So yeah I mean he was a *little* bit head of macro, in the sense that everyone at a financial firm is the head of something: Sometimes you want to inflate the importance of your analyst to get him into a meeting.

Sorry, I know this is so petty, but it gets pettier:

On January 10, 2024, Fishback emailed Greenlight and threatened to attend Greenlight's 2024 Annual Partner Dinner.

Many of Greenlight's investors, counterparties, service providers and employee family members attend Greenlight's Annual Partner Dinners. Fishback's threats were obvious attempts to intimidate and embarrass Greenlight, and interfere with Greenlight's relationships with its investors, counterparties and service providers. When Greenlight notified Fishback that he was not permitted to attend, he insisted that he would still attempt to do so, or at a minimum, stand outside the event venue and attempt to communicate with attendees.

He didn't actually do that, but it's a funny threat. Also he said mean things about Greenlight in his Twitter bio:

On June 2, 2024, Fishback quite childishly changed the bio of his X account to read: "Past: Head of Macro at Greenlight (sucks)" and "Past: Head of Macro at Greenlight (ew)," as shown below.

Greenlight also says:

Overall, Fishback seems to have accomplished his goal of generating the publicity he sought. Fishback's posts themselves were widely viewed, with some receiving more than one million views. Major media outlets covered the "dispute" that Fishback pretextually procured, including the *New York Times*, *Business Insider*, *Yahoo Finance*, *Bloomberg* and *Morningstar*, and as a result, his wrongful statements have been published to millions more.

Yes that is going to continue happening.

Things happen

Companies slash borrowing costs on \$400bn of US junk loans. Switzerland Sticks to Bank Capital Schedule in Blow to UBS. Ghana strikes deal with bondholders to end debt default. Starboard Value Criticizes Autodesk Board in Letter, Believes Investors Were Intentionally Misled. SEC's Gary Gensler on his agenda: 'If the courts adjust, we adjust.' Why Venture Capital Is Weighed Down by Its 2021 Vintage. Tech Investor Sean Parker Leads Rescue of Struggling AI Startup. Americans Chasing High Interest Rates Risk Falling Into a 'Cash Trap.' Atos crisis deepens as biggest shareholder ditches rescue plan. VW Latches Onto Rivian in \$5 Billion EV Pact to Regain Momentum. IRS Apologizes to Billionaire Ken Griffin for Leak of Tax Records. Ex-Segantii trader told Morgan Stanley banker: 'I know who my daddy is,' court filings claim. Australian Bank Monitors How You Tilt Your Phone to Detect Scams.

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To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

- 1. I mean, there are other order types, but these are the important ones.
- 2. I have no independent basis for thinking that this is true, though I'm inclined to believe it. Presumably Interactive Brokers sees some number of retail customer orders for BRK/A each day, and that number is small. And during the trading halt on June 3, presumably, it was large, and so they had reason to think "these people are trying to seize the opportunity to buy BRK/A cheap."
- 3. BRK/A traded below \$620,000 for much of the next day, and one problem for Interactive Brokers is that their customers bought the stock at high prices on the morning of June 3, but Interactive Brokers only decided to take over those trades that evening. (Because they were hoping that NYSE would cancel the trades.) So by the time they were able to get out of the trades, the stock had fallen further.
- 4. I made that up; I'm sure it was a regular bar.

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Starboard presses for changes at Autodesk after accounting probe

 [reuters.com/markets/us/starboard-presses-changes-autodesk-after-accounting-probe-suggests-cuts-2024-06-25](https://www.reuters.com/markets/us/starboard-presses-changes-autodesk-after-accounting-probe-suggests-cuts-2024-06-25)

Reuters

Item 1 of 2 The boardroom is seen during the grand opening and media preview of the new Apple Carnegie Library store in Washington, U.S., May 9, 2019. REUTERS/Clodagh Kilcoyne

[1/2]The boardroom is seen during the grand opening and media preview of the new Apple Carnegie Library store in Washington, U.S., May 9, 2019. REUTERS/Clodagh Kilcoyne
Purchase Licensing Rights , opens new tab

June 25 (Reuters) - Activist investor Starboard Value is seeking operational and governance changes at Autodesk (ADSK.O) , opens new tab after losing a bid to appoint its nominees to the design software firm's board ahead of its annual meeting next month.

Starboard said in a letter on Tuesday that Autodesk was maintaining a misleading "all is well" narrative and had dented investor trust with a "wholly inadequate response" to an accounting issue it disclosed recently.

The letter comes after Autodesk said there would be no reinstatement of its financial statements after a months-long probe it conducted into certain accounting practices, which had delayed the annual report and hit its share price.

Autodesk disclosed in May that, to meet free cash flow targets, it continued entering into multi-year, upfront contracts with enterprise customers through 2023 despite previously announcing a transition to annual billings a year earlier.

The company's sales grew at a six-year low of about 10% in the last fiscal year.

Starboard said the management at Autodesk, which provides 3D design and engineering solutions for several sectors, including construction, manufacturing and media, had "intentionally" misled investors.

It accused Autodesk of "subpar operational and financial performance", while identifying significant cost reduction opportunities.

Shares of Autodesk are down 30% since their peak in August 2021.

The company has offered to work with Starboard on its concerns and continues to engage with its shareholders, an Autodesk spokesperson said.

Autodesk appointed board member Elizabeth Rafael as its interim finance chief, replacing Debbie Clifford, who was moved to the role of strategy head.

Starboard, which revealed an over \$500 million stake in Autodesk earlier this month, has also managed activist campaigns at Salesforce (CRM.N) [↗](#), opens new tab, Wix.com (WIX.O) [↗](#), opens new tab and GoDaddy (GDDY.N) [↗](#), opens new tab.

The New York-based investment adviser had unsuccessfully sued Autodesk to delay its annual general meeting, set for July 16, and reopen its director nomination window, which closed in March.

