

1H24 Securities Suit Filings Project YE Totals Ahead of Last Year's Pace

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June 30, 2024



By Kevin LaCroix on June 30, 2024
Posted in Securities Litigation



The number of federal court securities class action lawsuit filings in the year's first half reflected a filing pace that projects year-end numbers ahead of last year's full-year totals.

According to my tally, there were 109 federal court securities class action lawsuit filings in the first six months of 2024. (Please note that the figures in this post do not include or discuss state court securities class action lawsuit filings.) The first-half filings, if annualized for the full twelve months of the year, suggest a year-end total number of filings of 218, ahead of the 213 securities suits filed in full-year 2023. But while the year-end projected number suggests a slight increase over 2023, it is worth noting that the 109 2024 first-half filings total was actually slightly *behind* the 114 filings in the first half of 2023.

Certain types of filings that contributed significantly to prior years' filing levels remained as factors in the number of first-half 2024 filings. Thus, for example, there were seven COVID-related securities suit filings in the first half of 2024, compared to nine for the full year 2023. However, while there were 20 SPAC-related securities suit filings in the full year 2023, there were only five SPAC-related securities suit filings in the first six months of 2024. Securities suit filings against commercial banks contributed significantly to full-year 2023 filings levels, as there were 12 2023 securities suits filed against commercial banks, whereas in the first six months of 2024, there was only one securities suit filed against a commercial bank.

The securities suits filed in the first half of 2023 were filed against companies in a wide variety of industries. The first-half 2024 securities suits were filed against companies in 59 different SIC Code categories. The SIC Code category with the highest number of first-half 2024 securities suit filings was SIC Code Category 7372 (Prepackaged Software), with ten securities suit filings. There was a total of 18 securities suits filed against companies in SIC Code Group 737 (Computer Programming and Data Processing). The two SIC Code

categories with the next highest number of first half securities suit filings, both with eight filings in the year's first six months, were SIC Code Category 2834 (Pharmaceutical Preparations) and SIC Code Category 2836 (Biological Products). There was a total of 18 first-half securities suit filings against companies in SIC Code Group 283 (Drugs).

The first-half 2024 federal court securities class action lawsuit filings were filed in a number of different federal district courts; by my count, securities suits were first-filed in a total of 33 different federal courts during the year's first half. The federal district court with the most first-filed securities class action lawsuits in the first half of 2024 was the Northern District of California, with 19, followed closely by the Southern District of New York, with 18. Overall, the California federal districts courts had 34 first-filed securities suit filings in the first half, while the New York district courts had 25. The two states' district courts had a total of 59 first half securities suit filings, representing about 55% of all first-filed securities class action lawsuits.

In prior years, merger objection class action lawsuit filings were a significant factor in the overall annual number of securities suit filings. However, in the first six months of 2024, class action merger objection lawsuit filings were barely a factor; by my tally, there were a total of only two federal court merger objection lawsuit filings in the year's first half. (Please note that the merger objection lawsuits are still being filed in significant numbers, but they are being filed as individual actions rather than class actions, and so do not show up in the class action lawsuit filings statistics.)

Of the 109 first half securities class action lawsuit filings, 16 involved non-U.S. defendant companies. The 16 suits against non-U.S. companies involved companies from ten different countries. The countries with the most first-half securities suit filings were Israel (4), China (3), and the United Kingdom (2). Among the countries with companies among the defendants sued in first-half securities suits are some unusual countries – unusual in the sense that companies from these countries are not frequent targets of U.S. securities class action lawsuits: Singapore, United Arab Emirates, and Vietnam.

Consistent with the relatively low level of IPO activity since 2022, there were relatively few IPO-related securities class action lawsuits filed in the first half of 2024. By my count, there was a total of six IPO-related securities suits filed in the first half. The IPO companies named as defendants completed their IPOs in 2020 (one company); 2021 (three companies); and 2023 (two companies).

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July 1, 2024, 2:00 AM PDT

This Week in Chancery Court: IBEW, Sol Goldman, New Relic

By Jennifer Kay, Alexis Waiss and Allie Reed

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This Week in Chancery Court: IBEW, Sol Goldman, New Relic

By Jennifer Kay, Alexis Waiss and Allie Reed 2024-07-01T05:00:50000-04:00

A hearing in a case challenging GoDaddy Inc.'s \$850 million buyout of investor tax benefits will be held Monday at the Delaware Chancery Court.

Here's more from the court's calendar next week:

Monday: IBEW Local Union 481 Defined Contrib. Plan & Trust v. Winborne, Del. Ch., No. 2022-0497, hearing 7/1/24.

At issue: GoDaddy Inc.'s board of directors is fending off a lawsuit over the company's \$850 million buyout of the tax benefits held by its founder and other investors. Vice Chancellor J. Travis Laster denied GoDaddy's motion to dismiss in August 2023, finding it plausible the board could've approved an overpayment on the tax benefits to please investors. The court stayed proceedings in the case in December 2023 to allow a Special Litigation Committee to investigate the allegations. The committee is requesting a 150-day extension of the stay, which the plaintiffs oppose, arguing the committee hasn't complied with the order's original stipulations.

Court action: A hearing will be held over Zoom before Vice Chancellor Laster.

GoDaddy Board to Face Pension Fund Lawsuit for \$850 Million Deal

Wednesday: In Re New Relic, Del. Ch., No. 2023-1089, pre-trial conference 7/3/24.

At issue: New Relic Inc. faces a lawsuit brought by a pension fund seeking the software company's books and records to investigate whether a sale to Francisco Partners Management LP and TPG Global LLC was driven by pressure from an activist hedge fund. The pension fund wants to "investigate potential breaches of fiduciary duty, evaluate the independence of New Relic's directors and officers, and value their Company shares," out of concerns that the merger involved conflicts of interest, it said in a pre-trial opening brief. New Relic denied the allegations in an answer to the pension fund's complaint, and said their records request was too broad.

Court action: A pre-trial conference will be held over the phone before Magistrate Selena Molina.

New Relic Sued Over \$6.5 Billion Sale to Francisco Partners, TPG

Wednesday: Gurney-Goldman v. Goldman, Del. Ch., No. 2023-1124, post-trial arguments 7/3/24.

At issue: Heirs of the late billionaire developer Sol Goldman, whose holdings once included the Chrysler Building, are fighting over control of the family's real estate empire. A 2023 lawsuit filed by a daughter and grandson of the property mogul says another of his daughters has been unilaterally running the enterprise without permission from family members who own 75% of it. The case went to trial in May, and it's now time for Vice Chancellor Laster to hear closing arguments. The plaintiffs argue in a post-trial brief that they're only asserting their "undeniable" management rights instead of seeking damages.

Court action: Post-trial arguments will be heard in Wilmington, Del. before Vice Chancellor Laster.

Billionaire Family Feud Breaks Out Over Goldman Property Empire

Wednesday: Blackwells Onshore I LLC v. The Walt Disney Co. , Del. Ch., No. 2024-0321, oral ruling 7/3/24.

At issue: An oral ruling is expected on whether Walt Disney Co. must release records about its relationship with activist investor ValueAct Capital Management LP and the role it played in a fight over the makeup of Disney's board of directors. Blackwells Capital LLC's pretrial brief alleged that Disney didn't properly disclose financial ties to ValueAct before ValueAct backed Disney's director candidates in an ongoing proxy fight. Disney argued in its own pre-trial brief that "Blackwells' theories of wrongdoing are invented out of whole cloth."

Court action: Magistrate Molina will deliver a telephonic oral ruling.

Blackwells Sues Disney Over Ties to ValueAct in Proxy Fight (2)

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Match Group's Executives Beat Investors' Securities Claims (1)

By Tre'Vaughn Howard

Documents

 [Docket](#) [Recommendation](#)

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- Claims are accurate, non-contradictory, non-actionable
 - Alleged misstatements alleged to inflate stock, led to losses

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Match Group's Executives Beat Investors' Securities Claims (1)

By Tre'Vaughn Howard 2024-06-28T17:00:15000-04:00

- Claims are accurate, non-contradictory, non-actionable
- Alleged misstatements alleged to inflate stock, led to losses

Shareholders of the umbrella company behind online dating services like Tinder and Hinge failed to allege the company's chief executives made misleading statements, causing the company's stock to trade at artificially inflated and maintained prices, a magistrate judge said in a recommendation Thursday.

Lead plaintiff Northern California Pipe Trades Trust Funds sued Match Group Inc. on behalf of a proposed class of investors, alleging executives made material misrepresentations and omissions when communicating with investors about the integration of Hyperconnect—a South Korean “social discovery and video technology” company—acquired by Match in June 2021.

The investors also alleged Match's executives mischaracterized the capacity of Tinder's new product offerings—Explore and Tinder Coins—to mitigate the decline in Tinder's user numbers, revenue, and profitability.

NCPTTF failed to allege material representations regarding the Hyperconnect integration and the Tinder products, said Magistrate Judge Sherry R. Fallon, of the US District Court for the District of Delaware, recommending a dismissal without prejudice.

The proposed class—investors that purchased Match stock between Nov. 3, 2021, through Jan. 31, 2023—brought claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, as well as under Section 20(a) of the Exchange Act., — The plaintiffs alleged they bought stock at inflated prices and suffered losses when Match's stock price plummeted. Match moved to dismiss the suit for failing to sufficiently plead violations.

Claims brought under Section 10(b) of the Exchange Act and Rule 10b-5 “are subject to the heightened pleading standard of the Private Securities Litigation Reform Act,” Fallon said. The heightened standard requires a plaintiff to specify each statement alleged to be misleading, the reasons it's misleading, and provide facts “giving rise to a strong inference that the defendant acted with a required state of mind,” she said.

Match argued the alleged misrepresentations “are either accurate and non-contradictory,” or are “non-actionable statements of opinion, puffery, and/or forward-looking statements” because the Hyperconnect integration was disclosed to shareholders. Match also said the amended complaint doesn't identify a misrepresentation about the Tinder initiatives.

The investors said statements by four former high-ranking Match employees who were confidential witnesses included claims that the company didn't plan to integrate with Hyperconnect, nor was it feasible, Fallon said.

The investors also alleged Match misled shareholders by representing that Tinder Explore increased user engagement and that Tinder Coins was on track to launch globally after a positive soft launch, but both weren't the case, she said.

But Fallon sided with Match in her recommendation: Using a side-by-side diagram of the alleged misrepresentations and actual statements made by Match officials, she said the statements were “corporate optimism” and “non-actionable opinions” that didn't contradict the Hyperconnect integration.

“Statements about what Defendants ‘think’ are not actionable under the PSLRA as long as the opinion was truly held when uttered,” Fallon said regarding one of the statements deemed to be simply puffery.

And regarding the Tinder initiatives, the investors also didn't make a sufficient pleading of material omissions or misstatements, Fallon said. The amended complaint doesn't contain any facts suggesting Match knew about expectations for Tinder Explore, nor did it allege the company made misrepresentations that user retention was slightly worse because of Coin's prototype testing, she said—among other reasons.

Fallon also recommended that a personal liability claim under Section 20(a) be dismissed because the amended complaint failed to allege a primary violation by the defendants under Section 10(b).

The investors have leave to amend the suit based on Fallon's recommendation.

Block and Leviton LLP, deLeeuw Law LLC, and Rigrodsky Law PA represent the investors. Morris Nichols Arsht & Tunnell LLP and Quinn Emanuel Urquhart & Sullivan LLP represent Match.

The case is Bardaji v. Match Grp. Inc. , D. Del., No. 1:23-cv-00245, 6/27/24 .

(Clarifies and corrects in paragraph five, sections and rules under the Exchange Act alleged to have been violated; adds additional context in paragraph six.)

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Catalent Inc. Investors Advance Narrowed Quality, Revenue Claims

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Catalent Inc. shareholders can continue with a proposed class action alleging the vaccine manufacturer misled them about quality control and sustained revenue, but not all their allegations about those issues made it through, a federal court said.

The investors can't proceed with claims over Catalent's statements about demand for its gene therapy and other non-vaccine products, Judge Zahid N. Quraishi said June 28 for the US District Court for the District of New Jersey.

The suit is among a number targeting vaccine and drug company statements and business tactics as the Covid-19 pandemic developed and eventually eased. Still other suits focus on how companies in other industries weathered changes in the pandemic.

The Catalent investors alleged the company schemed to pad its financial results and create the appearance of continued growth after its initial pandemic surge from packaging Covid-19 vaccines into syringes had subsided. Catalent also concealed contamination issues in some of its facilities and misrepresented the prospects of its non-vaccine business, they said.

The court trimmed the complaint but allowed the suit to proceed. A 2022 submission to the Securities and Exchange Commission, stating that the company's "sites and equipment are in good condition, are well maintained, and are able to operate at or above present levels for the foreseeable future," can form the basis of a securities fraud claim, Quraishi said.

Executives' statements related to one of the facilities—allegedly downplaying the effect of a shutdown there—are actionable because other omitted information would have altered the mix of information for investors, he said.

Quraishi allowed a statement about Catalent's accounting compliance in an SEC form and one disclaiming risk from inventory problems to proceed. The investors alleged that one client "specifically directed Catalent to stop manufacturing its products but Catalent did not listen, and Catalent additionally kept manufacturing more products for another client" against its wishes for revenue purposes, he said.

"Such information undermines Catalent's claims of paying 'careful attention to inventory levels' and that there was 'no significant...concern' regarding inventory levels during Catalent's fiscal year 2022," he said.

Kessler Topaz Meltzer & Check LLP and Labaton Keller Sucharow LLP are lead counsel for the class. Quinn Emanuel Urquhart & Sullivan LLP and Marino, Tortorella & Boyle PC represent Catalent.

The case is City of Warwick Ret. Sys. v. Catalent, Inc. , 2024 BL 222054, D.N.J., No. 23-1108 (ZNQ) (JTQ), 6/28/24 .

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Qualcomm \$75 Million Deal With Investors Gets Early Nod

By Tre'Vaughn Howard

Documents

 [Order](#)

 [Docket](#)

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- Plaintiff: Cash settlement the result of seven-year dispute
 - Court says settlement resulted from arms-length negotiations

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Qualcomm \$75 Million Deal With Investors Gets Early Nod

By Tre'Vaughn Howard 2024-06-28T17:53:10000-04:00

- Plaintiff: Cash settlement the result of seven-year dispute
- Court says settlement resulted from arms-length negotiations

Qualcomm Inc. investors, who brought a class action against the company alleging it misled them about “bundling” its sale and licensing business, have received preliminary approval for a \$75 million cash settlement.

The settlement is fair, reasonable, and adequate, Judge Jinsook Ohta, of the US District Court for the Southern District of California, said in granting preliminary approval.

Four corrective disclosures about regulators’ inquiries into anticompetitive bundling conduct in South Korea, the European Union, and the US caused declines in the company’s stock price, the investors alleged in the suit against the company that lasted for seven years before reaching a mutual agreement to settle.

Lead plaintiffs Sjunde AP-Fonden and Metzler Asset Management GmbH recognized in weighing the risks of going to trial that the maximum recoverable damages could be significantly reduced, according to their motion in support of the preliminary settlement proposal.

The lead plaintiffs and their counsel engaged in extensive discovery to reach the settlement, which included nearly 40 interviews and over 60 million pages of discovery from Qualcomm and more than 17 third parties.

The settlement class includes those who purchased Qualcomm stock between February 2012 and January 2017 and were damaged by the company's alleged misconduct. The class members must submit a claim to demonstrate they experienced a loss from their transactions in publicly traded Qualcomm common stock during the class period.

The more than 2.1 million potential class members were sent a notice and don't have any further opportunity to exclude themselves, Ohta said. Class members must sign and provide adequate documentation for claims submission, Ohta added, and those who don't submit a valid claim form waive their right to payment from the cash settlement.

The formula for distribution is based on the estimated amount of artificial inflation in the price of Qualcomm common stock during that time, according to the investors' motion for approval of the settlement. The calculation will also depend on when a claimant purchased or sold the eligible stock and for how long.

The investors' counsel plans to apply for an award of attorneys' fees that is 23% of the settlement fund and for reimbursement of expenses.

The class members will release Qualcomm of all asserted claims in exchange for the payment. But the court will retain jurisdiction of all proceedings in the suit until the conditions of the settlement are carried out, Ohta said.

The court will have a final settlement hearing in September.

Bernstein Litowitz Berger & Grossmann LLP and Motley Rice LLC are lead counsel for the class. Cravath Swaine & Moore LLP, Cooley LLP, Kecker, Van Nest & Peters LLP, and Stephen Ryan Benson Richards, who practices in South Jordan, Utah, represent Qualcomm.

The case is *In re Qualcomm Inc. Securities Litig.*, 2024 BL 220507, S.D. Cal., No. 3:17-cv-00121, 6/27/24.

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Meta Shareholder's Request Denied to Put Annual Meeting on Hold

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A shareholder's attempt to stop Meta Platforms Inc. from holding its annual meeting was rendered moot when the event went ahead as scheduled, a federal judge ruled in an opinion that detailed various other defects with the injunction request.

