Guest Post: The Additional Pro-Defense Benefits of the Macquarie Decision

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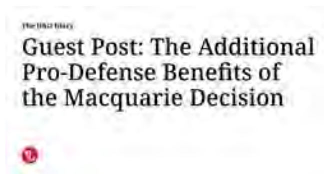

By Kevin LaCroix on July 10, 2024
Posted in Securities Litigation

Lawrence Fine

As discussed here, in its April 2024 decision in Macquarie Infrastructure Corp. v. Moab Partners, the U.S. Supreme Court held that a failure to disclose information required by Item 303 of Regulation S-K cannot support a private claim under Rule 10b-5 in the absence of an otherwise-misleading statement. The upshot is that so-called "pure omissions" cases are not actionable, meaning that omissions are only actionable if they make an affirmative statement materially misleading. In the following guest post, Larry Fine, Management Liability Coverage Leader for WTW, takes a closer look at the Macquarie decision and considers its implications, particularly with respect to future cases based on alleged omissions. A version of this article was previously published as a WTW client alert. I would like to thank Larry for allowing me to publish this article as a guest post on this site. I welcome guest post submissions from responsible authors on topics of interest to this site's readers. Please contact me directly if you would like to submit a guest post. Here is Larry's article.

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OVERVIEW:

On April 12, 2024, the U.S. Supreme Court issued its opinion in Macquarie Infrastructure Corp. v. Moab Partners. Writing for a unanimous court, Justice Sotomayor found for the defendants and reversed the decision of the Second Circuit. The Court found that a failure to disclose information required by Item 303 in Regulation S-K can't support a private action under Rule 10b–5(b), as long as the failure does not render any prior statements misleading. In order to reach that conclusion, the Court found that Rule 10b-5(b) doesn't create liability for pure omissions.

Everyone writing about it seems to agree that *Macquarie* is a big win for defendants, likely to stem the previously rising tide of securities class actions resting on Item 303-related allegations. However, upon further examination, the decision may turn out to be even more of a loss for plaintiffs than might be immediately obvious. This is because the *Macquarie* decision seems to call into question the continued vitality of the U.S. Supreme Court's decision in *Affiliated Ute Citizens of Utah v. United States,* a case with unique facts which has nonetheless been helpful to securities fraud class action plaintiffs over the 50+ years since it was decided.

THE FACTS OF MACQUARIE:

Macquarie Infrastructure Corporation has a subsidiary which operates large "bulk liquid storage terminals" in the U.S. One type of liquid stored in these terminals was No. 6 fuel oil. In 2016, the United Nations' International Maritime Organization adopted a regulation which would ban the use of sulfur-rich No. 6 fuel oil by the beginning of 2020. Macquarie didn't make any statements about this regulation until in 2018 when it announced that its liquid storage business had dropped off, which was due in part to the decrease in No. 6 fuel storage. After that announcement, Macquarie's stock price fell around 41%. Plaintiff Moab Partners filed a securities fraud class action against Macquarie, alleging that it violated the federal securities laws by failing to disclose a "known trend or uncertainty" as required by Section b(2)(ii) of Item 303 of Regulation S-K.

MISREPRESENTATIONS, OMISSIONS AND HALF-TRUTHS

To understand the holding in *Macquarie*, and most of the other cases discussed in this article, it is important to appreciate the sometimes subtle differences between misrepresentations, omissions and half-truths as they are discussed in the case law.

Misrepresentations:- As discussed in *Macquarie*, the definition of a "misrepresentation" is relatively straightforward: "false statements or lies" (though it should be noted that defendants have been known to raise nuanced defenses such as that the untrue statements in question were merely opinions or vague puffery (see *In Re: Philip Morris International Inc. Securities Litigation* and cased cited therein) and/or statements of a generic nature (see *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, discussed further below).

Omissions: According to *Macquarie*, "a pure omission occurs when a speaker says nothing, in circumstances that do not give any particular meaning to that silence".

Half-truths: In *Macquarie*, the Supreme Court defines half-truths (which have become an increasingly important category in recent years) as the failure to disclose "information necessary to ensure that statements already made are clear and complete."

THE *MACQUARIE* DECISION:

The first paragraph of the opinion summarizes the issue and the result with unusual brevity and clarity:

"Securities and Exchange Commission (SEC) Rule 10b– 5(b) makes it unlawful to omit material facts in connection with buying or selling securities when that omission renders "statements made" misleading. Separately, Item 303 of SEC Regulation S–K requires companies to disclose certain information in periodic filings with the SEC. The question in this case is whether the failure to disclose information required by Item 303 can support a private action under Rule 10b–5(b), even if the failure does not render any "statements made" misleading."