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Reporting by Yuvraj Malik in Bengaluru; Editing by Tasim Zahid and Shinjini Ganguli

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BlackRock Must Face Saba Capital Lawsuit Over Voting Bylaws (2)

By Chris Dolmetsch

- Judge refuses to dismiss Saba's lawsuit against asset manager
- Boaz Weinstein has made several moves against closed funds

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BlackRock Must Face Saba Capital Lawsuit Over Voting Bylaws (2)

By Chris Dolmetsch2024-06-26T12:36:41189-04:00

- Judge refuses to dismiss Saba's lawsuit against asset manager
- Boaz Weinstein has made several moves against closed funds

BlackRock Inc. must face a lawsuit from **Boaz Weinstein's** Saba Capital Management over a bylaw Saba claims will restrict its voice in a closed-end fund in which it holds a substantial stake, but a federal judge declined to block the world's largest asset manager from employing the rule.

US District Judge **Margaret Garnett** on Tuesday rejected BlackRock's request to throw out the case. However, she denied Saba's bid for a preliminary injunction preventing BlackRock from using the bylaw, which requires challengers for board seats to win the votes of a majority of shareholders.

Saba had argued that BlackRock is using the bylaw to keep un-elected trustees at its ESG Capital Allocation Trust in place indefinitely, skirting a federal law requiring at least two-thirds of a fund board to be elected by shareholders. Saba acquired a stake in the \$1.9 billion fund in 2022, but says the entire board was appointed by BlackRock.

The case is one of several moves Weinstein has made against the \$250 billion closed-end fund industry and its biggest names, including BlackRock, Nuveen and Franklin Resources Inc. Saba generally focuses on funds trading at large discounts to the value of their assets and pushes money managers to boost returns through steps such as buying back shares and liquidating funds.

BlackRock had asked Garnett to dismiss the case, saying it seeks an “unprecedented interpretation” of the 1940 Investment Company Act. A ruling for Saba, BlackRock argued in a court filing, “would have sweeping effects across the closed-end fund industry, improperly federalize decades of state law regarding corporate internal affairs, and risk leaving millions of retail investors vulnerable to modern-day corporate raiders.”

Garnett said Saba has sufficiently alleged that “there is a point where the voting bylaws of ECAT operate to deprive shareholders of their right to select the trustees of the fund, and to circumvent the ICA’s requirement that trustees be ‘elected’ at shareholder ‘meetings’ and that a certain number of directors be resubmitted for shareholder approval each year.”

Read More: BlackRock, Boaz Weinstein Escalate Fight Over Closed-End Funds

The judge said Saba may not succeed in proving the point at trial, “but the allegations in the complaint are sufficient to allow them to try.”

She also said BlackRock’s argument is “not plausible: that even where a fund fails to have successful elections for years and where a fund’s board is composed primarily or entirely of holdovers selected by the sole initial shareholder who is affiliated with the investment adviser, even in perpetuity, there is no circumstance where such a fund could be found to be in violation of the ICA’s requirements for shareholder elections and board composition, so long as the rules are facially compliant on a word-by-word basis,” she said.

Michael D’Angelo, partner and general counsel of Saba, said the decision paves a clear path for Saba to win at trial.

“There, we will show why this entrenched manager and its trustees cannot continue to act as if federal law does not apply to their closed-end funds,” D’Angelo said in a statement. “Failed elections and holdover trustees cannot exist in perpetuity at any closed-end fund.”

Weinstein said at the Bloomberg Invest conference on Tuesday that his campaign received strong support from shareholders to have new board members overseeing a separate BlackRock fund, Innovation & Growth Term Trust. Saba has a 23% stake in the fund.

A BlackRock spokesperson said in a statement that, “based on the preliminary results from last week’s shareholder meetings, it is clear that shareholders have rejected both Saba’s nominees and its efforts to displace BlackRock as investment advisor to the funds. The independent, preliminary results for BIGZ aren’t yet available, but we believe that a majority of the votes in Saba’s favor are coming from Saba itself, and not other shareholders.”

The asset manager has maintained all along that it's the one looking out for shareholders, not Saba, and expressed confidence about prevailing in a battle over board seats for funds.

In denying the injunction, Garnett acknowledged Saba's arguments that the bylaw makes it "very difficult or perhaps 'impossible'" for shareholders to cast meaningful votes in a contested election, but said the suit is different than cases where executives concoct methods to suppress investors' votes.

While Saba "may well prevail on that argument in the ordinary course, this is a different type of harm than that caused by the corporate action at issue in many of the cases Saba cited, in which corporate management instituted new procedural barriers intended to subvert elections, limit the value of votes, or eliminate existing shareholder rights," the judge wrote.

Saba, which owns about 27% of ESG Capital Allocation, sued BlackRock in March. According to the suit, BlackRock adopted the bylaw to make it harder for newcomers seeking to serve as fund trustees.

The case is Saba Capital Master Fund Ltd. v. BlackRock ESG Capital Allocation Trust, 24-cv-01701, US District Court, Southern District of New York (Manhattan).

(Updates with statements by Weinstein, BlackRock.)

--With assistance from **Silla Brush**.

To contact the reporter on this story:

Chris Dolmetsch in Federal Court in Manhattan at cdolmetsch@bloomberg.net

To contact the editors responsible for this story:

Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net

Steve Stroth, Peter Blumberg

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War between BlackRock and hedge fund Saba will continue after latest court rulings

 [reuters.com/legal/transactional/column-war-between-blackrock-hedge-fund-saba-will-continue-after-latest-court-2024-06-26](https://www.reuters.com/legal/transactional/column-war-between-blackrock-hedge-fund-saba-will-continue-after-latest-court-2024-06-26)

Alison Frankel

The BlackRock logo is pictured outside their headquarters in the Manhattan borough of New York City, New York, U.S., May 25, 2021. REUTERS/Carlo Allegri Purchase Licensing Rights , opens new tab

June 26 (Reuters) - Saba Capital Management lost its bid on Tuesday to bar , opens new tab a BlackRock investment fund from holding a trustee election under what Saba contends are illegal rules.

But the hedge fund defeated BlackRock's attempt , opens new tab to squelch Saba's entire lawsuit, which challenges election rules that Saba alleges , opens new tab to have been designed to entrench BlackRock's handpicked trustees.