Matt Eisner sought a preliminary injunction requiring Meta to make additional disclosures in its proxy statement with the US Securities and Exchange Commission regarding the company's efforts to safeguard children on its platforms, Facebook and Instagram; he also sought to postpone the annual shareholder meeting ultimately held May 29, giving time for the disclosures and for shareholders to review them before its meeting.

Eisner's motion for a preliminary injunction was rendered moot when the meeting was held, but Judge Charles R. Breyer of the US District Court for the Northern District of California filed an opinion in the case June 28 explaining why the motion was meritless. Breyer also said that the meeting wasn't enjoined "because the shortcomings of Plaintiff's motion were apparent from the papers," adding that "he fails to allege that the Proxy Statement contained any material misrepresentations or omissions."

Meta's original proxy statement included two shareholder proposals related to child exploitation on the company's platforms, and the board voted against the proposals, saying Meta's existing policies, "coupled with new efforts to prevent child exploitation," addressed the issue," Breyer said. Both of the proposals supported by Eisner were advisory, he said, and the Meta board recommended that they be rejected because it's "clear that Plaintiff and all other interested shareholders had sufficient information available to make an informed vote on the proposals."

Eisner said Meta violated Section 14(a) of the 1934 Securities Exchange Act because its proxy statement included material false statements regarding the extent to which Meta was addressing child exploitation and it contained omissions regarding the extent Meta was taking steps to protect children on its platforms and curb the risk the company was facing from failing to do so.

The first set of Meta statements that Eisner pointed to as misleading, included that the company's "policies prohibit harmful content, as well as content or behavior that exploits young people," and that Meta "seek[s] to prevent child exploitation through a number of measures, including using sophisticated technology." These are "aspirational statements" that aren't actionable under the Exchange Act, Breyer said.

Eisner did point to some objective statements, such as, in one month, the company “disabled more than 500,000 accounts for violating our child exploitation policies.” But he didn’t provide any “particularized reasons why these statements are misleading or false,” Breyer said.

Eisner further contended that Meta’s proxy statement didn’t disclose the full extent of its child exploitation problem. Meta wasn’t required to disclose every instance where it failed to eliminate child exploitation or any information that was already in the public domain, Breyer said, concluding that the omissions also didn’t violate the Exchange Act.

Nor did Eisner allege that there was any economic or irreparable harm linked to the proxy statement, Breyer said.

Balancing the equities, Breyer said that “there would have been significant disruption to Meta if the Court had delayed its annual shareholder meeting,” and Eisner “suffered no obvious harm by the meeting and votes going forward as planned: Plaintiff was not a sponsor of either of the shareholder proposals and had not advanced an alternate slate of directors.”

It wasn’t in the public’s interest to grant the preliminary injunction, Breyer said.

Bottini & Bottini, Inc., represented Eisner. Davis Polk and Wardwell LLP represented Meta.

The case is Eisner v. Meta Platforms, Inc. , 2024 BL 222142, N.D. Cal., No. 24-cv-2175-CRB, 6/28/24 .

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Archer Aviation's Executive Liability Shield Hit With Challenge

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Securities Law

Archer Aviation Inc. signage in San Jose, California, US, on Tuesday, Oct. 17, 2023.

Photographer: Loren Elliott/Bloomberg via Getty Images

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0700

Archer Aviation Inc. defied the will of its investors by adopting an officer liability shield they voted down at its annual meeting, a new lawsuit says.

A shareholder sued the air-taxi startup in Delaware, saying the company wrongfully declared the change had passed with 66.03% of the June 21 vote, contradicting the two-thirds supermajority requirement in its charter. Without that provision, CEO Adam Goldstein would have been able to push the amendment through based on his 51% voting power alone, the suit says.

"The officer exculpation amendment received just 440,283,684 affirmative votes, over 4 million shares short of the 444,498,243 votes required," according to the proposed class action filed June 29. "Proposal 5 had failed. Yet the board inexplicably deemed Proposal 5 to have been approved."

Archer didn't immediately respond to a request for comment Monday.

The case is the second in recent weeks to confront Archer affiliates in Delaware's Chancery Court, the leading US forum for corporate litigation. A different shareholder 10 days earlier sued billionaire investment banker Ken Moelis and other architects of its blank-check merger with a special purpose acquisition company. Archer and Goldstein aren't targeted by that lawsuit.

The new shareholder complaint seeks a court order invalidating the liability shield.

The investor leading the litigation, John Solak, is represented by Farnan LLP and Purcell & Lefkowitz LLP. Archer hasn't yet made a court appearance.

The case is Solak v. Archer Aviation Inc. , Del. Ch., No. 2024-0700, complaint filed 6/28/24 .

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Securities Law Prof Blog

 lawprofessors.typepad.com/securities/2024/06/new-securities-law-articles-in-print-2.html

Saturday, June 29, 2024

New Securities Law Articles in Print

The following law review article relating to securities regulation is now available in paper format:

Anat Alon-Beck & John Livingstone, *Mythical Unicorns and How To Find Them: The Disclosure Revolution*, 2023 Colum. Bus. L. Rev. 69 (2023).

Adam O. Emmerich, Robin Panovka & Jodi J. Schwartz, *REITs Come of Age*, 79 Bus. Law. 107 (2024).

Allan Horwich, *The Myriad Ways SEC Rule 10b5-1 Is Invalid*, 79 Bus. Law. 23 (2024).

Helen Norton, *What Twenty-First-Century Free Speech Law Means for Securities Regulation*, 99 Notre Dame L. Rev. 97 (2023).

Eric Rolston, Note, *Regulating Democratized Finance: Cryptocurrency, Retail Broker-Dealers and the SEC's Regulatory Perimeter*, 2023 Colum. Bus. L. Rev. 487 (2023).

Mary Ryan, Comment, *How Small is Small Enough? Examining the Limits of the Intelligible Principle Test*, 98 Tul. L. Rev. 141 (2023).

Maddie White, Note, *An Empirical Analysis of SEC Rule 6c-11's Impact on the Usage of Heartbeat Trades by Exchange-Traded Funds*, 2023 Colum. Bus. L. Rev. 533 (2023).

Visa, Mastercard can likely handle settlement much bigger than \$30 billion, judge says

 [reuters.com/legal/visa-mastercard-can-likely-handle-settlement-much-bigger-than-30-billion-judge-2024-06-28](https://www.reuters.com/legal/visa-mastercard-can-likely-handle-settlement-much-bigger-than-30-billion-judge-2024-06-28)

Jonathan Stempel

A screen displays the company logo for Mastercard Inc. on the floor at the New York Stock Exchange (NYSE) in New York City, U.S., February 29, 2024. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, June 28 (Reuters) - A federal judge said Visa (V.N) , opens new tab and Mastercard (MA.N) , opens new tab can likely withstand a "substantially greater" settlement with merchants who said they overpaid on swipe fees than the \$30 billion accord she rejected this week.

U.S. District Judge Margo Brodie in Brooklyn made her assessment in an 88-page opinion released on Friday, three days after announcing her rejection of the preliminary settlement. The accord covering more than 12 million merchants would have lowered and capped swipe fees, also known as interchange fees, they pay to handle Visa and Mastercard transactions.

But the judge called the estimated \$6 billion of annual savings for merchants "paltry" compared with the estimated \$100 billion in fees they paid to accept Visa and Mastercard in 2023.

"Without evidence of Visa's and Mastercard's profitability, the court cannot say with certainty that defendants can withstand a greater judgment; however, the evidence strongly suggests that they could withstand a substantially greater judgment," Brodie wrote.

The antitrust litigation began in 2005, and could go to trial absent a new settlement.

Visa said it was disappointed, and still believes that "direct resolution with merchants is the best way forward."

Mastercard also expressed disappointment, saying the settlement would have encouraged competition and given millions of businesses "substantial certainty and enormous value in how they manage their card acceptance activities."

The accord would have lowered the typical 1.5% to 3.5% swipe fee by 0.04 percentage points for three years, capped fees for five years, and given merchants more room to impose surcharges.

Brodie said the proposed changes fell short of "best possible" recovery.

She said it kept fees significantly above where they would be absent the alleged antitrust violations, and still "saddled" merchants with the "Honor All Cards" rule requiring that they accept all Visa and Mastercard cards, or none.

Many merchants objected to the settlement, as did several trade groups including the National Retail Federation.

The case is In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, U.S. District Court, Eastern District of New York, No 05-md-01720.

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Reporting by Jonathan Stempel in New York; Editing by Daniel Wallis

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What's Next for NFL After \$4.7 Billion 'Sunday Ticket' Verdict?

A Los Angeles jury ordered the NFL on Thursday to pay \$4.7 billion in damages to residential subscribers and \$96 million to businesses. Federal antitrust law could treble the damages to more than \$14 billion.

June 28, 2024 at 06:39 PM

Antitrust

By Kat Black | June 28, 2024 at 06:39 PM



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

A Los Angeles jury found that the National Football League broke antitrust law and conspired to inflate the price of its “Sunday Ticket” streaming package in a landmark class action verdict that could potentially reshape the professional football broadcasting landscape.

The jury ordered the League on Thursday to pay \$4.7 billion in damages to residential subscribers and \$96 million to businesses. Federal antitrust law could treble the damages to more than \$14 billion.

“It’s a hard pill to swallow,” said Alan Milstein, an attorney at Sherman, Silverstein, Kohl, Rose & Podolsky, who said that the damages are “not excessive” given the size of the class action.

Plaintiffs in the class action, which originally demanded up to \$7 billion in damages, included more than 2.4 million residential and 48,000 commercial “Sunday Ticket” subscribers between June 2011 and February 2023.

Mark Conrad, professor of law and ethics and director of the sports business initiative at Fordham University’s Gabelli School of Business, said that one of the problems with antitrust litigation is that it is “enormously complex” and is “hard for laymen ... to digest.”

“I think that the jury probably was not convinced of the defenses the NFL made, which were rather legalistic defenses,” he said, adding that the poor “optics” of forcing fans to buy a package of out-of-market games for a high price when they are fans of just one team could have also motivated the jury’s decision.

The lawsuit, which was initially filed in 2015 by the Mucky Duck sports bar in San Francisco, spans almost 10 years of litigation and went to a three-week trial on June 6. It accused the NFL of colluding with DirecTV to monopolize professional football broadcasting by granting the streamer exclusive rights to stream bundled out-of-market games to fans and businesses that subscribed to the “Sunday Ticket” service. DirecTV, which has an enforceable mandatory arbitration clause in its consumer agreements, was not named as a defendant in the suit.

YouTube TV acquired “Sunday Ticket,” which is priced at \$449 annually, in 2023.

The case was dismissed with prejudice by U.S. District Judge Beverly Reid O’Connell of the Central District of California in 2017 and revived in a decision by the U.S. Court of Appeals for the Ninth Circuit in 2019.

Judge Philip Gutierrez will hear post-trial motions in a hearing scheduled for July 31. If the NFL appeals the case, it will likely head to the Ninth Circuit and may possibly appear before the Supreme Court. The defense counsel has also filed a motion for judgment as a matter of law, which is still under submission.

The Supreme Court previously [rejected](#) an appeal from the NFL to reverse the Ninth Circuit’s ruling in 2020, but Justice Brett Kavanaugh wrote in the decision that “the denial of certiorari should not necessarily be viewed as agreement with the legal analysis of the Court of Appeals.”

“Moreover, the plaintiffs may not have antitrust standing to sue the NFL and the individual teams,” he wrote. “This Court’s case law ‘authorizes suits by direct purchasers but bars suits by indirect purchasers.’ The plaintiffs here did not purchase a product from the NFL or any team, and may therefore be barred from bringing suit against the NFL and its teams under *Illinois Brick Co. v. Illinois*. ... In sum, the defendants—the NFL, its teams, and DirecTV—have substantial arguments on the law. If the defendants do not prevail at summary judgment or at trial, they may raise those legal arguments again in a new petition for certiorari, as appropriate.”

Jodi Balsam, a professor at Brooklyn Law School who specializes in sports and antitrust law, said that the damages will “pinch” the NFL but that it won’t affect its business model “in any meaningful way”—at least not immediately.

“This verdict does not impose any injunctive relief, as far as I know,” Balsam said. “It does not say to the NFL, ‘You can’t do it this way anymore.’ All it says is that the way you structured your TV rights business in this instance is more anti-competitive than pro-competitive. The jury did not credit the NFL’s business justifications and found an antitrust violation justifying damages. But nothing stops the NFL from continuing to do business in exactly the same way that it has in the past, other than its own assessment of future risk. And they are not required to do what the plaintiff’s’ attorneys were arguing throughout this trial, which is unravel its pooled television rights agreement and delegate to all the member clubs the right and authority to individually contract for their TV rights.”

Fordham’s Conrad said that if the verdict stands, it will lead to some “restructuring” in the NFL’s broadcasting strategies because of the “huge” amount of rights fees and the size of the NFL’s audience, but that this process will take two to three years if the NFL appeals.

“You’re talking about a really big goose to be carved up,” he said.

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NOT FOR REPRINT

Trader Joe's Hit With Deception Suit Over Gluten-Free Bagels

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- **COURT:** C.D. Cal.
- **TRACK DOCKET:** No. 2:24-cv-05543

Trader Joe's Co. labels some of its "Almost Everything" bagels as "gluten-free" even though the products contain high levels of gluten, a proposed consumer class action said.

Testing from Moms Across America, a nonprofit dedicated to educating parents about toxins in food products, found the bagels have almost 270 parts per million of gluten, the complaint filed June 28 in the US District Court for the Central District of California alleged. The US Food and Drug Administration set the limit for labeling something gluten-free as having less than 20 ppm of gluten.

Trader Joe's didn't immediately respond to a request for comment.

Moms Across America campaigns against GMOs and vaccines and claims to support parental, human, and religious rights.

Gluten-free food options have proliferated over the last decade. Research from Statista shows the global market for gluten-free products will reach \$14 billion by 2032 and that Gen Z and Millennial consumers are more likely to follow gluten-free diets.

"Consumers have positive beliefs towards a gluten-free diet," the complaint said. "The 'Gluten Free' representation is important to consumers when deciding to purchase" the bagels.

Lead plaintiff Shaianne Starks said she relied on the "gluten-free" label and wouldn't have purchased the bagels if she knew they contained gluten.

Starks brings claims under California's consumer protection statutes as well as a claim for breach of warranty. She seeks to represent a nationwide consumer class. Starks is asking the court for damages and an injunction stopping the grocer from continuing to use deceptive advertising.

Starks is represented by Crosner Legal PC.

The case is Starks v. Trader Joe's Co. , C.D. Cal., No. 2:24-cv-05543, complaint filed 6/28/24

Ohio Lt. Gov. Husted denies knowledge of corruption scheme in wake of FirstEnergy texts

 1.next.westlaw.com/Document/I97605770378b11ef8a8bc087c23147ed/View/FullText.html

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July 1, 2024

Ohio Lt. Gov. Husted denies knowledge of corruption scheme in wake of FirstEnergy texts

Morgan Trau

Jul 01, 2024

Lt. Gov. Jon Husted in September 2022. (Photo by Graham Stokes for the Ohio Capital Journal / Republish photo only with original story)

Ohio Lieutenant Governor Jon Husted adamantly denied prior knowledge of the largest bribery scheme in state history after we discovered text messages from FirstEnergy executives alleging he led the push for House Bill 6.

He also seemed aggravated by follow-up questions asking how he was ignorant of the plot.

FirstEnergy spent \$61 million dollars in exchange for H.B. 6, legislation giving their failing utility company a \$1 billion bailout.

This landed former House Speaker Larry Householder in federal prison for 20 years, and he is now facing state charges, as well.

Recap

A public records request revealed both Gov. Mike DeWine and Husted's ties to former FirstEnergy CEO Chuck Jones and VP Michael Dowling — the ones who helped fund their campaign.

Both DeWine and Husted have continuously denied any involvement, and law enforcement has not accused either of wrongdoing.

Last week, new texts revealed that DeWine asked Jones for money, which he then received via a dark money PAC.

The day after the texts were revealed, DeWine was questioned as to why anyone should believe him that he didn't know about the corruption scheme.

The governor deflected questions about his relationship with the former FirstEnergy executives

On June 25, OCJ/WEWS discovered and reported on more texts alleging that he helped push forward H.B. 6 and got a playbook from FirstEnergy on how to convince others, according to FirstEnergy executives.

While DeWine is dealing with the ongoing discovery of text messages linking him to indicted FirstEnergy executives, Republican lawmakers are drafting legislation requiring greater campaign finance disclosure.

Last Wednesday, the bill sponsor gave a first look.

"My one takeaway from your story is — we need to get rid of all of it," House Finance Chair Jay Edwards (R-Nelsonville) said about dark money.

The next day, it was reported that an indicted FirstEnergy executive planned to call DeWine and Husted to testify as witnesses in his criminal trial.

After four days focused on the governor, the spotlight shifted to the second-in-command: Husted.