Prior to the Supreme Court's ruling in *Macquarie*, there had been circuit split as to whether Item 303 could serve as the basis for a private claim under Rule 10b-5(b) where no misleading statements have been made. Siding with the Ninth and Third Circuits, the Supreme Court resolved the issue once and for all, stating: "The Court holds that it cannot. Pure omissions are not actionable under Rule 10b– 5(b)."

The Court went on to explain:

"Even a duty to disclose, however, does not automatically render silence misleading under Rule 10b–5(b). Today, this Court confirms that the failure to disclose information required by Item 303 can support a Rule 10b–5(b) claim only if the omission renders affirmative statements made misleading"; in other words, only if the omission amounts to a half-truth."

The Supreme Court had long ago ruled that Section 10(b) of the Securities Exchange Act and Rule 10b-5, which implements it, give rise to an implied private right of action (see, for example, *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson* and *Blue Chip Stamps v. Manor Drug Stores*), whereas Item 303 does not. In part, the Court's holding amounted to a determination that plaintiffs shouldn't be allowed to get around the lack of a private cause of action under Item 303 by using alleged Item 303 noncompliance as a bootstrap into a 10b-5 private right of action.

The Court distinguished Rule 10b-5 claims from claims brought pursuant to Section 11 of the Securities Act of 1933, which the Court in *Macquarie* pointed out *does* create liability for pure omissions: "Statutory context confirms what the text plainly provides. Congress imposed liability for pure omissions in §11(a) of the Securities Act of 1933. Section 11(a) prohibits any registration statement that "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U. S. C. §77k(a). By its terms, in addition to proscribing lies and half-truths, this section also creates liability for failure to speak on a subject at all." The Court found this discrepancy between Section 11 of the Securities Act and Section 10(b) of the Securities Exchange Act to be significant and dispositive of an intent to *not* create liability for omissions under the latter statutory provision.

WAIT, WHAT ABOUT *AFFILIATED UTE*??

When plaintiffs bring a claim for securities fraud based on misrepresentations, one of the necessary elements they must establish is reliance: that they took action as a result of the fraud. For the past 36 years, class action plaintiffs have been allowed to establish a rebuttable presumption of reliance based on the "fraud-on-the-market theory," which assumes that material information is absorbed quickly into an efficient market, as established in the U.S. Supreme Court's decision in Basic, Inc. v. Levinson. According to *Basic* (and its progeny), it is difficult but possible to rebut the presumption of reliance in a few ways, including by arguing that the market for the stock in question wasn't efficient, that the misrepresentation didn't inflate the stock price, or that the truth of the misrepresented facts were known to the market. However, the Court in *Basic* referenced and didn't overrule their earlier decision in *Affiliated Ute Citizens of Utah v. United States*.

In *Affiliated Ute*, the Supreme Court considered a unique and complex fact pattern involving the sale of shares in a trust possessing most of the assets of the Ute Native American tribe. The part of the decision which has been relied on by many subsequent plaintiffs involves a finding of liability against two individuals who facilitated the purchase of numerous shares from certain members of the Ute tribe to non-Ute purchasers at below market prices. The Court found the individuals in question liable under Rule 10b-5 as a result of "soliciting and accepting standing orders from" [non-Ute] purchasers, and "receiv[ing] commissions and gratuities from the expectant [non-Ute] buyers, without revealing their role in market-making" to the sellers. The Court wrote that "[i]t is no answer to urge that, as to some of the petitioners, these defendants may have made no positive representation or recommendation," going on to hold that "[u]nder the circumstances of this case, *involving primarily a failure to disclose*, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision" (emphasis added). This has resulted in *Affiliated Ute* being cited for the propositions that a claim for liability under Rule 10b-5 can be predicated purely on omissions, and that such a claim does not require "positive proof of reliance".

THE LEGACY OF *AFFILIATED UTE*–

Although the facts were unique, and although *Ute* wasn't a class action (it was a mass action by a group of ascertainable individuals), it has been relied on by plaintiffs in subsequent litigation for the premise that a class action based purely on omissions does not require proof of reliance. Irrespective of what the Supreme Court may have intended, a line of cases developed, parallel to the misrepresentation cases which relied on the efficient market presumption from *Basic v. Levinson*, in which plaintiffs who only alleged omissions and did not allege affirmative misrepresentations were not required to establish reliance.