U.S. District Judge Margaret Garnett of Manhattan ruled , opens new tab that Saba, which owns about 26% of the BlackRock fund's shares, could not show that it would face irreparable harm from an imminent trustee election under the prevailing rules, in part because Saba was aware of the election rules when it acquired its stake in the fund yet delayed its motion to block the proceeding. Without a showing of irreparable harm, Garnett said, Saba was not entitled to enjoin a vote scheduled to take place on Wednesday. The judge also ruled, however, that Saba offered sufficiently strong allegations to keep alive its claim that the BlackRock election rules deprive shareholders of their right under federal law to pick trustees to head the fund. BlackRock's arguments to the contrary, the judge said, rely on a "pinched and parched" reading of the Investment Company Act.

Saba, which is led by prominent investor Boaz Weinstein and is represented in the BlackRock case by Susman Godfrey, characterized Garnett's decision as a victory, in an email statement.

"The court has paved a clear path for Saba to win at trial," the statement said. "We will show why this entrenched manager and its trustees cannot continue to act as if federal law does not apply to their closed-end funds."

In addition, Saba on Wednesday won a ruling , opens new tab from the 2nd U.S. Circuit Court of Appeals in a separate challenge to a different election bylaw at 11 BlackRock funds. As I'll explain below, the appeals court affirmed a trial court decision that requires the funds to rescind those rules.

BlackRock did not provide a statement on the Garnett and 2nd Circuit decisions. Its lawyers at Willkie Farr & Gallagher did not respond to a query.

The case before Garnett, as you've probably discerned, is part of a much broader fight between Saba and BlackRock over control of several BlackRock closed-end investment funds with roughly \$10 billion in assets. (Closed-end funds are a kind of mutual fund, but with a set number of shares that are initially offered in an IPO and can thereafter trade on public markets.)

Saba, which has acquired sizeable stakes in at least 10 of the funds, contends that BlackRock's mismanagement is depressing the funds' profitability. As my Reuters colleague Svea Herbst-Bayliss has reported, Saba chief Weinstein has said that \$1.4 billion in value could be unlocked if the funds cut their discount to their net asset value.

BlackRock, meanwhile, said on webpage [\[link\]](#), opens new tab for investors that is dedicated to its dispute with Saba that it is "committed to delivering long-term value and [has] created tangible gains for our shareholders through our years of expertise." It fleshed out that assertion in a filing [\[link\]](#), opens new tab last month at the U.S. Securities and Exchange Commission, arguing that unlike Saba, its goal is to manage these funds for the benefit of all shareholders, not just one activist hedge fund.

Over the last year or so, Saba has put considerable energy into hotly contested proxy campaigns to oust trustees who were selected by BlackRock when the behemoth asset management firm initially sponsored the funds. The proxy advisory firm Glass Lewis urged shareholders to support all of BlackRock's candidates. ISS, a different advisory firm, backed some of Saba's candidates. Both firms urged shareholders to vote against replacing BlackRock as the funds' investment adviser.

Six of the BlackRock funds held shareholder meetings last week. Reuters reported on Tuesday that Saba failed to secure enough votes to install its candidates or to replace BlackRock as investment manager. Additional shareholder votes — including a vote for trustees of the fund at issue in Garnett's ruling on Tuesday — will take place later this week. Saba, of course, argues that the outcome of the shareholder votes was effectively predetermined by the very rules it is contesting in litigation.

It has brought two different lawsuits in Manhattan federal courts to force the BlackRock funds to rescind voting rules that, according to Saba, violate the Investment Company Act.

In the case before Garnett, Saba is challenging a fund rule that allows uncontested trustees to be re-elected just by a plurality of shareholders who vote at the annual meeting but requires trustee candidates in contested elections to garner a majority of all outstanding shares.

The rule, in Saba's telling, has served to entrench BlackRock's originally appointed trustees, who have been "held over" when investors failed to muster a quorum in previous shareholder meetings.

At a hearing earlier this month, Garnett questioned whether the issue was more shareholder apathy than voter suppression, noting that shareholders did not turn out in sufficient numbers for previous votes "despite enormous effort and resources expended by both Saba and BlackRock."

But in Tuesday's ruling, the judge said it is "simply not plausible" that federal law permits a fund to structure elections in a way that leaves the board composed "in perpetuity" of holdover trustees.

"Saba may well not succeed in showing that this point has been reached in this case," Garnett said. "But the allegations in the complaint are sufficient to allow them to try."

In a previously filed case, Saba sued 16 BlackRock funds over a bylaw that allegedly diluted the voting power of shareholders with a stake of more than 10%. U.S. District Judge Jed Rakoff of Manhattan tossed claims against five funds on jurisdictional grounds but granted summary judgment to Saba on claims against 11 Maryland-based funds, holding in a written opinion [□](#), opens new tab issued last January that the rule violated the Investment Company Act provision assuring equal rights to all shareholders.

The 2nd Circuit agreed with Rakoff in its ruling on Wednesday, rejecting BlackRock's argument that the provision was justified under Maryland law. The appeals court also held that Rakoff acted within his discretion when he ordered the funds to rescind the bylaw before either side engaged in discovery.

Read more:

BlackRock directors keep seats at six funds in proxy battle with Saba
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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.

Saba Capital Notches Win Against Funds' Activist Voting Limits

By Matthew Bultman

- Case one of several Saba brought against closed-end funds
- Saba had standing to challenge the restriction, 2nd Cir. says

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Saba Capital Notches Win Against Funds' Activist Voting Limits

By Matthew Bultman 2024-06-26T17:24:20000-04:00

- Case one of several Saba brought against closed-end funds
- Saba had standing to challenge the restriction, 2nd Cir. says

A federal appeals court upheld Saba Capital Management LP's win over a voting restriction adopted by several closed-end funds under the umbrella of BlackRock Inc., Tortoise Capital Advisors LLC, and other firms.