OCJ/WEWS discovered and reported on messages sent between Husted and FirstEnergy executives, in addition to a slew of texts and emails between FirstEnergy officials and lobbyists about Husted.

Recap of texts

Husted frequently communicated with FirstEnergy execs before, during and after his campaign.

Once in office, records show that it was Husted, not DeWine, who allegedly helped lead the charge for the bailout bill.

Dowling emailed Jones before H.B. 6 passed in 2019, saying the governor "left the details of H.B. 6 to others — John [sic] Husted and Danny."

Dan McCarthy was DeWine's legislative director after having been a lobbyist for FirstEnergy.

Along with McCarthy appearing continuously in the documents, so does John Kiani. Kiani was the executive chairman of FirstEnergy's subsidiary, FirstEnergy Solutions.

"Husted, Sam, Evans and Danny McCarthy are fighting to the end and we've been talking to them all day," Jones texted Kiani. "Everything that can be done is being done."

The other men Jones mentions are Randazzo and Matt Evans, a Householder ally and coal company executive basically working as a lobbyist.

Then came the Senate tax debacle. In short, FirstEnergy wanted subsidies for 10 years for their nuclear plants, while the Senate leaned towards six.

"Just had long convo with JHusted just now. Senate President called John [sic] twice during our two calls and he called me back twice. All is well. JH is working on the 10 years," Dowling texted Jones in early July 2019. "He's afraid it's going to end up being 8. Talk later."

"Matt needs to close the 10 with Larry and you or him with JH," Jones responded.

When the Senate was holding up H.B. 6's passage, Jones texted Householder.

"Husted called me 2 nights ago and was supposed to get it in the Senate version," Jones said.

"He's not a legislator," Householder responded.

"I know, but he said Senate leaders would listen," Jones replied. "He didn't deliver."

While all of these policy discussion conversations are going on, Husted and FirstEnergy-affiliated people are texting, having meetings and talking on the phone dozens of times, according to call logs.

Although they aren't all dated, Husted's personal cell phone number comes up at least 30 times in call logs with Dowling and Jones — with many in 2019.

The above messages are just a sliver of the myriad of other messages about Husted helping FirstEnergy.

"You can read these texts and say 'this is nothing but politics as usual' or you can read them and say 'they know what they're doing and they're speaking in code in order to avoid the smoking gun,'" Case Western Reserve University law professor Mike Benza said.

DeWine was seemingly purposely left somewhat in the dark about the bribe, according to notes from Randazzo's federal indictment.

“Explain things like he doesn’t know anything about it — and be surprised when he does,” Dowling wrote about DeWine in a note for Jones. “Sometimes he knows what you’re talking about. Sometimes he doesn’t. Sometimes he does and pretends he doesn’t.”

On the flip side of that note, Dowling wrote that “Jon is getting some negative feedback,” illustrating that he allegedly was a part of the conversation.

“It’s either [DeWine] was clueless about what was going on both in the statehouse but even within his own administration, which doesn’t look good, or he knew what was going on, which makes him guilty,” Benza said. “The lieutenant governor has that same problem and some of these text messages may make it even worse for him — that it appears that they targeted him as the person to do this in order to insulate Governor DeWine from any issue.”

Months after the passage of H.B. 6, Dowling and Mike Dawson, a lobbyist, were texting about the possible 2026 gubernatorial race.

“In a Husted Householder primary who is FE for?” Dawson texted.

“Jon,” Dowling responded.

Finding out why FirstEnergy would want Husted is something that could come out in trial, Benza said.

“Remember the way the politics in Ohio are structured, really, the power of getting things done is in the General Assembly,” the professor said. “Sometimes muscle isn’t a good leader.”

Husted’s reaction

At an unrelated press conference on Friday, Husted was asked about the texts.

“With FirstEnergy executives talking about you, relying on you to pass House Bill 6, why should people believe you that you didn’t know about this scheme?” OCJ/WEWS asked.

“Well, first of all, everybody in the room may not have been around back when this all started, the Paris Climate Accords in 2000 ...” Husted started, addressing zero-carbon energy.

He advocated publicly for the saving of nuclear power plants, he said.

“There is every reason to believe that they were gonna go out — if they had, we’d be in an energy deficit today, so it’s important that they were saved,” Husted continued. “That was a very public position I’d taken and I stand by that position.”

When further pushed to talk about the actual texts regarding the bribery scheme, Husted seemed exasperated.

"I don't know what you're talking about," he said. "We weren't involved. Texts to other people — texts to other people shared amongst themselves — have nothing to do with me. And I wasn't involved in that conversation," he replied.

Going further, Husted was asked how he was ignorant of the behavior when phone logs show he talked to them more than 20 times.

"I wasn't involved in it. That was Larry Householder and there are no texts between me and him," he responded.

Benza said there are a few reasons why Husted might not know.

"You don't ask," he said.

Or, you're kept in the dark.

"He sees that as normal political action," he said. "If you think it's good policy, then the money isn't why you're voting."

When OCJ/WEWS first talked to Benza about DeWine's texts, he said politics, as usual, was a legitimate argument, even if the optics weren't great.

"At least in the public documents — nothing shows that same type of quid pro quo going to Jon Husted or Governor DeWine," the professor said. "It certainly has the appearance of it, but there's no smoking gun in this type of a case yet ... but I think they have to be worried."

Benza said the texts about Husted reinforce his point that Husted should be concerned.

"I think there's more here," he said. "But I'm not sure that this 'more' tips over to the ability of the prosecution to either even bring charges, let alone get a conviction."

Any politician in Ohio who has any connections to H.B. 6 has to be worried, he said. Whether or not you were involved in the scheme, your name is still attached.

This could put a damper on political ambitions, Benza said.

"Quite frankly, your biggest capital as a politician is your name and your reputation," he added.

Husted is expected to run for governor in 2026 against Attorney General Dave Yost — the man who indicted Jones, Dowling and Randazzo.

OCJ/WEWS reached out to the AG's office to ask if they were aware of all of these texts prior to the publication, if they could rise to a level of campaign coordination and if the office is investigating the politicians.

The office declined to comment.

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Company: FIRSTENERGY SOLUTIONS CORP.; CASE WESTERN RESERVE UNIVERSITY

News Subject: (Crime (1CR87); Criminal Law (1CR79); Fraud (1FR30); Government (1GO80); Government Litigation (1GO18); Legal (1LE33); Lobby & Pressure Groups (1LO18); Social Issues (1SO05))

Canna SPAC Has Phantom Stock

Published: Mon Jul 01 14:05:16 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

Canna Global

Every so often a company needs to sell stock, but it doesn't have any stock to sell. There is some restriction in its corporate charter saying that it can't issue any more stock,¹ but it needs money, there are willing buyers, and there's a deal to be done, if only there were any shares of stock left. It is a frustrating problem. "Stock" is not a real thing; stock is just a way to account for fractional ownership of the company, and in some sense the company can always create more. It's just that the corporate charter does not currently allow it to.

What can it do? There are two main approaches:

1. Most of the time, the restriction in the charter can be changed by a shareholder vote. So the company can go ask the shareholders to let it issue more stock, and hold a vote, and if it wins the vote it can sell more shares. This completely solves the problem. But it takes time: If the company needs money now, waiting months to get a shareholder vote is a problem. Also sometimes the shareholders vote no, because they don't like dilution, or they don't vote at all, because they are retail investors who tend not to vote.
2. Or the company can sell, not *stock*, but IOUs for stock, promises to issue stock later. The company has a buyer who will pay \$50 million for 10 million new shares of stock, and the company thinks that's a good price and wants to act now, but it has no shares left. So it goes to the buyer and says "look, we will *eventually* get 10 million new shares. We'll hold a shareholder vote, as many times as necessary to get approval. But that takes time, and we want to do this trade now. So why don't you give us the \$50 million now, and we'll give you a contract saying that, when we *can* give you 10 million shares, we will."

Obviously the second approach creates some risk for the buyer — what if it never gets the shares? — but it does happen.² Most notably, we talked a lot last year about AMC Entertainment Holdings Inc.'s "APE" stock, which was a form of IOU stock. AMC wanted to sell common stock, it was out of authorized shares and it couldn't get its shareholders to approve more. So it created a new class of quasi-stock, IOU stock, stock to be issued later: It called it AMC Preferred Equity Units (APEs), handed some out to shareholders, and started selling more. The APEs could be traded, and they

always traded at a discount to real stock, but eventually AMC got approval to convert them into real stock, and it did. This caused various bits of trouble, but it basically worked, and AMC was not the first or last company to use roughly this idea.

I guess here is a simpler solution:

- The company wants to sell stock, but doesn't have any.
- A buyer wants to buy the stock.
- They agree to an IOU: The buyer gives the company money and gets back a promise to issue stock eventually.
- The buyer is like "ehhhhhh I basically have stock, good enough."
- So he *sells* his stock — the stock that he doesn't *have*, but that he should get eventually — on the stock market, to other people, as real stock. And people buy it, thinking it is real stock.
- Now it's out there and there's no real way to unscramble the egg so, hey, *fait accompli*, he got the stock and sold it, problem solved. Stock is a construct anyway; it's silly to get too hung up on questions like "does he have stock" or "is this stock real."

No, I'm kidding! Come on! You can't do that. What does that even *mean*? The buyer doesn't *have* stock — doesn't have actual shares of stock — so how could he turn around and sell it, on the stock exchange, interchangeably with real shares? This doesn't make sense; I'm sorry I suggested it.

Here's an 8-K from last Thursday (emphasis added):

On June 21, 2024, Canna Global Acquisition Corp (the "Company") executed a Settlement and Recapitalization Agreement (the "Agreement") with Liqueous LP, a Delaware Limited Partnership ("Liqueous"). ...

In consideration for entering into the Agreement with the Company and for entering into the Debt Purchase Agreement with EF Hutton, the Company agreed to issue 1,544,531 new shares of Class A common stock to Liqueous at a future date because at the time of entering into the Agreement, the Company's Second Amended and Restated Certificate of Incorporation, as amended, did not permit the issuance of additional shares of common stock prior to the consummation of the Company's initial business combination, if the additional shares of capital stock of the Company would entitle the holders thereof to receive funds from Company's trust account or vote on any initial business combination. ...

Thereafter, Liqueous tendered the Agreement and a legal opinion to the Company's transfer agent and arranged a sale of 724,000 shares of Class A common stock in the market.

In response, the Company is working with its transfer agent to protect its public investors

from its initial public offering to ensure receive priority to the proceeds in the Company's trust account in the event of redemptions coinciding with the Company's closing of an initial business combination or liquidation. With respect to the Company's stockholders who purchased shares of Class A common stock sold by any Liqueous trade, the Company is negotiating with Liqueous to enter into a backstop agreement whereby Liqueous would guarantee the payment of redemption proceeds for those Company stockholders to the extent that the Company's trust account proceeds is not sufficient to honor such redemptions in the event of the Company's closing of an initial business combination or liquidation. The Company will issue additional reports on Form 8-K as this matter develops.

Uh. Okay. Canna is a special purpose acquisition company that went public in 2021, during the SPAC boom. It sold 23 million shares, for \$10 each, to SPAC investors, raising \$230 million. It had basically 18 months to complete its mission of closing a merger with a cannabis company (obviously), or else the shareholders would get their money back with interest. It kept the \$230 million in a trust account in case it had to give the money back.

It failed to close a merger on time, so it asked shareholders to allow it to extend its search. The shareholders agreed, as a technical matter — they voted to approve the extension, and Canna is still around — but as part of the extension request, Canna gave them the chance to take their money back, and almost all of them did. Last June, 20.6 million of the 23 million shares redeemed at \$10.26 each, leaving Canna with just \$24.3 million in its trust account. It got another extension in December, and another 1.3 million shares redeemed at \$10.76. At this point there are just 860,000 shares of Class A common stock — the stock owned by public SPAC investors — and about \$12.6 million in the trust account. (There are some more Class B shares owned by the sponsors of the SPAC, but those don't get a claim on the trust account: They're only valuable if the company finds a deal.)

When it did its initial public offering in 2021, Canna paid its investment bank, EF Hutton LLC, a fee to underwrite the IPO. It also agreed to pay EF Hutton another \$8 million if it ever closed a merger. It considers this deferred underwriting fee a debt, which is a little odd: It seems unlikely Canna will ever close a merger, so it's unlikely to have to pay EF Hutton the \$8 million. EF Hutton certainly thinks so: It decided to *sell* that \$8 million deferred fee to Liqueous for just \$1.25 million, reflecting a low — and yet higher than I would have expected? — probability of Canna ever actually paying the fee.

And then Liqueous agreed with Canna that it would extinguish that debt — and Canna wouldn't owe any money for deferred underwriting fees — in exchange for a payment of about 1.5 million Class A common shares.

Which ... what? On June 21, when this happened, Canna's stock closed at \$10.86 per share. The 1.5 million share payment to Liqueous was worth about \$16.8 million, more than twice as much as the

extremely-unlikely-to-be-paid EF Hutton debt that was being canceled. A very strange corporate choice.

But it gets much stranger. The way SPACs work is:

1. If the SPAC doesn't complete a merger, it gives holders of its Class A shares — the public investors who bought shares of the SPAC — their \$10 back, with interest.
2. The money in the SPAC's trust fund is earmarked to make sure that they get their money back.

As of March 31, Canna had \$12.6 million in its trust account and 860,000 Class A shares outstanding, or about \$14.60 per share, more than enough to cover the shareholders' \$10 plus interest. That — and not the prospects of a deal — is why Canna's stock was trading at \$10.86 on June 21: The stock represented a well-collateralized claim to get back \$10 with interest since 2021. But if Canna issued 1.5 million new shares to Liqueous, *for no cash*, that would dilute the other shareholders: That \$12.6 million would have to cover 2.4 million shares, and would work out to about \$5.22 per share. Instead of shareholders getting their money back with interest, they'd get back roughly half of it.

This is so bad — so contrary to how SPACs are supposed to work, to how they are advertised and regulated — that it is not allowed. Canna's corporate charter simply said that it *couldn't* issue new Class A shares "if the additional shares of capital stock of the Company would entitle the holders thereof to receive funds from Company's trust account." Again, that's why Canna's stock was trading at \$10.86: The stock represents a claim on a pot of money that is (1) large enough to pay each shareholder \$10 plus interest and (2) *protected* from any other claims or uses. You can't spend or dilute the trust account.

Canna did it anyway. Or, rather, it didn't: It gave Liqueous an *IOU* promising "to issue 1,544,531 new shares of Class A common stock to Liqueous at a future date." Presumably the thinking here is something like:

- Canna actually finds and closes a merger (???).
- After the merger, any shares of Canna that are *not* redeemed for \$10 plus interest flip into being shares of the new public company.
- At *that* point, it's fine to issue new shares to Liqueous: Those new shares will just be shares of stock of a new public (cannabis?) company, not a SPAC with a trust account.
- So Liqueous will get the 1.5 million new shares, which (after the merger and redemptions) might be worth considerably less than \$10 each. (This is why Liqueous gets 1.5 million IOU shares, worth \$16.8 million at the time: Because Liqueous doesn't *actually* get those shares; it only gets them later, when the trust account is gone and the shares are riskier.)

Or not; I don't really know what the thinking was. But what happened next was: "Liqueous tendered the Agreement and a legal opinion to the Company's transfer agent and arranged a sale of 724,000 shares of Class A common stock in the market." I cannot explain it. Apparently Liqueous got the IOU — the promise to issue 1.5 million shares of stock in the future — and a note from a lawyer saying "actually this is stock," and took them to Canna's transfer agent — the company that keeps track of the company's stock ownership — and said "see, this is stock," and the transfer agent looked at it and said "yes, everything is in order here, this is stock," so it registered Liqueous as owning 1.5 million shares of regular Class A stock in Canna.

And in some sense, if "stock" is anything, it's "an entry on the list maintained by the transfer agent." So if the transfer agent decided that Liqueous had stock, it did. The stuff it bought from Canna wasn't stock — it was an IOU for stock — but it became stock once the transfer agent decided it was stock.

And then Liqueous sold like half of it. It sold 724,000 shares, without telling anyone about any of this. The people *buying* those shares thought that they were getting regular Class A shares, which would entitle them to \$10 plus interest from the SPAC's trust account. So the price of the stock stayed above \$10 almost the whole time since the Liqueous deal,³ and it was able to sell its stock for something like \$8 million, much more than the \$1.25 million it apparently paid EF Hutton to get this deal.

I cannot stress enough how not allowed this is.⁴ As of last week, roughly half of the Canna shares in the hands of public shareholders were, in some sense, *fake*. But nobody knows which ones: The US stock market is not great at tracking provenance, so if you bought your shares on the stock exchange it's hard to know if you bought them from (someone who bought them from (someone who bought them from ...)) Canna in its initial public offering (real shares), or from (someone who bought them from (someone who bought them from ...)) Liqueous (fake shares). Also I don't know what the consequences would be. Some possibilities:

1. Some shares are real and represent a claim on \$10 plus interest in the trust account; others are fake and do not. (Maybe they get whatever is left over in the trust account after paying out the real shares.)
2. All shares are indistinguishable at this point, and the trust account is divided equally among them, making each share a claim on roughly \$5.22 in the trust account.