Under the so-called control share resolutions, shares that would put the holder at 10% or more of a fund's voting power generally were stripped of voting rights.

The US Court of Appeals for the Second Circuit rejected the funds' argument that Saba lacked legal standing to sue because it didn't have a 10% stake in most of the funds and wasn't at risk of imminent harm.

"Saba's sworn testimony, in combination with Saba's past actions and concrete plans, establishes that, in this case, Saba intends to acquire at least a 10% stake in each of these particular Funds," the court wrote in a Wednesday order affirming a lower court's decision.

The case is one of several that Saba has brought against the closed-end fund industry and its biggest names, including BlackRock, Nuveen LLC, and Franklin Resources Inc. Unlike open-end funds, closed-end funds aren't required to buy back shares from their shareholders, giving the funds more leeway in deciding where to invest their assets.

The Second Circuit in November ruled an amendment to the bylaws of Nuveen funds, similar to the restriction at issue Wednesday, violated federal law.

A New York federal judge this week ruled BlackRock must face a lawsuit over a bylaw that requires challengers for board seats to win the votes of a majority of shareholders. The judge in that case, however, denied Saba's request for a preliminary injunction preventing BlackRock from using the bylaw.

Susman Godfrey LLP represents Saba. Willkie Farr & Gallagher LLP; Sidley Austin LLP; Venable LLP; K&L Gates LLP; and Skadden, Arps, Slate, Meagher & Flom LLP represent the various funds.

The case is Saba Capital Master Fund, LTD. v. BlackRock ESG Capital Allocation Trust , 2d Cir., No. 23-8104, 6/26/24 .

— With assistance from Martina Barash.

To contact the reporter on this story: Matthew Bultman in New York at mbultman@bloombergindustry.com

To contact the editor responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com

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3 Firms Vie For Lead Role In Autodesk Securities Suit

By **Sydney Price**

Law360 (June 26, 2024, 7:13 PM EDT) -- Robbins Geller Rudman & Dowd LLP, Bernstein Litowitz Berger & Grossmann LLP and The Rosen Law Firm PA have each asked a California federal judge to lead a securities lawsuit against software company Autodesk for allegedly lacking proper internal controls due to issues with its free cash flow and operating margin practices.

All three proposals filed Monday claim to represent the "largest financial interest" in the **proposed class action** against Autodesk, which was filed in April by shareholder Michael Barkasi.

Barkasi, who is represented by Rosen Law, said in **his proposal** to lead the suit that he lost \$850.74.

According to **a motion** filed by Robbins Geller, its clients — Canadian Elevator Industry Pension Trust Fund and Canadian Elevator Industry Welfare Fund — said they lost more than \$233,000 in connection with their purchases of Autodesk securities.

In **a separate bid** for lead plaintiff, Bernstein Litowitz client Ontario Provincial Council of Carpenters Pension Trust Fund said it lost \$121,500.

Barkasi's suit alleges that throughout the class period, which begins June 1, 2023, Autodesk failed to inform investors that the company had not implemented effective internal controls.

The truth about Autodesk's insufficient controls began to emerge April 1, when the company told the U.S. Securities and Exchange Commission it would need 15 additional days to file its annual report due to its audit committee's internal investigation of its free cash flow and non-generally accepted accounting principles operating margin practices, the suit says.

According to the suit, issues with the practices were revealed to Autodesk after the company's earnings report in February.

Autodesk's stock price declined \$10.73, or about 4%, closing at \$248.71 per share on April 2, the suit says.

Fifteen days later, Autodesk said it would need even longer to file its annual report because of the ongoing investigation. Additionally, the company said it expected to submit a plan to Nasdaq to address how the company intends to remain compliant with Nasdaq's listing rules, according to the suit.

Autodesk's stock price fell \$13.32, or about 6%, closing at \$214.92 per share on April 17, the suit says. The next day, it fell an additional \$4.29, or about 2%, closing at \$210.63.

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

Barkasi is represented by Laurence M. Rosen of The Rosen Law Firm PA.

The Canadian Elevator funds are represented by Danielle S. Myers, Jennifer N. Caringal and Shawn A. Williams of Robbins Geller Rudman & Dowd LLP.

The Ontario carpenters are represented by Jonathan D. Uslaner, John Rizio-Hamilton, Avi Josefson and Scott R. Foglietta of Bernstein Litowitz Berger & Grossmann LLP.

Autodesk is represented by Caz Hashemi, Jessica L. Snorgrass and Stephen Bruce Strain of Wilson Sonsini Goodrich & Rosati PC.

The case is Barkasi v. Autodesk Inc. et al., case number 3:24-cv-02431, in the U.S. District Court for the Northern District of California.

--Editing by Stephen Berg.

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BREAKING: Justices Nix 3rd Party Liability Releases In Purdue Ch. 11 Plan

By **Vince Sullivan**

Law360 (June 27, 2024, 10:12 AM EDT) -- The U.S. Supreme Court shot down the validity of nonconsensual third-party releases in an opinion issued Thursday in the case of bankrupt drugmaker Purdue Pharma LP, potentially exposing the Sackler family members who own the company to personal liability for the company's role in the opioid crisis.

In a 5-4 decision authored by Justice Neil Gorsuch, the high court said there is nothing in the Bankruptcy Code that authorizes the nonconsensual discharge or release of claims against nondebtors.



The high court's rejection of a key provision in Purdue Pharma's bankruptcy settlement could open the door to legal action against members of the Sackler family. (AP Photo/Douglas Healey)

"Confining ourselves to the question presented, the court holds only that the Bankruptcy Code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants," the opinion said. "Because the Second Circuit held otherwise, its judgment is reversed and the case is remanded for further proceedings consistent with this opinion."

The liability shield in question is called a nonconsensual release of third-party claims, which can extinguish a creditor's claim against a person or entity other than the one that filed for bankruptcy, without that creditor's permission. These provisions are often included in bankruptcy plans and require a substantial

majority of affected creditors to support the releases, thus binding nonconsenting creditors to the releases.

In the case of Purdue, the members of the Sackler family who own the company are contributing up to \$6 billion to the estate in exchange for a release of claims tied to its potential liability for the opioid crisis.

The Office of the U.S. Trustee opposed the releases throughout the Chapter 11 plan process and through an appellate process that saw the issue meander through the bankruptcy court, the New York district court and the Second Circuit before reaching the Supreme Court for **December arguments**.

During those arguments, counsel for the U.S. Trustee said the releases are not an "appropriate" provision covered by Section 1123(b)(6) of the Bankruptcy Code because they give what amounts to a discharge of liability for the Sacklers without requiring them to submit to the authority of the bankruptcy courts.

Purdue argued that these kinds of releases have been used for decades in situations in which a nondebtor's liability is so closely intertwined with a debtor that exposing the nondebtor to collection actions brought by a single creditor would drain the resources available to the larger creditor body.

Connecticut-based Purdue **filed for bankruptcy** in New York in September 2019 after reaching a deal with 24 state governments to resolve claims that its sales of OxyContin played a major role in creating the U.S. opioid crisis. A Chapter 11 plan was confirmed in September 2021 in which the company's then-owners in the Sackler family agreed to contribute \$4.325 billion to a trust fund to pay opioid claims in exchange for releases from all opioid liability.

Eight states, the District of Columbia and the Office of the U.S. Trustee appealed the confirmation order to the Southern District of New York, which **ruled in December 2021** that the bankruptcy court lacked statutory authority to grant releases of third-party claims against nondebtors.

Purdue appealed to the Second Circuit, and the states and the District of Columbia subsequently dropped their opposition to the plan after the Sacklers increased their plan contribution to between \$5.5 billion and \$6 billion. The Second Circuit then reversed the district court decision, leading the U.S. Trustee's Office to file its **motion for a stay** in July with the Supreme Court. The U.S. Trustee said the issue was in need of Supreme Court review because of the "entrenched" circuit split on involuntary third-party releases.

The high court in August agreed to pause the implementation of Purdue's plan and hear the dispute.

Purdue is represented by Gregory G. Garre, Charles S. Dameron and Eric J. Konopka of Latham & Watkins LLP, and Marshall S. Huebner, Benjamin S. Kaminetzky, Marc J. Tobak and Garrett L. Cardillo of Davis Polk & Wardwell LLP.

The official committee of unsecured creditors is represented by Mitchell P. Hurley, Arik Y. Preis, Sara L. Brauner, Pratik A. Shah, Z.W. Julius Chen and Lide E. Paterno of Akin Gump Strauss Hauer & Feld LLP.

William K. Harrington, the U.S. trustee for the Second Circuit, is represented by Solicitor General Elizabeth B. Prelogar, Brian M. Boynton, Curtis E. Gannon, Masha G. Hansford, Michael S. Raab, Michael Shih, Sean R. Janda, Lawrence H. Fogelman, Pater Aronoff and Benjamin H. Torrance of the U.S. Department of Justice, and Ramona D. Elliott, Nan Roberts Eitel, P. Matthew Sutko, Beth A. Levene and Sumi K. Sakata of the Executive Office of the U.S. Trustee.

The case is William K. Harrington v. Purdue Pharma LP et al., case number 23-124, in the Supreme Court of the United States.

--Editing by Robert Rudinger.



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Ed Tech Co. Can't Beat Investor Suit Over Bot-Inflated Classes

By **Katryna Perera**

Law360 (June 26, 2024, 7:51 PM EDT) -- A New Jersey federal judge has ruled that confidential witness testimonies, among other things, "paint an unmistakable picture" that education tech company GSX Techedu Inc. used "bots" to inflate its online class enrollment numbers, in refusing to dismiss a suit against the company that demands recompense from certain executives for stock price drops.

In a 55-page **opinion** on Tuesday, U.S. District Judge Michael E. Farbiarz said the suing investors have identified several actionable misleading statements in the complaint and adequately pleaded loss causation and scienter, or knowledge of wrongdoing, by the defendants.

The operative second amended complaint was filed in April 2023, alleging that GSX and its top brass made it seem like it had more enrolled students than it really did by paying for "bots" to pose as students and attend the company's offered classes. According to Judge Farbiarz's opinion, GSX publicly reported the bots' attendance, the company used its own money to pay the fake students' enrollment fees and then GSX publicly reported those fees as revenue.

The inflated revenue numbers made GSX more enticing to investors, the opinion states, but when the truth was revealed through a short-seller report and other disclosures, GSX's stock price fell, causing damage to investors.

The defendants moved for dismissal last June, arguing the investors have not shown any actionable misstatements or misrepresentations made about GSX's enrollment data or revenue.

Judge Farbiarz said Tuesday that the defendants' arguments are "by and large not persuasive," pointing to the complaint's "extensive and detailed allegations" from confidential witnesses who worked for GSX during the relevant period.

The testimonies provided by the six confidential witnesses are detailed, based on solid sources of information and corroborated, the judge said.

"Taken together, confidential witnesses paint an unmistakable picture of allegedly systematic and large-scale use of bots by the company to generate fake student enrollments," the opinion states.

The judge also said the investors' claims of enrollment number misrepresentations are supported by a third-party report cited in the complaint that analyzed GSX-supplied data and concluded that more than 70% of GSX's students were bots.

According to the opinion, the defendants argued that the report's analysis was flawed because the data set used was too small, but Judge Farbiarz disagreed.

"Report-1 relies on information from over 200 classes, with data from 54,000 users, and 463,217 sign-in records from January to March 2020. In absolute terms, these are not small numbers," he said.

As for the allegedly false revenue statements, Judge Farbiarz said because it "stands to reason" that GSX's revenues flow directly from its student enrollment, there is a strong inference that an overstatement of enrollment numbers also caused an overstatement of revenue. He also said the

investors adequately pleaded loss causation.

Regarding the complaint's scienter claims, the judge said there are "ample" allegations that GSX's top executives knew of the inflated numbers and were provided with reports and information detailing the scheme.