Both quite bad! Canna opted for the first option, and tried to get Liqueous to "backstop" the fake shares: It amended its charter to somehow, retroactively, say that the new shares sold by Liqueous are real but "would have subordinate rights to those of the stockholders of the Corporation's initial public offering of securities to receive funds from the Trust Account such that stockholders of the Corporation's initial public offering of securities would receive their full access to the funds in the trust account before holders of additional shares would receive residual proceeds of the trust account."

And it “is negotiating with Liqueous to enter into a backstop agreement whereby Liqueous would guarantee the payment of redemption proceeds for those Company stockholders [who bought from Liqueous] to the extent that the Company’s trust account proceeds is not sufficient to honor such redemptions in the event of the Company’s closing of an initial business combination or liquidation.” Perhaps Liqueous will guarantee those shareholders their \$10 plus interest, why not. (Why?)

Meanwhile, no unscrambling the egg, so “the Company instructed its transfer agent to proceed with the issuance of the remaining 829,531 of Class A common stock to Liqueous in reliance on Liqueous’ attorney’s opinion.” Okay. The fake shares have become real. Real but subordinated. Even though they are indistinguishable from the unsubordinated ones. Can Liqueous keep selling them?

No, is the answer, because Nasdaq — the exchange on which Canna is listed — halted the stock last Thursday, and said on Friday that “trading will remain halted until Canna-Global Acquisition Corp has fully satisfied Nasdaq’s request for additional information.” I would also like more information!

The latest news is that Canna’s transfer agent, Continental Stock Transfer & Trust Co., seems to have realized that Liqueous’s stock was not stock, and feels bad about turning it into stock, so it has promised to pay back anyone who bought it. From its press release this morning:

Continental Stock Transfer & Trust Company, New York, NY, stock transfer agent and trustee for Canna Global Acquisition Corp. (NASDAQ: CNGL, CNGLU and CNGLW), announced today that, in light of the failure of Liqueous LP to return 724,000 shares of Canna Global Class A common shares issued to them based on instructions from Canna Global in contravention of its Certificate of Incorporation, and in the absence of an agreement by which Liqueous would provide a backstop guarantee insuring payment of full trust value for said 724,000 shares should they be presented for redemption, Continental as trustee has itself agreed to guarantee the payment of full trust value for the 724,000 Class A common shares of Canna Global in the event of a redemption or liquidation event.

I don’t know what to tell you. People sometimes worry that naked short sellers are going around creating “phantom shares” in public companies to drive down the price and make trouble. That almost never actually happens. But it did here.

24-hour trading

I have thought sometimes that financial markets should be divided into two clearly demarcated regimes, which I once called the Nice Market and the Fun Market. The Nice Market has rules, and the rules aim to achieve fairness, informative asset prices and efficient capital formation. The Fun Market has fewer rules, and it aims to achieve fun. The Nice Market, like all financial markets, tolerates a

certain amount of speculation, because speculation can be good for price efficiency and liquidity. The Fun Market mostly encourages gambling.

And then if you want fairness and efficient pricing — if you are a buy-and-hold index investor looking to invest your retirement funds in equity claims on the economy at prices reflecting the market's sense of the present value of future cash flows — you invest in the Nice Market. And if you want to gamble, you invest in the Fun Market.

This suggestion is not *that* real, because financial markets are interconnected, and inevitably some of the fun had in the Fun Market would bleed back into the Nice Market. And some people looking for the Nice Market would inevitably stumble into the Fun one and have, you know, too much fun. (I originally proposed this for *crypto*, because crypto markets are just *less* interconnected than real ones. Who cares about price efficiency and capital formation in a memecoin?)

Still it is a useful thought experiment. Consider segmenting the stock market by *time*. It's so intuitive:

1. If you are buying large-cap US stocks at the 4 p.m. closing auction, when big index funds do their trades to get maximum liquidity and match the “official” price of the day, you are *clearly* looking for the Nice Market, and that's what you should get. If the closing auction is very volatile, or manipulated, that would be self-evidently bad: Zillions of dollars of indexed retirement savings would be getting inaccurate prices.
2. If you are buying small-cap US stocks at 3 a.m., *you do not care about price efficiency or capital formation*. Everyone who cares about price efficiency or capital formation is in bed. The market at 3 a.m. is the Fun Market. You do not need me to tell you this, or a regulator or your broker. It is intuitively obvious that if you're on your computer speculating on stocks at 3 a.m., *you are gambling*.

Anyway Bloomberg's Lu Wang and Katherine Doherty have a story today on the rise of 24-hour retail trading, which features a lot of complaints of the form “the market at 3 a.m. is not Nice”:

“We're only going to have trouble in the middle of the night when things are so illiquid,” says Joseph Saluzzi, co-head of equity trading at Themis Trading LLC.

A market veteran of more than three decades, Saluzzi has been perturbed by a handful of huge moves at unexpected times recently, like a 20% surge in GameStop Corp. on a Sunday evening in June. His big fear is that someone could take advantage of slow overnight trading to create momentum in a share, pushing it higher for a quick profit. ...

A Bloomberg Intelligence analysis showed that nearly three-quarters of stock volume on Blue Ocean [*Technologies LLC, an alternative trading system for overnight trading*] was in illiquid names, or those with a spread between bid and ask price of over 30 basis points.

At major alternative trading venues which focus on regular hours, that cohort accounts for an average of just 16.6% of activity.

“You might incur extra spreads” when trading overnight, Sanders at Interactive Brokers says. “People should do their homework and understand what the spread is during regular trading hours and compare it to overnight and decide if it's worth it.”

This just strikes me as a complete non-problem. If you have no view on price and just want to buy stocks at whatever price reflects an efficient market's view of their value, you do that during the trading day, or at the closing auction, and you will get tight bid-ask spreads. If you are trading at 3 a.m., you *want* volatility. You *want* the possibility that stock prices are 20% too high, or 20% too low: That's how you make money. I mean, obviously: That's how you lose money. But still. You want stocks to trade at the wrong price, because that's what makes the game fun and risky and potentially rewarding. If stocks trade at the right prices, you can't make any money, and that's boring; save that for the Nice Market during daylight.

But there are other complaints, for which I have more sympathy, of the form “yes obviously the 3 a.m. market is Fun, but the Fun Market inevitably bleeds into the Nice Market and vice versa”:

Proponents of non-stop trading point out that issues like illiquidity and wide spreads will naturally lesson as overnight volumes increase. In a kind of virtuous circle, they expect rising activity will also pave the way for larger trade sizes and hence more institutional involvement, further improving market depth and breadth.

Yes right if the stock market is really open 24 hours a day then some institutions will trade at 3 a.m. to get an edge and to react to news, and then other institutions will have to, and then everyone will be awake all the time and that seems exhausting:

A market that never sleeps could create mental hazards for anyone who feels pressured to constantly monitor moves or reactively adjust positions, according to Malcolm Polley, chief market strategist at Stratos Investment Management.

I have often argued that the stock market should be open half an hour a day, to (1) concentrate liquidity when everyone else is trading and (2) let traders get more sleep and time with their families. Obviously the synthesis is:

1. The Nice Stock Market is open 3:30 p.m. to 4 p.m., all official prices are set there, all mutual funds are benchmarked to its close, etc.
2. The Fun Stock Market is open 24/7 and institutional investors are actively *discouraged* from trading there, but if you want to, good luck, have fun.

It's not perfect but it feels like the right idea.

Elsewhere in fun markets

I don't know man:

Shares of Chewy climbed after the influential retail trader known by his online moniker "Roaring Kitty" disclosed a 6.6% stake in the online pet-products retailer.

The stock was up 20% at \$32.72 in premarket trading. Shares had gained 15% year to date as of Friday's market close.

Keith Gill's stake was disclosed in a regulatory filing days after posting a photo of a dog on his account on X.

The cryptic post fueled speculation that Gill, whose advocacy of GameStop in 2021 spurred massive gain in that retailer's stock, was also throwing his support behind Chewy, which was founded by GameStop CEO Ryan Cohen.

Chewy's stock spiked after Gill's post last Thursday, jumping from the prior day's close of \$29.15 to a high of \$35.95 in midday trading, only to then sink back to around \$29 by the time the market closed.

Gill's filing with the Securities and Exchange Commission, dated June 24 and made public Monday, shows that he owns 9 million shares in Chewy. Gill checked a box on the filing noting that he is "not a cat," a distinction he made to lawmakers in his 2021 congressional testimony in the GameStop saga.

Here's Keith Gill's Schedule 13G, because Keith Gill is a 13G filer now. Good for him. There is not actually a box on Schedule 13G labeled "Check the appropriate box to designate whether you are a cat," but you can kind of type whatever you want, and he did. Obviously it will be funny if Chewy founder Ryan Cohen controls GameStop and GameStop ... mascot? ... Keith Gill controls Chewy, but honestly not that funny. It feels like there are diminishing returns to all of this, both as a matter of market impact and as a matter of comedy. But, sure, if you have the magic ability to make a stock go up just by talking about it, that is intoxicating, and you'll do what you can to hold onto it.

Chutzpah

Some US states have passed laws making it illegal for employers to discriminate against employees (or potential employees) based on their criminal records. The natural arbitrage is:

1. Get a job.
2. Steal from your employer.
3. When you get fired, say “no, I have *committed a crime*, and you can’t discriminate against me based on my criminal record, so you can’t fire me.”

This is not a good plan, because between Steps 2 and 3 you go to jail, but it is a very funny plan. Also — extremely not legal advice — it might work?

Two brothers found guilty of stealing scrap metal from the Oconomowoc Area School District have been fighting for eight years to keep their jobs with the district.

Their case is now headed to the Wisconsin Supreme Court.

Gregory and Jeff Cota were part of the school district’s grounds crew. An investigation in 2014 found the brothers, a supervisor and co-worker kept more than \$5,000 that was supposed to be turned over to the district after they recycled scrap metal, according to the lawsuit.

Police investigated the case. The Cotas were issued citations for municipal theft.

The Cotas agreed to pay \$500 restitution to the school district, and they were ultimately fired for theft in 2016.

In 2021, the state’s Labor and Industry Review Commission found the Oconomowoc School District violated the Wisconsin Fair Employment Act’s prohibition against arrest record discrimination.

That was reversed on appeal, but it’s now before the state supreme court, so who knows. It’s possible that the rule is that, if you commit crimes at work, you can be fired *or* prosecuted, but not both.

Chevron

It’s been a wild few days for the US Supreme Court, and I am not going to cover it in any depth, but I should note that the Court overruled Chevron last week, meaning that courts no longer have to defer to regulatory agencies’ interpretations of laws. I wrote last Thursday: “I continue to think that there is a live possibility that, in the not too distant future, the Supreme Court will rule that the SEC has no power to make rules, and all of its rules are invalid. But not today.” Kind of Friday, though.

I have written around here about the US Securities and Exchange Commission’s regulatory agenda in the last few years — things like its new climate disclosure rules or swaps disclosure rules or private funds rules — and I kind of wish I hadn’t.

Anyway, here's Noah Feldman at Bloomberg Opinion on Chevron. Here's Rachel Barkow. Today I think the Supreme Court ruled that the president can order anyone murdered without consequence? Which really seems like a more expansive regulatory power than interpreting statutes. We have fun around here, thinking about the rules and how they work and what sorts of things you can construct, if you are clever, to take advantage of the rules. I find myself already missing that sort of fun. I worry that there are no rules anymore.

Things happen

The World Economic Forum in Davos, the place where billionaires fly in on private jets to find solutions to income inequality and climate change, is allegedly a toxic workplace. The foreign investors left stranded in Evergrande's web of Chinese debt. Philippines courts investors for 'China-free' nickel supply chain. A Real-Estate Fund Industry Is Bleeding Billions After Starwood Capped Withdrawals. BlackRock Enters Booming Market for Stock ETFs With a 100% Hedge. Citi was money launderers' favourite bank, US law enforcement officials say. Boeing Scoops Up Spirit AeroSystems, Its Troubled 737 Supplier. UniCredit Seeks Clarity From Court After ECB Orders Russia Cuts. Nomura seeks global acquisitions to expand wealth management business. Wall Street Cop Finra Goes Quiet on the Beat as Its Caseload Plunges. Sovereign Haircuts: 200 Years of Creditor Losses. Morgan Stanley to join Goldman and JPMorgan in scrapping UK bonus cap. Bain's new boss says consultancy pulling back from work in China. Chicken Soup for the Soul Files for Chapter 11 Bankruptcy. Eton Parents Rush to Pay School Fees in Advance as Tax Hit Looms. How Tractor Supply Decided to End DEI, and Fast. "The old private equity model of 40 years ago where people think you borrow as much as you can, go play golf, and see if it all worked out in five years." Tennis clubs grapple with surge in demand for padel and pickleball. Watch a baseball game on the toilet.

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1. Most typically, this is a problem of "authorized shares": The certificate of incorporation (the charter) says "the company can issue up to 100 million shares of common stock," or whatever, and it has 99.97 million shares outstanding and wants to sell another 20 million shares to raise money.

2. Often it takes the form of “blank check preferred stock.” Typically a corporate charter that says “the company can issue up to 100 million shares of common stock” will go on to say “and up to 20 million shares of preferred stock, which can have whatever terms the board of directors wants.” If the charter authorizes the board to issue preferred stock and set whatever terms it wants (a “blank check” for the board), it can issue preferred stock with terms that mirror the common. So you issue, like, 1 million shares of new preferred stock, and the terms of the preferred stock are (1) each share is entitled to the same economic rights (dividends, etc.) as 20 common shares, (2) each share gets to vote with the common stock and has 20 votes and (3) the company will, at the next chance it gets, ask its shareholders to vote to authorize more shares, and if and when the shareholders approve, each share of preferred stock will automatically convert into 20 shares of common stock. And typically you can build in some protections for the buyer: It buys the preferred shares at a discount to the price of real shares, the preferred shares get to vote along with the regular shares, the preferred shares get any dividends that the regular shares get, if the preferred shares don’t flip into real shares within some reasonable time, there’s some penalty (the company has to pay back the money, or pay interest), etc. But for our purposes here, the preferred shares are a class of shares that function like IOUs for future common shares.
3. It briefly dipped to \$9.90 on the afternoon of June 21; not sure if that was Liqueous’s selling or what. Since last Monday it never got below \$10.17.
4. Several readers emailed me about it, many of them complaining that Liqueous’s sales might be *insider trading*: Liqueous knew the material facts about this deal, but the market didn’t, and it apparently sold the stock while everyone else was unaware. This seems plausible to me, but not the biggest problem!

Cassava Sciences forms internal panel after US probe into two employees

 [reuters.com/business/cassava-sciences-forms-internal-panel-after-us-regulatory-probe-into-two-2024-07-01](https://www.reuters.com/business/cassava-sciences-forms-internal-panel-after-us-regulatory-probe-into-two-2024-07-01)

Christy Santhosh, Pratik Jain

The seal of the U.S. Justice Department is seen on the podium in the Department's headquarters briefing room before a news conference with the Attorney General in Washington, January 24, 2023. REUTERS/Kevin Lamarque Purchase Licensing Rights , opens new tab

July 1 (Reuters) - Cassava Sciences (SAVA.O) , opens new tab will form a committee to evaluate new probes by U.S. regulators and investigate two senior employees, it said on Monday, days after a medical professor linked to the company was charged with fraud. Shares of the Austin, Texas-based pharmaceutical company were down more than 8% in early trade.

They tumbled 35% on Friday after federal prosecutors charged Hoau-Yan Wang, a doctor who collaborated with Cassava, with fraud for allegedly submitting fabricated data to the National Institutes of Health related to an experimental treatment for Alzheimer's disease.

Wang's laboratory conducted the final analysis for the mid-stage study evaluating the company's Alzheimer's drug, simufilam.

The company said on Monday it was engaged with the U.S. Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) on the investigations into the two employees.

The committee, consisting of independent directors, is evaluating information contained in the DOJ indictment of Wang and will oversee disclosures in filings with the SEC regarding matters at issue, said Cassava.

Cassava said it had terminated its consulting relationship with Wang prior to his indictment, adding he did not have any involvement in its ongoing late-stage trials.

However, H.C. Wainwright analyst Vernon Bernardino said it is "inescapable" that Wang is charged with fraud related to early and mid-stage study data that has been used as evidence to support a late-stage trial for simufilam.