The investors are also correct in their argument that the individual defendants, Larry Xiangdong Chen and Nan Shen, would have been "attuned" to enrollment data and revenue numbers in their positions as CEO and CFO, respectively, the judge said.

"The allegations in the complaint paint a picture of a company that systematically and intentionally made use of bots to drive up 'student' enrollment — to make the company look more revenue-rich, and accordingly more attractive to investors. The company could have operated in this way without the CEO and CFO knowing. But that is not, on balance, the more persuasive inference," the opinion states.

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

The investors are represented by Jeremy A. Lieberman and Austin P. Van on Pomerantz LLP, Laurence M. Rosen and Jing Chen of The Rosen Law Firm PA, and Junbo Hao of Hao Law Firm.

GSX and the individual defendants are represented by Scott D. Musoff, Robert A. Fumerton, Michael C. Griffin and Judith A. Flumenbaum of Skadden Arps Slate Meagher & Flom LLP.

The case is Wu v. GSX Techedu Inc. et al., case number 2:20-cv-04457, in the U.S. District Court for the District of New Jersey.

--Editing by Vaqas Asghar.

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Tesla Says Musk's Pay OK In Texas Affects Del. Class Fee Bid

By **Jeff Montgomery**

Law360 (June 26, 2024, 6:54 PM EDT) -- Tesla Inc. has doubled down on arguments that stockholder ratification of Elon Musk's mammoth compensation plan in Texas should sideline a Delaware Court of Chancery hearing on a potential multibillion-dollar class attorney fee tied to the court's earlier voiding of the same pay package.

In a reply brief filed in Chancellor Kathleen St. J. McCormick's court on Tuesday, the electric-vehicle and clean energy company argued it never conceded that the July 8 fee hearing schedule would be unaffected by the June 13 Texas vote — and never took the position that the chancellor's Jan. 30 compensation ruling was a final judgment.

"The class fee petition cannot be decided before the court addresses ratification" in Texas, Tesla argued, as the class attorney position "depends upon a counterfactual universe where ratification did not occur."

In the Texas vote, Tesla stockholders ratified Musk's stock-based pay proposal — estimated at around \$46 billion based on the company's current stock price — with 72% of the vote. The "redomestication" of the company's charter in Texas received 84% of the vote, according to the company.

Musk's prior Tesla-approved compensation package went to a weeklong trial in Delaware in November 2022 after it was challenged by stockholders opposing the 10-year compensation scheme. It included multiple performance milestones, all of which Tesla argued Musk had met.

Chancellor McCormick voided Musk's compensation plan on Jan. 30 after concluding the approval was marred by disclosure failures, a conflicted board, vague terms and unfair interference by Musk himself. Soon after, the company moved to reincorporate in Texas.

On Monday, attorneys for the stockholders argued in a brief that Tesla's "ratification gambit has no effect" on the Delaware case, including the court's already-entered judgment rescinding the grant and the pending class attorney fee petition.

Tesla argued last week that the ratification's consequences "alter the course" of the Chancery Court litigation and "any relief that is potentially available" including attorney fees — "and thus cannot be ignored in an action that is supposed to advance the best interests of the company."

On Tuesday, Tesla pointed to an April 17 letter to the court it said made clear that ratification of Musk's compensation "would materially impact these proceedings, including plaintiff's fee petition." Company attorneys also said they might request postponement of the July 8 hearing.

"Plaintiff's suggestion that defendants seek delay is backwards. Defendants will address the facts and the controlling law on an expedited schedule, including by filing our opening motion and brief on June 28, 2024, or on any other schedule that is convenient for the court," the Tesla reply said.

In April, amid earlier disagreements over the court's rulings and fee schedule, class attorneys filed motions for an expanded anti-suit injunction, as well as an order sequestering or transferring to a trust the Tesla shares that Musk was slated to receive before the chancellor's voiding of the deal.

Chancellor McCormick declined the proposals, saying the court had received assurances Tesla would not argue that the Jan. 30 order is unenforceable or that the claims can be argued outside of Delaware.

Tesla and counsel for the stockholders did not immediately respond to requests for comment.

Tesla Inc. is represented by Rudolf Koch, John D. Hendershot, Kevin M. Gallagher and Andrew L. Milam of Richards Layton & Finger PA, William M. Lafferty, Susan W. Waesco, Ryan D. Stottmann, Miranda N. Gilbert and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP, John L. Reed, Ronald N. Brown, Caleb G. Johnson and Daniel P. Klusman of DLA Piper, Catherine A. Gaul and Randall J. Teti of Ashby & Geddes PA, and Brian T. Frawley, Matthew A. Schwartz and Matthew L. Strand of Sullivan & Cromwell LLP.

Musk, Robyn M. Denholm, Antonio J. Gracias, James Murdoch, Linda Johnson Rice, Brad W. Buss and Ira Ehrenpreis are represented by David E. Ross, Garrett B. Moritz and Thomas Mandracchia of Ross Aronstam & Moritz LLP and Evan R. Chesler, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP.

Tornetta is represented by Jeroen van Kwawegen, Gregory V. Varallo and Glenn R. McGillivray of Bernstein Litowitz Berger & Grossmann LLP, Jeremy S. Friedman, Spencer M. Oster and David F.E. Tejtzel of Friedman Oster & Tejtzel PLLC, and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC.

The case is Richard J. Tornetta et al. v. Elon Musk et al., case number 2018-0408, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas, Lauren Berg and Hailey Konnath. Editing by Philip Shea.

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Investor Appeals Chancery Toss Of \$2.4B SPAC Deal Suit

By **Jeff Montgomery**

Law360 (June 26, 2024, 4:54 PM EDT) -- A stockholder of the blank-check company that took electric vehicle company Canoo Holdings Ltd. public in March 2021 has appealed to the Delaware Supreme Court the dismissal of his proposed Delaware Court of Chancery class action challenging the \$2.4 billion deal.

In a notice filed Tuesday, shareholder Paul White Jr. appealed Vice Chancellor Lori W. Will's May 31 decision granting special purpose acquisition company Hennessy Capital Acquisition Corp. IV's motion to toss his class action complaint in its entirety. White is also appealing a January order from Vice Chancellor Will regarding a motion to amend the complaint.

The vice chancellor said that the case relied too heavily on post-closing developments and found that White had "failed to plead a reasonably conceivable breach of fiduciary duty claim" against the SPAC's architects.

White filed his initial complaint in 2022, claiming that Hennessy Capital's board and the SPAC's sponsor breached their fiduciary duties to shareholders by failing to disclose that Canoo's business model would change after the merger, which prevented Hennessy's stockholders from making a "fair" share redemption choice.

Poor performance, however, is not "indicative of a breach of fiduciary duty. Conflicts are not a cause of action," Vice Chancellor Will said. The opinion added that "to allow this faulty claim to proceed would fuel perverse incentives" and invite questionable suits and claims.

The case is *In re: Hennessy Capital Acquisition Corp. IV Stockholder Litigation*, case number 2022-0571, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.

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Judge Trims 2nd Attempt At Crypto Lender Loan Suit

By **Sydney Price**

Law360 (June 26, 2024, 10:35 PM EDT) -- A California federal judge has again dismissed crypto lender Nexo Capital's affiliates from an amended suit over claims they fraudulently induced customers to take out risky loans, but found the new suit plausibly alleges Nexo distributed a nonexempt, unregistered security.

U.S. Magistrate Judge Thomas S. Hixson's Tuesday order dismisses most of the claims in investor John Cress' complaint, which was amended in November after several claims were **tossed the previous month**.

Nexo is an online platform that allows customers to use their digital assets as collateral to borrow cash. According to Cress' complaint, a customer can borrow as much cash as they want so long as a specific loan-to-value ratio between the amount of cash borrowed and the value of the collateral is maintained.

Since the value of the digital assets held as collateral fluctuates, Nexo maintains it will transfer assets or automatically sell them if a customer's loan-to-value ratio rises above a certain threshold, according to the complaint. Cress claims he was induced to borrow against his held digital assets and invest in Nexo's financial products.

On Tuesday, Judge Hixon dismissed Cress' claims against all of Nexo's affiliates named in the suit for lack of personal jurisdiction for the same reasons he did in October. The defendants previously argued Cress failed to show Nexo Financial LLC, Nexo Financial Services Ltd., Nexo AG and Nexo's CEO, Antoni Trenchev, "purposefully directed" their activities at California since they do not collectively operate the Nexo Capital website through which Cress was a customer.

The new complaint does not address the previously dismissed defendants, the judge said.

"Cress appears to recognize that all defendants except Nexo Capital have been dismissed, but he does not think it is necessary to file an amended complaint that omits them," the order said.

Nexo had previously asked the court to instruct Cress to file a new complaint removing the dismissed defendants.

In his suit, Cress says Nexo made false promises to him regarding its services to so-called VIP customers, which he relied upon, ultimately suffering millions of dollars in losses when the lender liquidated all of his digital assets.

According to Tuesday's order, Cress' amended complaint adds a new section that claims Nexo's sale of the NEXO token did not qualify for any exemption for security registration.

However, the defendants argue nothing in the new section undermines the court's prior dismissal. The court disagreed and allowed the claim to survive, saying it could no longer conclude the defendants' federal preemption defense was established by the allegations in the complaint.

"For example, the new allegations ... plausibly allege that Nexo sold the NEXO token to nonaccredited investors, failed to take reasonable measures to verify that the purchasers were accredited investors, and failed to take reasonable care to assure that the purchasers of the NEXO token were not statutory underwriters," the order said.

The order said it is Nexo's burden to show its tokens are exempt.

"Defendants quibble with the sufficiency of Cress's allegations, but their argument gets the burden of proof backwards," the order said. "Federal preemption is a defense, and defendants must plead and prove it."

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

Cress is represented by Max Ambrose and James Taylor-Copeland of Taylor-Copeland Law.

Nexo is represented by Ian S. Shelton of Eversheds Sutherland LLP.

The case is Cress v. Nexo Financial LLC et al., case number 3:23-cv-00882, in the U.S. District Court for the Northern District of California.

--Editing by Drashti Mehta.

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NFL Sunday Ticket Trial Goes To Jury With \$21B At Stake

By **Craig Clough**

Law360 (June 26, 2024, 11:06 PM EDT) -- Counsel for the NFL and DirecTV Sunday Ticket subscribers suing the league for billions of dollars made their closing arguments Wednesday in a California federal jury trial, with the customers' attorney saying the NFL didn't play fair and violated antitrust laws, while the league's lawyer said no conspiracy or illegal monopoly exists.

William C. Carmody of Susman Godfrey LLP, who represents two classes of Sunday Ticket subscribers, repeatedly asked the jury the same question — "What is competition?" — throughout his closing arguments. The question highlighted his main point that while the NFL believes in fair competition on the field, off the field, it engaged in a conspiracy with its teams and DirecTV to violate antitrust laws.

Emails and internal documents from the league and DirecTV shown during the **four-week trial** are evidence of an illegal agreement to keep the price of the Sunday Ticket from 2011 through 2023 artificially high, all for the purpose of protecting multi-billion-dollar contracts with CBS and Fox, so that the networks didn't get angry about the Sunday Ticket sucking viewers away from their free, over-the-air local games, Carmody said.

"You're going to answer the question, 'What is competition?'" Carmody told the jurors. "What does it really look like to compete? Think about it. All of us in our personal lives, we compete all the time. It could be in sports. It could be in anything. It could be competing to get a new job."

He said one example of competition is an NFL game, with two teams "battling it out, competing against each other" to try to advance and win the Super Bowl.

"On the field, the coaches aren't getting together before the game to talk about what plays they're going to call," he added. "And on the field, the networks don't weigh in and have any decision on who's going to win and who's not. But off the field, and behind the shield, it's a very different story. We have seen that the teams have chosen not to compete with one another. And the reason is they're making a whole lot of money doing that."

Following closing arguments, the jurors spent about 90 minutes deliberating and are expected to continue deliberations Thursday.