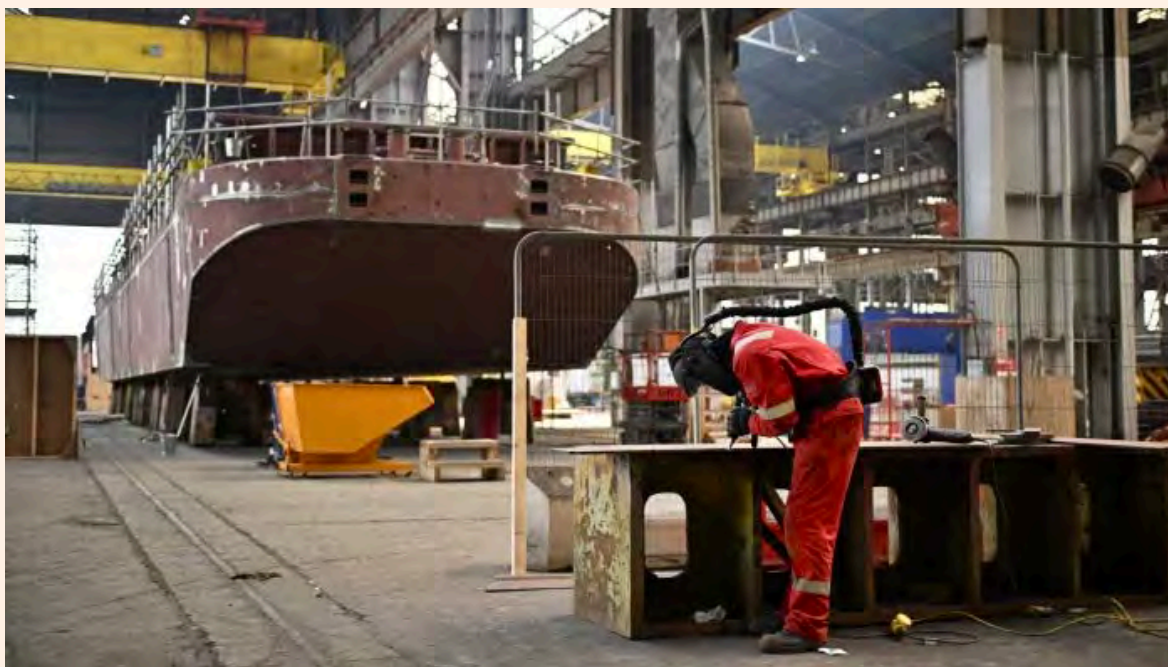
"This controversy could be a significant long-term challenge to realizing upside in Cassava stock", Bernardino said.

Doubts concerning the drug emerged three years ago and was followed by an investigation by the SEC in November 2021.

Harland & Wolff Holdings PLC

Harland & Wolff shares suspended after delay to annual results

Belfast shipbuilder cites 'ongoing discussion' with auditors over revenue recognition for hold-up



The delay to H&W's annual results comes at a time of uncertainty about government-backed financial support for the company, which is trying to reduce its financing costs © Charles McQuillan/FT

Sylvia Pfeifer in London 8 HOURS AGO



Belfast shipbuilder Harland & Wolff has suspended trading in its shares in London after accounting issues delayed the filing of its audited annual results.

The Aim-listed company, which owns the shipyard that built the Titanic, said it had been in “ongoing discussion” with its auditors over how to recognise revenues related to the “multiyear and complex nature of some of the contracts under which the company is working”.

[H&W](#) said the audited results would now be published a week after the original June 30 deadline.

The delay comes at a time of uncertainty about [government-backed financial support](#) for the company, which is trying to reduce its financing costs.

H&W has a \$115mn credit facility with New York-based Riverstone Credit Partners that matures at the end of December. It has been in talks with a group of banks to secure a £200mn loan at a lower interest rate with the UK government acting as a guarantor.

Without that guarantee, the lossmaking business would need to find other financing to help meet its working capital requirements and fulfil key contracts that include building three ships in a £1.6bn Royal Navy contract. H&W won the contract in 2022 as part of a consortium led by Spain's Navantia.

H&W said on Monday that it expected ministers to make a decision on the export finance guarantee after this Thursday's general election but warned that "should there be any material delays to securing the facility" after that, the company's "ability to execute new and large contracts would be adversely affected".

John Wood, H&W chief executive, told the Financial Times last month that "[all the commercial banks are lined up ready and waiting to go](#) and I see no reason why a decision can't be made fairly soon".

Unaudited results, published on Monday, showed that the company recorded an operating loss of £24.7mn in the year to the end of December 2023, down from a loss of £58.5mn in 2022. Revenues jumped from £27.8mn in 2022 to £86.9mn last year.

H&W's interest costs rose from £12.29mn in 2022 to £18.37mn in 2023.

Arun Raman, chief financial officer, said that while he was "encouraged by the growth in revenues", the company's "financing costs are high".

"It is crucial to close the UKEF facility as soon as possible in order to provide the stable long-term working capital needed for securing large, multiyear contracts. Our engagement with the UK government continues in order to bring this deal to closure."

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The Big Read **Evergrande Real Estate Group**

The foreign investors left stranded in Evergrande's web of Chinese debt

Overseas bondholders have discovered to their cost that they have little recourse in the Chinese system when boom turns to bust

Thomas Hale and Wang Xueqiao in Changsha and Kaye Wiggins in Hong Kong YESTERDAY



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In Changsha, the capital city of Hunan province, Yang has just finished his morning flute practice by the lake next to his apartment. Over his seven decades he has lived in five different housing compounds, but says this one, with its greenery and nearby high-speed rail, is the best.

Yang, who declined to provide his full name, bought into the Changsha Evergrande Oasis, one of many developments in the region, for Rmb615,000 (\$85,000) in 2009. A year later, after his apartment was finished, he and his son's family moved in.

Although the name has since become synonymous with the rise and fall of Chinese real estate, at that time he knew "nothing about Evergrande" or "where its money came from".

The company was by then expanding rapidly. The year Yang moved in, Changsha Oasis brought in Rmb1.7bn (\$230mn) in sales. In 2011, when Evergrande issued over \$1bn of bonds settled in dollars to overseas investors, its offer document mentioned the project nine times.

The document, which offers the most comprehensive insights into Evergrande's funding mechanisms, bore the logos of western investment banking giants such as Bank of America, Deutsche Bank and Citi alongside that of state-owned Bank of China International. More pertinently, they promised coupons of up to 9.25 per cent — a highly attractive return in a post-crisis world of near-zero interest rates.

It was part of a wave of bond issuance that funnelled tens of billions of dollars from western financial institutions, and the savers ultimately behind them, into China's real estate boom.

Endorsed by Wall Street's finest and often issued via Hong Kong, with its westernised legal system and investor protections, they represented a financial bridge between China and the wider world. But they offered none of the security usually associated with debt instruments when boom turned to bust.



When Evergrande stopped making interest payments to overseas investors in late 2021, it was the first clear sign that something was seriously awry with China's property model © Wang Xueqiao/FT

The 2011 bonds fully matured in 2016, but many more recent issues with similar characteristics are now close to worthless. They are being fought over by lawyers and restructuring experts, and picked over by speculators hoping to salvage some returns via a Hong Kong insolvency process.

Almost three years after Evergrande first missed payments to offshore investors, China's real estate industry is still struggling. Beijing has refused an overt bailout but has permitted local authorities to buy unsold housing. Many of the projects launched by mainland developers are unfinished, and in some cases under the control of provincial bureaucrats rather than the overseas investors who helped to fund them. In Hunan, local government late last year identified 45 unfinished Evergrande projects alone.

Dozens of investors in Evergrande bonds, the structure of which is rarely discussed outside specialist circles, declined to comment to the FT, as did the banks.

Evergrande's bonds are deep in distressed territory

Price of bond maturing on June 28 2025 (cents on the dollar)



Their rise and fall sheds light on the profound differences between mainland China's financial, legal and political systems and those of the wider world, and raises questions over how capital will flow between the two in future.

“The international investing community wanted to be part of the great real estate boom in China, and the Chinese real estate companies recognised this was an avenue to generate liquidity . . . in some senses it was a match made in heaven,” says one restructuring specialist.

“Everything was premised on the assumption that the real estate market would continue to rise.”

Before Evergrande listed its shares in Hong Kong in 2009, it was already drawing on money from outside China. One former investor, who spoke on condition of anonymity, participated in a private debt placement that raised over \$500mn in the mid-2000s.

At a creditors’ meeting, he recalls discussing one of the projects that had been earmarked for the funds. It was supposed to be completed in three to five years, but someone had visited the construction sites and found there was “nothing going on”. Money, however, “was flowing out of the account”.

The investors’ money was released from a mainland bank account after the company provided invoices stamped with an official seal. But “you couldn’t find who had signed it off,” the investor says. “They might say, you know, five tons of steel, but five tons of steel for what? It doesn’t matter, it’s five tons of steel.

“What became evident was [the money] was raised against certain projects, but wasn’t necessarily spent on those projects,” he concludes.

In Hong Kong, the perils of trying to account for mainland assets and liabilities were well known after a wave of often speculative state-owned companies listed there in the 1990s.

“They were effectively towns,” says one person involved in some of the earliest listings, referring to the range of municipal assets such entities often controlled. “As much as possible, we tried to get them into the international model.”



Almost three years after Evergrande first missed payments to offshore investors, China's real estate industry is still struggling © Thomas Hale/FT

A private property market had essentially been recreated in the same decade in China, and by the 2000s it was a leading driver of economic growth. But, wary of the risks of an overheating property sector, Beijing was already starting to rein it in.

A 2007 circular issued by the People's Bank of China prohibited commercial banks from lending to any developers "found to be hoarding land", Evergrande said in its bond documents. In the same year, Safe, part of a regulatory apparatus controlling capital flows in and out of China, said it would no longer process foreign debt registration for real estate purposes.

As a result, Evergrande relied on a structure common across many other emerging markets. Bonds were sold to international investors by a specially created vehicle outside of China, often in the British Virgin Islands. That entity sent the money it raised into China mostly in the form of equity investments in subsidiaries — and relied on the equity dividends from those subsidiaries to meet obligations to its own investors.

Lawrence Lu, a director at S&P in Hong Kong, says the rating agency has referred to this phenomenon as "structural subordination", a term also used in developed markets when holding companies issue debt that may have limited claims on the assets of its subsidiaries in the event of default.

“Even in western markets, once you raise money, money is fungible,” he says. “Once they raise the money, they use [it] as equity to project companies. Where the money goes, it’s outside of our expertise.”

Offshore instruments of this kind helped to fund companies such as Changsha Tianxi Real Estate Property Co, the developer of Changsha Evergrande Oasis. A chart in Evergrande’s documents shows dozens of subsidiaries, with a dividing line separating those within mainland China from those outside.



The Cultural Tourism City is one of many unfinished projects by Evergrande © Wang Xueqiao/FT

The foreign flows were not Evergrande’s only source of financing, but they helped to kick-start presales payments from homebuyers like Yang, which could then be invested elsewhere. On its opening day, the Changsha Evergrande Oasis brought in over half a billion renminbi in such downpayments. Across 62 Evergrande projects in total in that year, a total of Rmb50bn was brought in.

The investor in the private placement says that similar transactions were typically arranged by investment banks ahead of equity IPOs, which in turn were priced based on the value of the developer’s land holdings. That gave banks “an incentive to encourage developers who wanted to list to grow their land bank and show they could sell projects”.

It was a “fee machine”, the investor adds; fees from the pre-IPO bonds, the IPO itself, and then high-yield bond issues after that. The developer’s presence in Hong Kong, meanwhile, “gave it the veneer of ‘you’re covered by Hong Kong law and it looks like a normal bond’.”

But in his view, that was “an illusion”. He adds: “They were always going to be the part that didn’t get paid.”

When Evergrande stopped making interest payments to overseas investors in late 2021, it was the first clear sign that something was seriously awry with China’s property model. But since then, the fate of its bonds has faded from public discussion.

A two-year restructuring negotiation, led by lawyers at Kirkland & Ellis and investment bank Moelis in Hong Kong and largely focused on its listed subsidiaries outside China, produced no deal with creditors. Moelis declined to comment. Kirkland & Ellis did not respond to a request for comment.

A court in the city issued a winding up order for Evergrande’s Hong Kong entity but it has limited legal significance unless it is recognised by courts in mainland China. Even then, the investors’ ultimate claims are typically equity stakes in projects in China owned through a web of subsidiaries.

Evergrande also did not respond to a request for comment.

Evergrande's home sales plunge

Annual home sales (Rmb bn)

600

When it defaulted, Evergrande had over \$20bn of offshore bond debt in issue, held by investors such as BlackRock, HSBC and emerging market specialist Ashmore. Those that still had some exposure this year, according to Bloomberg terminal data, included UK insurer Legal & General and US hedge fund Saba. All declined to comment for this article.

Some investors spoke on condition of anonymity, including one investor at a major international firm. "It will be a very, very low price, like 0.0 something, depending on the market price of that day," the investor says of the firm's "legacy exposure" to Evergrande. "Over the past two years we have de-risked the sector significantly, but of course we cannot 100 per cent exit."

The person adds that the investor community was “fully aware of the structure” and that there had been “long discussions” about the bonds in the past. But there was never “clarity” on exactly how cash moved from individual projects in China to the offshore vehicles that paid bondholders and the matter of legal obligations was “overlooked”.

No full list of bondholders is publicly available. But Evergrande “was in the portfolio of ‘tourist investors’,” says one person involved in the fallout, referring to those who would not normally invest in the region but made an exception for Evergrande because it was a well-known name.

Some hedge funds “decided, without knowing much, to pile in” when signs of distress emerged, expecting to be able to negotiate a profitable restructuring deal through a legalistic, US-style approach, the person adds.

Those investors have now “discovered what the lawyers already knew, that . . . it wasn’t going to be easy to enforce and it would be time-consuming and expensive, with a limited prospect of recovery.”

Claims against those who underwrote the bonds are complicated by international norms, which see fixed-income instruments as much safer than equity. Guiping Lu, a lawyer at Mayer Brown specialising in capital markets, says investors in the US seeking redress need to prove that private bond underwriters ignored clear red flags rather than simply provided inaccurate information. That is a higher burden of proof than in more regulated equity issuance. “If you want to sue the [debt] underwriters, you need a legal basis,” he says. “What is the legal basis?”

“We have been holding the view [that] it’s not worthwhile to get involved in the recovery process,” says another investor. “Bankers and lawyers need to sit down and come up with a better structure [for future issues],” he adds.

Such discussions may have to wait until conditions in the real estate sector improve, he predicts. “The market, in the form of what we had in the past almost twenty years . . . it’s gone.”

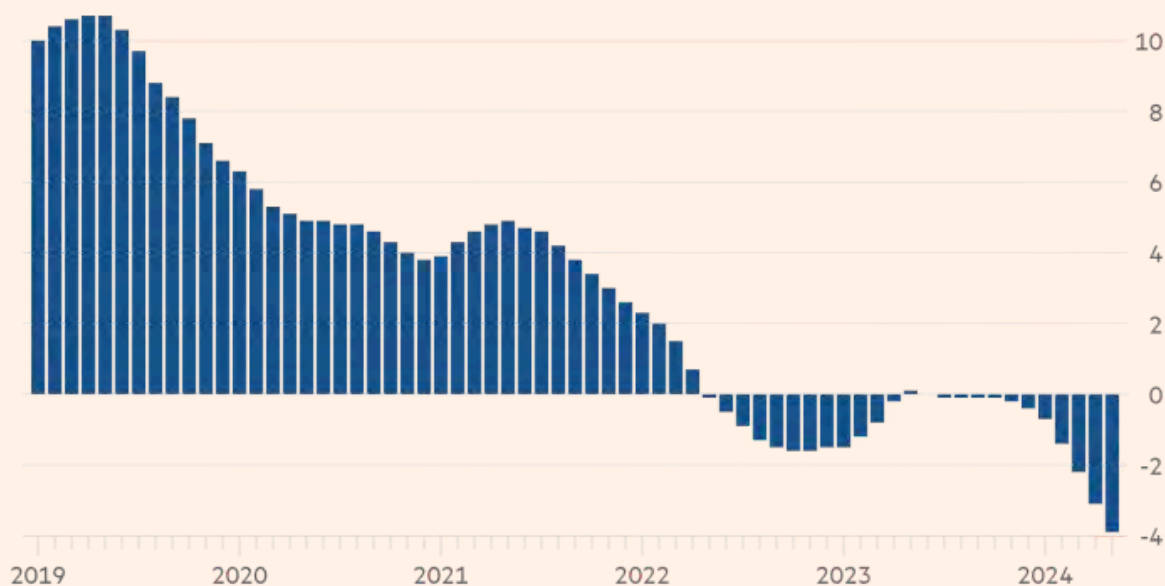
Online searches suggest that all 76 of the real estate projects mentioned in Evergrande’s 2011 bond documents have been completed.

But at a former Evergrande scheme a few miles away from Yang's morning flute recital, construction has been suspended for three or four years and a crane is about to be removed. "The money has not arrived," says one employee of a state-owned company that has taken over.

At another development, a member of staff has just completed sales of all of the apartments in the block. He used to work for Evergrande, attracted by the prestige of the company and the staff discounts, but now his wages are paid by the government.

Chinese house prices have been falling for two years

Newly built houses, annual % change



Source: LSEG, China National Bureau of Statistics

At a third, closer to the city centre, a woman holding a baby is anxiously checking in on an unfinished project launched by Evergrande but since taken over by a state-owned developer.