The subscribers are seeking just **over \$7 billion** in damages, which, under federal antitrust law, could ultimately be tripled to \$21 billion. Aside from the money at stake, a loss for the NFL could have a major impact on how it chooses to market and sell games that are not broadcast for free on network television if the jury finds that the league's past approach violated antitrust laws.

Carmody walked the jury through the evidence he said supported the two violations of the Sherman Act the subscribers were harmed by. He relied on emails and internal documents that he argued suggest NFL executives and DirecTV fixed the price of the Sunday Ticket, along with emails he said showed that Fox and CBS were **often pressuring the league** to keep the price high.

DirecTV must be part of the conspiracy to prove the customers' case, according to several questions on the jury's verdict form, even though the TV company is not a defendant in the case. CBS and Fox are not included on the verdict form, but Carmody said it was the pressure the league received from the networks that was a key motivator for it to enter into the antitrust conspiracy.

"I like this email," Carmody said as he showed the jury an email that former CBS Sports Chair **Sean McManus** sent to a top NFL executive during negotiations in 2011 for CBS to renew its deal to broadcast NFL games on Sundays. In the email, McManus said the network would "need clarification" for Sunday Ticket pricing because the "concept" was for it to be "sold at a premium" and "limit distribution."

The email "goes to the heart" of the case, Carmody said, adding that "this is what CBS is reminding the NFL of," which is to keep the Sunday Ticket price artificially high. What's missing is any response from the top NFL executives correcting McManus and telling him the league doesn't control the price of Sunday Ticket, the attorney contended.

"That never happened," he said, later adding that it was a "rigged game to keep these two networks happy."

He also hammered the NFL for not responding to the emails and documents during the case. One witness, top NFL executive **Brian Rolapp**, was repeatedly questioned about emails he was involved in or that his direct underlings were that the subscribers alleged is evidence of collusion. Carmody said that when the NFL's attorney had a turn to question Rolapp, he was not asked to explain those messages.

"They ran from these documents," Carmody said.

Other messages and documents Carmody highlighted included an internal DirecTV document stating the Sunday Ticket price was "subject to NFL approval."

During the NFL's closing arguments, counsel for the league and individual NFL teams, Beth A. Wilkinson of Wilkinson Stekloff LLP, focused much of her comments on the live testimony. Only one plaintiffs' witness, an expert, offered any testimony alleging the NFL's actions were illegal, she told jurors.

The proof that the NFL's conduct was correct is in the pudding, Wilkinson suggested, arguing that the NFL is the only major sports league to provide 100% of a team's games on the air for free in a team's local market, and that 87% of Sunday Ticket subscribers in a recent poll said they were happy with the product.

Studies also show the NFL has the best competitive balance of the major U.S. sports leagues, which is achieved by the teams pooling media revenue like the out-of-market Sunday Ticket games, she said.

The plaintiffs' main damages theory that the NFL should have followed the college football model for out-of-market games and allowed teams or small groups of teams to negotiate their own packages would create "chaos," Wilkinson said, calling the theory "fantasy land."

As for the emails and documents stressed by Carmody, those are just "snippets" that result from "cherry-picking" specific lines out of 30 years of documents, Wilkinson said.

The testimony from league executives, including Commissioner **Roger Goodell**, along with broadcasting executives and NFL owners all supported the argument that there was no collusion or illicit monopoly of out-of-market games, Wilkinson said, arguing that the subscribers produced no witness who claimed they had direct knowledge of any antitrust conspiracy.

"None of this was secret," she said.

Since Sunday Ticket began in 1994 through the end of DirecTV's contract in 2023, it has shown all NFL Sunday afternoon games for prices that ranged each year in the hundreds of dollars, while Fox and CBS aired free Sunday afternoon games over the air. Only Fox or CBS had the right to air a home team's game in a local market, such as a Dallas Cowboys game in the Dallas area, and the Dallas game at that time could not be viewed under Sunday Ticket in the Dallas area.

DirecTV and the NFL have been fighting the antitrust allegations for the better part of a decade. In

late 2015, more than 20 lawsuits from bars, restaurants and fans were centralized into the current multidistrict litigation over Sunday Ticket. On Tuesday, the league argued that the **commercial class** should be removed from the case, but a judge denied the request.

The NFL also sought on Wednesday to bar the plaintiffs from arguing alternative damages based on an alleged "**NFL tax**," but the judge denied that request as well.

The class period runs from 2011 through 2023, the period in which DirecTV exclusively aired Sunday Ticket.

Last season, Sunday Ticket moved to YouTube TV, and that contract is not subject to the current litigation.

In their suit, the subscribers said DirecTV can charge more because it doesn't have competition for football broadcasts. They have also contended that without the deal with the NFL to sell rights collectively, each football team would be motivated to distribute its out-of-market games nationally via cable, satellite or online channels at competitive prices.

A class of NFL fans and another class of businesses, such as bars and restaurants, are challenging the Sunday Ticket exclusivity agreement. They **won class certification** in early 2023.

The subscribers are represented by Ian B. Crosby, Marc M. Seltzer, Kalpana Srinivasan, Amanda Bonn, William C. Carmody, Seth Ard, Tyler Finn and Ian M. Gore of Susman Godfrey LLP, Scott Martin, Sathya S. Gosselin, Christopher L. Lebsack, Samuel Maida and Farhad Mirzadeh of Hausfeld LLP and Howard Langer, Edward Diver, Peter Leckman and Kevin Trainer of Langer Grogan & Diver PC.

The NFL and individual NFL clubs are represented by Rakesh N. Kilaru, Beth A. Wilkinson, Brian L. Stekloff, Max J. Warren, Anastasia M. Pastan and Jeremy S. Barber of Wilkinson Stekloff LLP, and by Neema T. Sahni, Gregg H. Levy, Derek Ludwin and John S. Playforth of Covington & Burling LLP.

The case is In re: National Football League's Sunday Ticket Antitrust Litigation, case number 2:15-ml-02668, in the U.S. District Court for the Central District of California.

--Editing by Covey Son.