For Beijing, homeowners like these who have not yet received their properties are the priority. Their downpayments acted as lending to the system and their claims are part of a wider social contract.

Evergrande's accounting for its revenues inflated them during 2019-2020, according to China's financial regulator, which in May imposed a Rmb4.2bn fine on the group's mainland entity and accused it of fraudulent bond issuance, over debt issued within the country rather than offshore. Evergrande's auditor, PwC, has also come under scrutiny. PwC declined to comment.

But individual projects were often audited at a local level: the subsidiary behind Changsha Evergrande Oasis was audited by the Hunan Yuancheng United Certified Public Accountants Office, and 2011 documents list dozens of other similar local accountants.

Compared to the 2011 bonds, future debt issues leading up to Evergrande's collapse provided less detail as to where a growing pool of money sourced from outside China was going. Meanwhile, dozens of Chinese developers listed in Hong Kong have defaulted on their debts, though some have shown signs of being able to restructure outside of China.

"I don't think any of us thought it would be a Chapter 11-style process," says one investor in the bonds of several mainland property developers, referring to the established US insolvency mechanism. "But we thought there was a capital structure in China." He describes his holdings, which he hopes to negotiate some recovery on, as "subordinated equity", a far more junior entity than a bond secured on real assets.

Evergrande's financial instruments were shaped by a system that retained strict capital controls to obstruct overseas investment, but which was at the same time hosting the biggest property boom in history.

Future foreign investment into China, whatever its structure, will have to assess the unfolding realities of a property bust that has, according to Goldman Sachs estimates, left China with Rmb30tn of unsold housing.

On the edge of Changsha, in the vast ruins of an unfinished theme park that was once part of Evergrande's empire, there is only one person on site. He is taking a break from a separate project nearby to fish in what remains of a boating lake.

"There are enough houses for four billion people in China nowadays . . . I read that number online," he says with a grin, as he throws a fish into a nearby bucket. But, like many of those left holding Evergrande's bonds, "we're not really all that clear".

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Cabot \$40M Deal To End Investors' Fracking Suit Gets 1st OK

By **Sydney Price**

Law360 (June 28, 2024, 7:59 PM EDT) -- A Texas federal judge agreed to grant preliminary approval of a \$40 million cash settlement Cabot Oil & Gas Corp. agreed to pay to resolve an investor class action accusing the company of misrepresenting its environmental regulatory compliance in Pennsylvania.

According to the order signed Thursday by U.S. District Judge Lee H. Rosenthal, class counsel will apply for fees not to exceed a third of the settlement fund and expenses up to \$1.75 million. A settlement hearing will be held Oct. 24.

The parties agreed to settle the suit in April following two mediation sessions, according to the order. In September 2023, the court certified a class of investors who purchased or otherwise acquired common stock between Feb. 22, 2016, and June 12, 2020.

In their complaint, the investors accuse the company and its officers of misrepresenting and concealing that Cabot, which is now known as Coterra Energy Inc., had inadequate environmental controls and procedures, and failed to fix faulty gas wells that polluted Pennsylvania's water supplies, causing the company's stock to decline by 12%. The litigation was later transferred to Texas federal court in June 2021.

Cabot faced 15 criminal counts for failing to fix faulty wells that were allowing methane — released during fracking operations — to leak into the local water supply, which allegedly caused a water well to explode in 2009. In November 2022, successor Coterra pled no contest to the charges and agreed to pay \$16 million for the construction of a new public water supply in Pennsylvania.

Although Judge Rosenthal **initially dismissed** the investors' securities fraud claims against Cabot in January 2022 without prejudice, the judge **allowed a trimmed version** of the case to move forward in August 2022 before eventually granting class certification for the investors. In January, Judge Rosenthal allowed the investors to **add more claims** to their second amended complaint.

The new claims contend that Cabot and certain former executives knowingly concealed that the company would be charged with felonies by the Pennsylvania attorney general, and that they hid a proposed consent order and agreement from the Pennsylvania Department of Environmental Protection regarding alleged noncompliance.

Earlier this month, Cabot's insiders were hit with a shareholder **derivative suit** accusing them of not disclosing that Cabot was not safeguarding drinking water from the company's fracking operations.

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

The pension funds are represented by Joe Kendall of Kendall Law Group PLLC, Darryl J. Alvarado, Kevin A. Lavelle and Jack Gephart of Robbins Geller Rudman & Dowd LLP, and Andrew L. Zivitz, Joshua E. D'Ancona, Alex B. Heller and Max Johnson of Kessler Topaz Meltzer & Check LLP.

Cabot is represented by Gerard G. Pecht, Kelly Potter and Peter A. Stokes of Norton Rose Fulbright.

The case is Delaware County Employees Retirement System et al. v. Cabot Oil & Gas Corp. et al.,

case number 4:21-cv-02045, in the U.S. District Court for the Southern District of Texas.

--Editing by Kristen Becker.

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Home Point Investor Attys Get \$1.5M Fee As Judge OKs Deal

By **Sydney Price**

Law360 (June 28, 2024, 10:03 PM EDT) -- A Michigan federal judge on Friday granted final approval to a \$5 million deal resolving investor allegations that mortgage lender Home Point exaggerated its ability to keep costs low ahead of its initial public offering, giving class counsel a \$1.5 million cut of the deal.

The order said class counsel spent 1,800 hours litigating the case. The court agreed to give the attorneys 30% of the settlement fund, or \$1.5 million, for fees and an additional \$30,766.91 to reimburse litigation expenses.

The court said the result achieved for the class is substantial. The settlement, which comprises 10% to 40% of estimated recoverable damages, represents a premium over the 7.5% median recovery for Securities Act class actions for the past decade, according to the order.

The order also gives unconditional class certification to investors who purchased or acquired Home Point Capital Inc. stock in a January 2021 initial public offering, and those who purchased or acquired shares between the IPO and June 21, 2021.

A few months after the IPO, in a May 2021 earnings call, the company disclosed its costs "had soared from \$84 million in the first quarter of 2020 to \$227 million in the first quarter of 2021" and that its gain-on-sale margins had fallen.

According to investors, this showed the company was lying about its ability to control costs and withstand market pressures better than its competitors.

The class is represented by Ellen Gusikoff Stewart, Danielle S. Myers, Juan Carlos Sanchez, Chad Johnson, Jonathan Zweig and Ana Avalos Cuellar of Robbins Geller Rudman & Dowd LLP and Thomas C. Michaud and Francis E. Judd of Vanoverbeke Michaud & Timmony PC.

Home Point Capital is represented by Jonathan K. Youngwood, Craig S. Waldman and Karen M. Porter of Simpson Thacher & Bartlett LLP and Andrew J. Kolozsvary of Dykema Gossett PLLC.

The case is In re: Home Point Capital Inc. Securities Litigation, case number 4:21-cv-11457, in the U.S. District Court for the Eastern District of Michigan.

--Editing by Drashti Mehta.

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Nixed Purdue Ch. 11 Plan May Leave States Ready For A Fight

By **Chris Villani**

Law360 (June 28, 2024, 2:35 PM EDT) -- State attorneys general across the country could be gearing up for more opioid-related litigation against the Sackler family after the U.S. Supreme Court wiped out a \$5.5 billion third-party release for the owners of bankrupt drugmaker Purdue Pharma LP, experts told Law360.



Purdue Pharma's headquarters is seen at night in Stamford, Connecticut. OxyContin producer Purdue Pharma's owners, the Sackler family, will likely head back to court to fend off state attorneys generals' efforts to hold them accountable for the company's role in causing the nationwide opioid epidemic, following a U.S. Supreme Court ruling Thursday. (AP Photo/Frank Franklin II, File)

The high court's **ruling** found the liability release, which would have shielded the Sacklers from the suits, is not supported by the U.S. Bankruptcy Code. While most observers believe the two sides will ultimately reach an agreement, some of the attorneys general who initially sued the company and its controlling family signaled they are ready for a fight.

"It is no secret that members of the Sackler family, through their control of Purdue, fueled the opioid crisis, devastating countless lives in the pursuit of profit," said Massachusetts Attorney General Andrea Campbell. "The Sacklers must and will be held responsible, and in the wake of this decision, we will use every power available to us to make sure that occurs."

North Carolina Attorney General Josh Stein said in a statement that the high court ruling means states

and the Sacklers have to get back to the negotiating table, while adding: "If they won't pay up, I'll see them in court."

Gregory Jones, a bankruptcy partner at Stradling Yocca Carlson & Rauth PC, said Campbell will likely explore any avenue to recoup the \$110 million that was supposed to come to Massachusetts through the global settlement.

"What she said today was aggressive. She did everything she could do to have Massachusetts get as much money as it can and, at this point, the Supreme Court knocked down something that was purportedly equitable," Jones said. "If you don't pursue any litigation, if you don't pursue alternative ways to get that amount of money, then you are not doing your job."

Massachusetts in 2018 filed the first lawsuit by any state against members of the Sackler family and other officers and directors at Purdue, the maker of OxyContin and other opioid drugs. The suit claimed Purdue's executives lied to both doctors and the public in order to get more people hooked on the powerful and highly addictive drugs, leading to thousands of overdoses in the commonwealth.

Purdue filed for Chapter 11 in 2019, putting the Massachusetts suit and other litigation against the company on hold. In July 2021, the states announced a settlement that released the Sacklers from liability in exchange for a \$5.5 billion sum. The plan won the approval of the bankruptcy court and survived a legal challenge by the Office of the U.S. Trustee in the Second Circuit before being undone by the Supreme Court's 5-4 decision on Thursday.

Jones noted the Sacklers could file their own bankruptcy cases, but that would open up individual family members to scrutiny of their finances.

"Generally, individuals, especially high-profile individuals, only file for bankruptcy after everything else is totally exhausted," he said.

Matthew Gold, a bankruptcy attorney with Kleinberg Kaplan, predicted the parties will quickly mediate to try to salvage some version of the deal that was already in place.

"This will be a last gasp, a last chance for the parties in the case to see if some kind of global resolution is possible," Gold said. "It's certainly not a slam dunk that it is going to happen, but there will be benefits for lots of parties if some kind of settlement can be put together."

If talks go south, Gold said he thinks "a lot of states are preparing to have papers ready to file."

"If for no other reason than to make credible their threats that that's what will happen if they don't get what they want in the negotiation," he added.

Robert Fisher, a white-collar litigation attorney with Nixon Peabody LLP and former Massachusetts assistant attorney general, said Campbell and other attorneys general will face some practical challenges in trying to restart litigation that has been dormant for several years. He said it would likely make sense to split involved attorneys into two teams: one working on a potential settlement, and one focusing on litigation and other possible next steps.

"Litigators will tell you, you lose some of that momentum when you think the case is going to settle," Fisher said. "Oftentimes, you want someone on the litigation team who isn't involved in the settlement discussions so they don't know which way the settlement is going. You're getting ready so that, if it does go to court, you're prepared."

Against the backdrop of preparing for a court battle, most experts agreed a new settlement is the most likely outcome, despite how complex it could be to get it done.

Both Purdue and the Sackler family issued statements on Thursday indicating they are hoping to reach a deal at the negotiating table.

"We will immediately reach back out to the same creditors who have already proven they can unite to forge a settlement in the public interest, 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 as a public benefit company," Purdue said.

The families of Mortimer Sackler and Raymond Sackler, both of whom are deceased, said the "unfortunate reality is that the alternative [to a settlement] is costly and chaotic legal proceedings in courtrooms across the country."

"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," the families said.

Michael Shepard, a founding partner at Shepard O'Donnell, said that he agreed with the rationale of the majority in the high court ruling. He noted the dissenting justices feared the ruling could harm the thousands of victims of the opioid crisis, but allowing the Sacklers a third-party release could set a dangerous precedent.

"It would open the door for companies who wanted to put dangerous or defective products on the market to operate with impunity," Shepard said. "They would know that, if their product ever led to a serious injury that impacted a lot of people, they would be able to move into bankruptcy court and get all of those claims dismissed and maneuver it in a way that could subject some small stooge subsidiary company to bankruptcy and protect the bigger company and its directors and owners."

Shepard agreed that a settlement is likely given how tenacious and creative plaintiffs' attorneys and attorneys general will be in going after the family's exceptionally deep pockets in a high-profile case.

"It's going to take some time, but I don't see either side running away from a resolution," he said. "The risk to the Sacklers is that, if they don't sit down and negotiate, and the plaintiffs' lawyers and AGs are successful in getting to their assets, it could wipe out their family's wealth. They have every incentive to sit down and negotiate in good faith."

--Additional reporting by Vince Sullivan. Editing by Marygrace Anderson.

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Will 'Moral Victory' In Purdue Ruling Help Plaintiffs?

By **Emily Field**

Law360 (June 29, 2024, 12:05 AM EDT) -- The U.S. Supreme Court's decision that the Sackler family members who own Purdue Pharma LP cannot be shielded by the bankruptcy code from lawsuits over the opioid crisis reflects the widespread public outrage over their role in the epidemic, but experts say it remains unclear what will happen next for the individuals and governments that have sued the company.

The Sacklers have been widely viewed as the face of the opioid crisis, inspiring not only in-depth investigative articles, but books, documentaries and a Netflix show based on the Edgar Allan Poe tale "The Fall of the House of Usher." Members of the family controlled and made decisions for Purdue, which the high court called the "center" of the opioid crisis in its **majority opinion** that held that the bankruptcy code doesn't authorize nonconsensual release of claims against nondebtors.

"This decision resonates with the public's moral outrage, as it prevents the family from potentially shielding their substantial wealth from the consequences of their actions related to the opioid crisis," said Steve Mehr, founding partner of personal injury firm Sweet James, calling the decision a "moral victory."

As the high court noted in the opinion authored by Justice Neil Gorsuch, Sackler family members held positions as president and chief executive officer, and "dominated" the board of directors. They also "dominated" the firm's marketing strategies to grow sales of OxyContin and went along with sales representatives to visit doctors, the court said.

"The company's success propelled the Sacklers onto lists 'of the top twenty wealthiest families in America,' with an estimated net worth of \$14 billion," the court said.

Purdue started marketing OxyContin as a safe, time-release narcotic in the mid-1990s. Between 1999 and 2019, about 247,000 people in the country died from prescription-opioid overdoses, according to the opinion.

"Certainly plenty of the plaintiffs are enraged by what the Sacklers did or were trying to do," said Carl Tobias, a law professor at the University of Richmond School of Law.

On one hand, it's somewhat unfair to paint the Sacklers as the main villains in the story of the opioid epidemic, considering there were many other bad actors, Elizabeth Chamblee Burch of the University of Georgia School of Law said.

"But, certainly, I understand from the victims' perspective that it seems like that when we're talking about a corporation, it's different," Chamblee Burch said. "And here we have a family who has made billions."

Purdue **filed for Chapter 11** in 2019, which put its role in the multidistrict litigation brought by thousands of local governments and victims on hold. Two years later, state attorneys general announced a deal that freed the Sackler family from liability in return for a \$5.5 billion payment. A bankruptcy court **approved it**, as well as the U.S. Trustee's Office in the Second Circuit, before the high court struck it down Thursday.

The high court's ruling is also a victory in the sense that while most of the voting creditors supported the bankruptcy plan, fewer than 20% of those eligible to vote sent in ballots, Chamblee Burch pointed out.

This was also highlighted in the majority opinion, which said that thousands of opioid victims voted against it, and "many pleaded with the bankruptcy court not to wipe out their claims against the Sacklers without their consent."

But now it's unclear how the plaintiffs may be compensated for the alleged harm, the attorneys said.

Mehr said while the decision is correct on logical and moral grounds, it will likely lead to more complicated outcomes in the recovery process, as well as lower payouts for victims of the opioid epidemic and their families.

"Without bankruptcy protection, the Sackler family is likely to defend any lawsuits vigorously and prolong litigation, delaying any claim resolution," Mehr said. "Realistically, only those Sackler family members who served as employees or board members of Purdue and authorized distributions to the family will face direct exposure, which will likely be substantially less than the \$6 billion the collective family was contributing to the original settlement of claims."

Tobias also said he was unsure whether the deal will collapse or if it will have to be entirely redone.

"I'm not sure the court really knew how to instruct the lower courts, so it'll be interesting to see," Tobias said. "But my guess is they'll try to reconstruct some kind of deal and see whether it can be renegotiated."

The decision may be beneficial to plaintiffs bringing mass tort litigation in general, Chamblee Burch said, as companies like Johnson & Johnson and 3M Co. **have attempted** to use the bankruptcy process to **handle claims** over allegations that baby powder causes cancer and **defective combat earplugs** damaged service members' hearing, respectively.

As Chamblee Burch pointed out, some of the data that emerged from the litigation over the opioid epidemic was just how many pills were being sent to small Appalachian areas, which did not come out as a result of bankruptcy.

"I worry about bankruptcy becoming the go-to resolution spot for mass torts," Chamblee Burch said. "You know, some people talk about, well, we might make mass torts harder to settle. Well, heaven forbid we actually get more consent from the people who have been injured by them."

--Editing by Kelly Duncan and Lakshna Mehta.



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Rite Aid Ch. 11 Plan OK'd With Insurers' Objections Resolved

By **Rick Archer**

Law360 (June 28, 2024, 9:07 PM EDT) -- A New Jersey bankruptcy judge Friday approved pharmacy chain Rite Aid's Chapter 11 restructuring plan after the company said it had resolved objections from its insurance carriers to how the plan treats their policies.

U.S. Bankruptcy Judge Michael B. Kaplan dismissed the remaining objections to Rite Aid's plan and confirmed it in a bench ruling, saying it was the product of "meaningful accommodations and cooperative effort by nearly all stakeholders."

"The debtor's proposed plan is far superior to address the outstanding claims and obligations as opposed to liquidation, and no stakeholder has come forward with a competing plan," he said.

Philadelphia-based Rite Aid and several dozen affiliates **hit Chapter 11** in October hoping to trim more than \$3 billion in debt; close some of the chain's more than 2,100 locations; sell its prescription benefits subsidiary Elixir; and resolve tort liability stemming from opioid sales.

The proposed plan would pay \$2.6 billion in term and asset-based loans in cash and exchange \$1.2 billion in senior notes for equity. The plan valued the more than 1,600 opioid claims brought by state and local governments, Native American tribes, hospitals and individuals at \$2.3 billion and said they would be paid with \$43 million in cash from Rite Aid and the proceeds of the company's insurance policies.

Tort claimants and unsecured creditors would also receive 10% of the reorganized company's equity, and share in any post-confirmation proceeds with second-lien creditors.

The insurance carriers had opposed the plan, saying it impaired their contractual rights, but following an hourlong recess before the start of closing arguments in Friday's hearing, counsel for Rite Aid and the objecting insurers told Judge Kaplan that the insurers' issues with the plan had been resolved.

This left objections that had been voiced **the previous day** by an ad hoc group representing children who had been injured by prenatal opioid exposure — which argued that governments and corporations should not share in the insurance proceeds, since the policies only cover personal injury claims — and the state of Maryland, which was the only state of the 17 that Rite Aid had stores in that did not agree to the plan settlement.

The state had filed an adversary action seeking a ruling that Rite Aid can't discharge state law fraud claims in the Chapter 11, but Judge Kaplan granted a motion by Rite Aid to dismiss the action, saying the state has not yet filed any claims he could rule on.

"Maryland has repeatedly acknowledged there is no litigation, there is an ongoing investigation," he said.

He went on to say the state had not provided any evidence that anyone had relied on the alleged false claims — some of which he said were marketing "puffery" and not actionable — or explained how it could derive fraud claims from its allegations the chain allowed pharmacists to write unnecessary opioid prescriptions.

He also said he hoped the state would take a "step back" from continuing to pursue the claims,

saying they endangered recovery for other opioid claimants and Rite Aid's survival as an employer.

Maryland Assistant Attorney General Brian Edmunds objected to those remarks before arguing the state's objections to the plan, saying in part that it improperly consolidates Rite Aid and its subsidiaries, does not take possible future fraud suits into account and does not deal with the company's opioid prescription policies.

"The bankruptcy does not resolve this very real issue," he said.

The Office of the U.S. Trustee said while most of its objections to the plan had been resolved, it remained opposed to the plan's claims releases for third parties, and suggested the confirmation be delayed to allow more time for briefing in light of Thursday's **Purdue Pharma**  **decision**, which wiped out a \$5.5 billion third-party release for the owners of the bankrupt drugmaker.

Rite Aid argued the plan was confirmable and as fair as possible, and that the only alternative was to liquidate, close down its remaining 1,300 stores and lay off its 28,000 employees.

"We're at the stage in this case where we achieve it now or we achieve it never," Rite Aid counsel Aparna Yenamandra said.

Counsel for the unsecured creditors committee, the tort claimants committee and an ad hoc senior noteholder group spoke in favor of the plan, with the unsecured creditors arguing the plan was an improvement from the early days of the case, where no recovery was anticipated for any unsecured creditors.

Tort committee counsel Arik Preis said Rite Aid's contribution to the opioid claims translated to \$250 to \$500 per individual claimant and between \$750,000 and \$1 million for each government claimant.

"It's pretty awful, but it could have been worse," he said.

In his ruling, Judge Kaplan said the plan was significantly better than a liquidation, which he said the evidence showed would leave no recovery for unsecured creditors and government claimants and a 30% to 40% return for second-lien noteholders, and leave individual tort claimants to seek recovery from Rite Aid's insurers.

He said he had ruled on the third-party releases earlier in the case and did not feel the need to revisit the ruling, even in light of the Purdue decision.

Rite Aid is represented by Edward O. Sassower, Joshua A. Sussberg, Aparna Yenamandra, Ross J. Fiedler, Zachary R. Manning, Mark McKane and Brenton Rogers of Kirkland & Ellis LLP and Michael D. Sirota, Warren A. Usatine, Felice R. Yudkin and Seth Van Aalten of Cole Schotz PC.

The insurers are represented by Stamatios Stamoulis of Stamoulis & Weinblatt LLP, Tancred Schiavoni, Adam Haberkorn and Samantha Indelicato of O'Melveny & Myers LLP, Frank J. Perch III of White and Williams LLP, Philip W. Allogrimento III of Connell Foley LLP, Monica T. Sullivan, Tamiko A. Dunham and Jacob F. Meli of Nicolaides Fink Thorpe Michaelides Sullivan LLP and Tony L. Draper and Fred L. Alvarez of Walker Wilcox Matousek LLP.

The committees representing neonatal abstinence syndrome babies are represented by Javier L. Merino of the Dann Law Firm, Donald Creadore of the Creadore Law Firm and Stephen P. New of Stephen New & Associates.

Maryland is represented by James M.C. McHale, Brian T. Edmunds and Sarah A. Zadrozny of the state's Office of the Attorney General.

The U.S. trustee's office is represented in-house by Jeffrey M. Sponder and Lauren Bielskie.

The creditors' committee is represented by Arik Preis, Mitchell P. Hurley, Kate Doorley, Theodore James Salwen and Brooks Barker of Akin Gump Strauss Hauer & Feld LLP and Arthur J. Abramowitz and Ross J. Switkes of Sherman Silverstein Kohl Rose & Podolsky PA.

The tort claimants' committee is represented by Kenneth H. Eckstein, Adam C. Rogoff, Rachael Ringer, Natan M. Hamerman, Megan Wasson and Emily Mandell of Kramer Levin Naftalis & Frankel LLP and James S. Carr, Robert L. LeHane and Maeghan J. McLoughlin of Kelley Drye & Warren LLP.

The noteholders are represented by Andrew N. Rosenberg, Brian S. Hermann, Christopher J. Hopkins and Douglas R. Keeton of Paul Weiss Rifkind Wharton & Garrison LLP and Joseph J. DiPasquale, Howard A. Cohen and Mark E. Hall of Fox Rothschild LLP.

The case is In re: Rite Aid Corp. et al., case number 3:23-bk-18993, in the U.S. Bankruptcy Court for the District of New Jersey.

--Editing by Michael Watanabe.

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AT&T Faces Derivative Suit In Del. Over Toxic Cable Risks

By **Jeff Montgomery**

Law360 (June 28, 2024, 6:49 PM EDT) -- An AT&T Inc. stockholder launched a derivative suit in Delaware's Court of Chancery on Friday seeking damages from the company's directors and top officers on the company's behalf for past, present and future expenses caused by toxic risks from lead-tainted cables around the country.

The case echoes litigation already moving through other U.S. courts, including a securities action filed in the U.S. District Court for Delaware in January and allegations that stock drops related to lead pollution resulted in the company's overpayment on company stock buybacks by some \$1.7 billion between the second quarter of 2020 and third quarter of 2023.

The five-count, heavily redacted Chancery Court suit, filed by stockholder Ilya Ozerets, accuses the business of making false and misleading statements regarding its potential liabilities and failing to disclose toxic pollution risks to the company about which it was long aware.

In 2021 alone, the complaint notes, AT&T settled a lawsuit brought by California Sportfishing Protection Alliance in which the company reserved \$1.5 billion for removal of lead cables and pollution mitigation in Lake Tahoe, on the California-Nevada border southwest of Reno.

"Although the company has since 'backtracked' on this settlement it is evident that the individual defendants knew, or ought to have known, about the lead-clad cables and the harm that these cables were causing, yet continued to make and/or allow" allegedly false and misleading statements and failed to take action beyond the Lake Tahoe deal.

Named in the Delaware suit are nine current or former directors and three top AT&T officers. The allegations include breaches of fiduciary duties, waste of corporate assets, gross mismanagement, unjust enrichment and aiding and abetting.

Among the suits filed before the Chancery Court action was a securities action filed in New Jersey federal court last July naming the company's current CEO and current and prior chief financial officer as well as Randal L. Stephenson, AT&T's CEO and chairman from May 2007 to June 2020.

The New Jersey case was transferred on May 16 to a consolidated action in the U.S. District Court for the Northern District of Texas. That suit and others, and the claims they involve, the Delaware complaint says, will cause AT&T to incur "significant" costs to defend itself and its directors and officers.

Between 2020 and 2023, the Delaware complaint says, AT&T paid out more than \$212 million to directors and top officers of the business.

"As part of their respective roles, the individual defendants were required to, among other things, exercise due care and diligence" in managing the company, including acting ethically and in compliance with laws and regulations, the suit says.

The risks went unmentioned in corporate statements in 2020 and 2021 touting the company's commitment to environmental compliance and protection, at a time, the suit says, when the company owned cables covered in toxic lead posing a risk to employees, the public and the environment.

The complaint says the issue came to the forefront in mid-2023, when the Wall Street Journal published a series of articles detailing AT&T's ownership of "sprawling" networks of lead cables, some leaching lead into soil and water at levels far above federal limits.

Officers named in the suit "engaged in and/or permitted the company to engage in the scheme to issue materially false and misleading statements to the public, including in the company's SEC filings, and by facilitating and disguising" violations of the law by directors, as well as by failing to report those violations, the complaint said.

AT&T did not immediately respond to a request for comment.

The company has in the past said the telecommunications industry began using lead in the 1880s to protect its copper wires. Phaseout of the practice began in the 1950s, but some lead-bearing cables remain in use.

Postings on the issue on the company's website include a statement that "Our policy is to manage the lead-clad cables in our network in compliance with applicable laws and regulations. We have not seen evidence that lead-clad cables are a significant cause of lead exposure or the cause of a public health issue."

Ilya Ozerets and the proposed class are represented by Ryan M. Ernst of Bielli & Klauder and Thomas J. McKenna and Gregory M. Egleston of Gainey McKenna & Egleston.

Counsel information for AT&T in the Delaware case was no immediately available.

The case is Ilya Ozerets, derivatively on behalf of AT&T Inc., v. Randall L. Stephenson et al., case number 2024-0684, in the Court of Chancery of the State of Delaware.

--Editing by Linda Voorhis.



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Maxeon Was Overreliant On SunPower Sales, Investor Says

By **Sydney Price**

Law360 (June 28, 2024, 7:18 PM EDT) -- Maxeon Solar Technologies was hit with a proposed shareholder class action alleging that the company concealed that a significant portion of its business depended on exclusive sales of certain products to its former parent company, SunPower Corp., and that a terminated contract between the two would lead to a 41% revenue drop for Maxeon.

According to **the suit filed Thursday** by shareholder Trevor Wayne in California federal court, SunPower was Maxeon's largest customer, but in mid-2023, Maxeon and SunPower engaged in a dispute that ended in the parties terminating a master supply agreement. Maxeon disclosed in May that it is "facing a serious cash flow challenge" as a result of dissolving the contract, the suit said.

Maxeon went public in August 2020 through a strategic spin-off from SunPower Corp, the complaint said. Maxeon and SunPower maintained a supply agreement under which, among other things, SunPower was obligated to purchase certain minimum product volumes. In 2023, Maxeon said SunPower was withholding approximately \$29 million in past due invoices and SunPower said Maxeon was in breach of the agreement's noncircumvention clause. Maxeon stopped shipments to SunPower in July 2023 and terminated the master supply agreement in November.

In addition to Maxeon, its CEO William Mulligan and Chief Financial Officer Kai Strohbecke are individual defendants in the suit.

The class period begins Nov. 15, 2023, the day Maxeon announced its third quarter 2023 financial results. That day, Maxeon also told investors it had settled its dispute with SunPower, thereby "clearing the way for Maxeon to aggressively ramp sales into the U.S. market."

Over the next several months, the company continued to conceal that Maxeon relied on the exclusive sales of certain products to SunPower and that following the termination of the agreement, Maxeon was unable to drive up its sales.

The truth was revealed, the suit said, on May 30, the day Maxeon announced its first quarter 2024 financial results, including \$187.5 million in revenue, a 41% year-over-year decline. Maxeon said the termination of its agreement with SunPower forced Maxeon to seek liquidity support, which would result in "substantial dilution to existing public shareholders" and TCL Zhonghuan Renewable Energy Technology Co. Ltd. becoming a controlling shareholder.

On that news, shares of Maxeon declined \$1.08 each, or about 35%, to close at \$2.03 on May 30, 2024, according to the suit.

Wayne claims Maxeon and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act. He seeks damages on behalf of the proposed class.

Counsel for Wayne and a representative for Maxeon did not immediately respond to requests for comment Friday.

Wayne is represented by Robert V. Prongay, Charles Linehan and Pavithra Rajesh of Glancy Prongay & Murray LLP.

Counsel information for Maxeon was not immediately available Friday.

The case is Wayne v. Maxeon Solar Technologies Ltd. et al., case number 3:24-cv-03869, in the U.S. District Court for the Northern District of California.

--Editing by Stephen Berg.

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Most H.I.G. Capital Claims Advance In \$915M Del. Audax Suit

By **Jeff Montgomery**

Law360 (June 28, 2024, 5:23 PM EDT) -- A Delaware Superior Court judge has kept alive much of a suit filed by affiliates of H.I.G. Capital alleging "brazen" sell-side fraud and conspiracy by interests of Audax Group in connection with H.I.G.'s \$915 million deal in early 2022 for an allegedly overvalued Mobileum Inc.

Judge Meghan A. Adams on Thursday dismissed two unjust enrichment counts against individuals named in the suit, but sent toward trial claims from two counts, each alleging common law fraud, aiding and abetting fraud, and civil conspiracy. The judge also ordered additional briefing on the need to hold a jury trial on the claims.

In the decision, Judge Adams said the crux of the case involved the H.I.G. parties' allegations that the attractive earnings, revenue growth and bookings touted by Mobileum management — a provider of telecommunications industry analytics — "were based on fraud and not actual business performance."

Preserved by the decision were claims against six Audax Group-affiliated limited partnerships and LLCs in Delaware and Massachusetts, while allegations against Audax managing director Iveshu Bhatia, principal Daniel Doran and partner Timothy Mack were dismissed for lack of personal jurisdiction.

An Audax spokesperson said in a statement that "We are confident that the facts and the law are on our side."

An H.I.G. spokesperson said that "we are pleased that the court has ruled that our claims surrounding a significant coordinated fraud by Audax can proceed, and we look forward to proving our claims in court."

The original eight-count suit, filed in October 2023, accused multiple Audax affiliates, as well as Bhatia, Doran and Mack, of having a hand in a complex and secretive scheme to falsely portray the telecommunications software company's finances as flush and promising.

Allegations included pre-deal seller representations of 2021 earnings as growing by 30%, while they were actually in decline, and an overall \$250 million overpayment for Mobileum Inc.

H.I.G. said in the complaint that it learned "only after the acquisition closed, and as shown through a forensic investigation, there was a carefully coordinated, systemic effort intended to deceive."

Judge Adams found Thursday that H.I.G. pled reasonably conceivable fraud claims based on "a fair inference that defendants knew of the fraud."

"Plaintiffs highlight three 'pillars' of fraud to describe the recipe Mobileum allegedly used to cook its books," Judge Adams wrote. The supports included improperly accelerating Mobileum's revenue recognition "by acting as if it had performed more work than it had."

In addition, the opinion said, "under the defendants' guidance," Mobileum covered up its alleged improper revenue acceleration "by creating, but not sending, invoices for work that had not been done" and then "recorded 'sham' bookings from artificial entities, knowing that the bookings would

not lead to revenue."

The tactics were described in the opinion as "having functionally fake companies sign up for millions of dollars' worth of services with no plan to pay for them."

Judge Adams observed that the alleged fraud relied in part on Mobileum's use of a "percentage of completion" method to associate contracted revenue with the percentage of contracted work performed.

"That method can be abused in two ways: overstating how much work has been done on the contract or understating how much work the contract requires," the judge wrote. "According to plaintiffs, Mobileum did both," with the suit raising "a fair inference" that the stock purchase agreement for Mobileum contained false representations.

Allegations in the complaint included timesheet manipulation, as well.

"Indeed, unbilled revenue became a problem for Mobileum in the lead-up to the sale, growing from \$6 million in 2019 to \$23 million in 2021," the decision noted. Mobileum employees "allegedly created 'dummy' invoices, which were recorded for accounting purposes but not sent to customers."

The employees, the decision said, were told to use generic descriptions when there was no real contract milestone connection for billing.

"Plaintiffs claim this type of timesheet manipulation was 'pervasive' at Mobileum," the opinion said, despite risks that high levels of "unbilled" revenue would create a red flag for due diligence assessments. Examples turned up in company records, including a growth in unbilled revenue from \$6 million in 2019 to \$23 million in 2021.

When efforts to obscure the alleged billing fraud produced a drop, on paper, in unbilled revenue, Mobileum's CEO Orathi "Bobby" Srinivasan was found to have sent an email marking the development to a group that included Bhatia and Doran.

"Frankly, this should be game, set and match" for H.I.G., Srinivasan was said to have written.

H.I.G. and the Audax parties executed the stock purchase agreement 10 days later.

Not yet resolved, the judge said, was an Audax motion to strike a demand by the H.I.G. parties for a trial by jury. The court agreed to accept additional briefing on the issue, saying that it had received relatively little attention in the case to date.

H.I.G.-affiliated buyer Matrix Parent Inc. and the H.I.G. entities are represented by Elena C. Norman, Daniel M. Kirshenbaum and Michael A. Laukaitis II of Young Conaway Stargatt & Taylor LLP, and Michael S. Shuster and Vincent Levy of Holwell Shuster & Goldberg LLP.

The Audax parties are represented by Kevin R. Shannon of Potter Anderson & Corroon LLP and Kevin B. Huff and David Schwarz of Kellogg, Hansen, Todd Figel & Frederick, P.L.L.C..

Bhatia, Doran and Mack are represented by Michael Kendall of White & Case LLP.

The case is Matrix Parent Inc. et al. v. Audax Management Company LLC et al., case number N23C-10-212, in the Superior Court of the State of Delaware.

--Editing by Melissa Treolo

Update: This story has been updated with more details, comments from spokespeople for Audax and H.I.G., and with additional counsel information.



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Visa, Mastercard Can Manage 'Greater' Fee Deal, Judge Says

By **Lauren Berg**

Law360 (June 29, 2024, 12:02 AM EDT) -- Visa and Mastercard could likely tolerate a "substantially greater judgment" than the proposed settlement valued at about \$30 billion in multidistrict litigation over the credit card companies' merchant fees, a New York federal judge ruled in an order unsealed Friday evening, rejecting the parties deal.

U.S. District Judge Margo Brodie on Tuesday **entered an order** denying preliminary approval of the settlement, under which Visa Inc. and Mastercard Inc. would have slashed their merchant fees by about \$30 billion over five years, just weeks after she first signaled that she would **"likely not approve"** the proposed deal. But it wasn't until Friday that she unsealed the reasoning behind her decision.

In an 88-page memorandum **opinion**, Judge Brodie found deficiencies under the so-called Grinnell factors — which assist courts in weighing final approval and determining whether a settlement is fair, reasonable and adequate — that weigh against approving the proposed settlement, particularly Visa and Mastercard's ability to withstand a greater judgment.

The goal in these types of cases is to stop the defendant from violating a plaintiff's civil rights, the judge said, noting that, on one end of the spectrum, a defendant just needs to stop violating the law. But at the other end of the spectrum, the resolution of the action requires the dissolution of the defendant company, the order stated.

"In between these extremes, the vast majority of injunctive relief will impose some costs on the defendant, short of requiring its dissolution," Judge Brodie said, adding that in this case, "based on the evidentiary record before the court ... defendants could withstand a substantially greater judgment."

She quantified the "cost" of the settlement based on the promised "rate caps and rollbacks," which the merchants estimate as being worth about \$30 billion over five years, according to the order.

However, she noted that one of the settlement objectors pointed out that "the estimated \$6 billion in annual savings to merchants is paltry compared to the \$100 billion that merchants paid in interchange fees on Visa and Mastercard transactions in 2023" alone.

But because there is no evidence of Visa and Mastercard's profitability in the record, Judge Brodie was quick to point out that she can't say with certainty that the credit card companies could withstand a greater judgment, just that "the evidence strongly suggests that they could withstand a substantially greater judgment."

The dispute goes back nearly 20 years. Since 2005, Mastercard and Visa have been battling multidistrict litigation accusing them and several banks — including Barclays and JPMorgan Chase & Co. — of conspiring to maintain a set of rules that allowed the credit card companies to overcharge merchants whenever customers used their cards.

Visa and Mastercard **struck the deal** with merchants in March, agreeing to reduce fees significantly over the next few years and to eliminate restrictions on steering customers to cheaper payment options. Specifically, Visa and Mastercard agreed to roll back credit card processing fees and remove restrictions that prevent merchants from adjusting prices and discounts based on the cost of

accepting different credit cards.

In her order unsealed Friday, Judge Brodie said that while she is likely to find that the class representatives adequately represent their fellow merchants and that class counsel have adequately represented the class — factors that weigh in favor of granting final approval to the settlement — she found that the adequacy of the relief for the class is likely to weigh against granting final approval.

For one thing, Target Corp., 7-Eleven Inc. and "numerous other objectors" have expressed their dissatisfaction with the settlement's terms, arguing that the benefits offered don't have much value to them and that greater relief is achievable, according to the order.

Combining two Grinnell factors — "the range of reasonableness of the settlement in light of the best possible recovery and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation" — Judge Brodie found they both weigh against preliminary approval of the settlement, the order stated.

For instance, the surcharging relief contemplated by the settlement, which would expand merchants' ability to surcharge the companies' credit cards, "is too limited to justify approval of a settlement that does not provide most other forms of relief sought by other class members," the judge said.

In addition, the reductions in posted and average interchange fees proposed in the deal fall short of the "best possible" recovery, the order said. The reductions would maintain fee rates above those in place during the litigation and above rates merchants had already challenged, according to the order.

Lowering the average rate "by the amounts proposed in the settlement would still keep interchange significantly above rates that experts in this litigation have previously described as an 'upper limit' on what interchange fees might have been in the absence of the challenged competitive restraints," Judge Brodie said.

"Accordingly, in comparing 'the terms of the compromise with the likely rewards of litigation,' the court cannot conclude that these two Grinnell factors weigh in favor of approving the settlement in order to avoid the risks of litigation," she added.

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

The settling merchants are represented by Robert Eisler and Chad Holtzman of Grant & Eisenhofer PA, Michael J. Freed, William H. London and Robert J. Wozniak of Freed Kanner London & Millen LLC, Linda P. Nussbaum and Susan R. Schwaiger of Nussbaum Law Group PC, and Steve Shadowen, Richard Brunell and Sherwin Faridifar of Hilliard & Shadowen LLP.

Visa is represented by Arnold & Porter Kaye Scholer LLP and Holwell Shuster & Goldberg LLP.

Mastercard is represented by Paul Weiss Rifkind Wharton & Garrison LLP.

The cases are In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, case number 1:05-md-01720, and GrubHub Holdings Inc. et al. v. Visa Inc. et al., case number 1:19-cv-06555, both in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Lauraann Wood, Hailey Konnath and Matthew Perlman. Editing by Kristen Becker.



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Philips Gets OK For \$25M Med Monitoring Deal In CPAP MDL

By **Mike Curley**

Law360 (June 28, 2024, 5:36 PM EDT) -- A Pennsylvania federal judge has given the go-ahead to a \$25 million medical monitoring settlement in multidistrict litigation stemming from a recall of ventilator machines by Koninklijke Philips NV and some of its American subsidiaries.

In an **order** filed Thursday, U.S. District Judge Joy Flowers Conti preliminarily approved the deal, which is part of a \$1.1 billion settlement Philips reached with plaintiffs **in April**, finding that the deal was reached through arm's-length negotiations, there's no evidence of collusion and it provides real and tangible benefits to the settlement class.

The order certifies for settlement purposes a class consisting of all individuals in the U.S. and its territories who used one of the devices. The judge wrote that the class is conditionally certified as a mandatory class, meaning that settlement class members cannot opt out.

Under the deal, Philips will pay \$25 million into a fund for the creation of a Medical Advancement Program, and those funds will be used for research, registration and other resources related to the injuries plaintiffs allege they suffered or could suffer from using the machines.

Class counsel will seek up to \$5 million in fees, costs and service awards, according to the **motion** filed in May for preliminary approval.

Judge Conti's order scheduled the final fairness hearing for Oct. 30, according to the order.

Philips had faced hundreds of lawsuits after it issued a 2021 recall of 10.8 million breathing machines used to treat conditions such as sleep apnea. The company said it had used the wrong kind of sound-insulating foam, which could break down under certain conditions and release chemicals and particles that plaintiffs said they inhaled while using the machines.

Cases against Philips were consolidated in the U.S. District Court for the Western District of Pennsylvania **in October 2021**, and cases against a separate company, SoClean, whose products were allegedly blamed for exacerbating the foam problems, were also consolidated there **in February 2022**.

In May, Philips filed a third-party **complaint** against SoClean, aiming to get the company to chip in on the \$1.1 billion deal.

The suits against Philips were eventually divided into three tracks, each with its own "master complaint": customers who only suffered economic losses from having to replace a recalled device, customers who claimed physical injuries from allegedly breathing in the degraded foam and its byproducts, and customers who wanted long-term monitoring of their health for problems that might arise later due to their alleged exposure.

The \$1.1 billion settlement for personal injury and medical monitoring plaintiffs, along with an **uncapped settlement** for economic loss claims starting at \$506.3 million, would end all three tracks of the multidistrict litigation against Philips stemming from its recalled CPAP, BiPAP and ventilator machines.

In a statement Friday, the plaintiffs' counsel said, "We are pleased Judge Conti granted preliminary

approval of the medical monitoring class action settlement. This agreement provides critical funding to conduct medical research on injuries at issue in this litigation and ensures patients will gain access to important information about the long-term health effects of exposure to recalled Philips devices."

A Philips spokesperson said Friday that the company is pleased with the preliminary approval.

"Our agreement to resolve these claims is an important further step toward fully resolving the consequences of the Respironics recall," the spokesperson said. "Importantly for patients, the remediation of sleep therapy devices is now almost complete, and the test results to date are reassuring, showing that the use of these devices is not expected to result in appreciable harm to health."

The plaintiffs are represented by Sandra L. Duggan and Keith J. Verrier of Levin Sedran & Berman LLP, Christopher A. Seeger, Caleb Seeley and David R. Buchanan of Seeger Weiss LLP, Kelly K. Iverson of Lynch Carpenter LLP, Steven A. Schwartz of Chimicles Schwartz Kriner & Donaldson-Smith LLP, D. Aaron Rihn of Robert Peirce & Associates PC, Michael F. Ram of Morgan & Morgan PA and Peter St. Tienne Wolff of Pietragallo Gordon Alfano Bosick & Raspanti LLP.

Philips is represented by Wendy West Feinstein, John P. Lavelle Jr. and Lisa C. Dykstra of Morgan Lewis & Bockius LLP, Erik T. Koons of Baker Botts LLP and Michael H. Steinberg, Tracy Richelle High and William B. Monahan of Sullivan & Cromwell LLP.

The case is In re: Philips Recalled CPAP, Bilevel PAP and Mechanical Ventilator Products Litigation, case number 2:21-mc-01230, in the U.S. District Court for the Western District of Pennsylvania.

--Additional reporting by P.J. D'Annunzio, Lauren Berg and Matthew Santoni. Editing by Rich Mills.



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The NFL Lost Big: What Happened, What Happens Next

By **Alex Lawson**

Law360 (June 28, 2024, 8:47 PM EDT) -- A California federal jury's rebuke of the NFL's Sunday Ticket broadcast package has the league staring down a \$4.7 billion class action verdict, prompting experts to wonder why the league was willing to risk a jury trial in the first place and how it will try to overturn the verdict now that it lost.

After a three-week trial that saw testimony from NFL commissioner Roger Goodell, Dallas Cowboys owner Jerry Jones and a range of academics and economists, and just six hours of deliberation, the jury's 10-figure verdict fully backed Sunday Ticket subscribers' assertions that the league's 32 teams illegally colluded with DirecTV to pump up its price.

While the \$4.7 billion figure, which may still be trebled under federal antitrust law, is short of the \$7 billion the plaintiffs proposed to the court, it is a staggering figure even for the NFL, leaving many expert observers with one question in the wake of the verdict: How did the league ever allow the case to get this far?

"In sports law, antitrust is king," said Helen A. Drew, former Buffalo Sabres counsel and director for the Center for the Advancement of Sport. "There is a reason why teams and leagues never make important decisions without antitrust counsel at the table. And the reason is treble damages. Why that wasn't driving this, I couldn't begin to explain to you. Was it hubris? Was it arrogance? I can't begin to tell you."

The sheer size of the NFL's damages exposure led most observers to predict a pre-trial settlement, similar to the class action surrounding the MLB's premium streaming package, which settled mere hours before trial in January 2016.

But no settlement came, and the jury saw the plaintiffs — two classes of residential subscribers and commercial subscribers like bars and restaurants — produce extensive communications and documents stretching two decades into the past that they said proved the making of a sweetheart deal between DirecTV and the league's franchises to keep Sunday Ticket's price artificially inflated.

The central allegation was that Sunday Ticket, which allows subscribers to access all the league's games, was kept expensive to appease broadcasters like CBS and Fox. The networks viewed the product as a threat to their broadcasts, which bring games to local markets for free over the air.

Still, the size of the damages claim arose from the size of the class, tabbed at about 2.4 million residential subscribers and at least 48,000 commercial establishments, which added to the complexity of attempting to strike a deal ahead of trial, according to University of Buffalo law professor Christine P. Bartholomew.

"We're at a time right now where, with any class action settlement, there's just a lot more judicial scrutiny of it," Bartholomew told Law360. "It's not so clear that [a settlement] would have even worked here. They would have had to get judicial approval ... it may have quite simply been that they didn't think they could reach a settlement that could get judicial approval."

There is quite recent history illustrating Bartholomew's point. Just a day before the Sunday Ticket verdict, a New York federal judge wiped out a \$30 billion settlement in an antitrust case accusing Visa and Mastercard of colluding on merchant fees, turning nearly two decades of litigation on its head.

The case could still settle in the course of the years' worth of appeals that likely lie ahead. But R. Mark McCareins, a professor at Northwestern University's Kellogg School of Management, told Law360 that a 10-figure verdict on the books will only complicate the effort.

"The problem here is negotiating a manageable settlement after this verdict will be unlikely — the best chance [the NFL has] is a form of reversal at the Ninth Circuit to force the plaintiffs and their counsel to take significantly less to settle," McCareins said.

After the verdict, the NFL said it will "certainly contest" the decision, coloring the subscribers' claims as "baseless and without merit." Barring a retrial, that means a trip back up to the Ninth Circuit, which actually put the case back on its feet in 2019 after it was tossed out of district court.

That decision touched only on the sufficiency of the pleadings, leaving the NFL with any number of avenues to challenge the verdict, including the decision to certify the class, sufficiency of the evidence or jury instructions.

Many of the pre-trial skirmishes involved the admission of expert witnesses, which Bartholomew said is very likely to re-emerge in a Ninth Circuit petition, given the considerable gains a defendant can make if it casts doubt on an expert, particularly one that testified on damages.

"If the NFL is successful in convincing an appellate court that any of the expert witnesses, especially damages experts, should have been disqualified, that's huge," she said.

The league is also likely to ask the appeals panel for a broader read of the broadcasting antitrust exemption given to it by Congress in 1961. That arrangement allows the league to package all of its games and sell them to broadcasters like Fox, CBS and NBC, and the NFL has argued that the arrangement should be extended to a premium offering like Sunday Ticket.

But courts have generally construed such exemptions narrowly, and the NFL's attempts to apply it in this context thus far have been unsuccessful. At the core of the plaintiffs' argument is that the league's 32 franchises ought to be competing for out-of-market broadcast rights, rather than banding together as one unit.

That assertion looms large if the league should need to resort to U.S. Supreme Court intervention to overturn its ruling. In the 2010 case *American Needle v. NFL* , the justices rejected the NFL's claim that it can operate as a single entity in the context of a challenge to the teams' apparel licensing rules.

"It is going to take some fancy arguing to get around that precedent, and the odds do not favor the league, in my humble opinion," said Anthony Sabino of Sabino & Sabino PC.

While a final resolution is likely years off, the NFL's defeat at the trial level is certainly enough to put other leagues on notice, given that the value of sports broadcasting rights continues to climb and negotiations for those rights fall under closer scrutiny.

Sabino explained that the advent of streaming platforms, and leagues selling broadcast rights to them, creates even more urgency, as the Sports Broadcasting Act, which set the rules of the road for the industry, was designed for over-the-air broadcasting only, and leagues cannot assume that courts will port its provisions to digital offerings.

"All leagues should seriously rethink their broadcast deals, because they must recognize the risk that the SBA only applies to true, old-fashioned, over-the-airwaves broadcasts, and not modern media such as satellite or streaming," he said.

--Editing by Kelly Duncan and Dave Trumbore.