The Court in *Macquarie* did not cite to *Affiliated Ute* or mention it at all. However, the holding in *Macquarie*—that lawsuits = alleging only omissions cannot support claims under Rule 10b-5(b)—seems to undermine the *Affiliated Ute* line of authority. Note that, in addition to escaping the need to establish reliance, *Affiliated Ute* omissions-only plaintiffs can achieve near-automatic class certification. Cases revolving around these issues under the *Basic* line of cases have been hard-fought at the class certification stage in recent years, including *Halliburton v. Erica P. John Fund, Inc.* (*Halliburton II)* ("defendants must be afforded an opportunity before class certification to defeat the presumption [of reliance] through evidence that an alleged misrepresentation did not actually affect the market price of the stock") and *Goldman Sachs* ('The generic nature of a misrepresentation often will be important evidence of a lack of price impact").

The question of *Affiliated Ute*'s continued vitality is important: issues centering on *Affiliated Ute* are currently on appeal to the Sixth Circuit following the district court's order granting class certification in the *In re FirstEnergy Corp Sec. Litigation*. Specifically, at issue in *FirstEnergy* is whether *Affiliated Ute*'s presumption of reliance applies to cases alleging half-truths. The plaintiffs take the view that because *Affiliated Ute* applies to cases "primarily involving omissions," it applies to cases based on half-truths because half-truths are misleading by virtue of what they *omit*. The defendants, on the other hand, argue that half-truths are a species of an affirmative misstatement, so *Affiliated Ute's* presumption of reliance—which was intended only for the impossible situation of proving reliance on a statement that was never made—does not apply. The parties in the case have both assumed that *Affiliated Ute* remains good precedent that defendants have no ability to rebut a presumption of reliance in a pure omissions case.

WHAT ABOUT SCHEME LIABILITY?

In a footnote, the *Macquarie* Court made clear that its holding only relates to subsection b of Rule 10b-5, which is the most often cited section of the Rule, and not to subsections a and c (known as the scheme liability provisions).

Here is the full text of Rule 10b-5 (CFR section 240.10b-5):

§ 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Until recently, plaintiffs had seldom focused on subsections a and c of Rule 10b-5. The reach of those two subsections, while frequently disputed in litigation, has been interpreted to relate to potential liability from schemes. “Scheme liability” had been largely curtailed by the U.S. Supreme Court’s decisions in Central Bank of Denver v. First Interstate Bank of Denver (no private right of action for aiding or abetting), Stoneridge Investment Partners v. Scientific-Atlanta, Inc. (upholding *Central Bank*, saying that “the implied right of action in §10(b) continues to cover secondary actors who commit primary violations”; noting that the Private Securities Litigation Reform Act (PSLRA) provided the SEC with the power to bring claims against aiders and abettors and they have used it liberally), and *Janus Capital Group, Inc. v. First Derivative Traders*(citing *Central Bank* and *Stoneridge* in finding no liability for mutual fund investment advisor for its behind-the-scenes involvement with statements made by the company), but was reinvigorated by the Supreme Court’s decision in *Lorenzo v. Securities and Exchange Commission* which found potential liability under Rule 10b-5’s scheme liability provisions for a party which “disseminated” the false statements of another.

Notwithstanding the *Macquarie* Court’s purported abstention in relation to subsections a and c of Rule 10b-5, it seems that the Supreme Court already weighed in on the subject in the *Lorenzo* decision when it said that no liability would attach where “an individual neither *makes* nor *disseminates* false information – provided, of course, that the individual is not involved in some other form of fraud.” Since it isn’t possible to “disseminate” an omission, it is difficult to see how a pure omission could lead to scheme liability absent other non-disclosure-related allegations of fraud.

CONCLUSION:

As many commentators have noted, in recent years securities class action complaints in “duty to disclose” cases have often been premised on Item 303 deficiencies. Hence, it seems likely that somewhat fewer securities class actions may be filed in the future for that reason alone.

However, as discussed above, the pro-defense effects of the *Macquarie* decision are likely to go far beyond Item 303 issues. Based on the foregoing analysis, it seems that the U.S. Supreme Court has effectively killed *Affiliated Ute*, at least in relation to the principle for which it has been so often cited. Although even now parties are fighting over what it takes to qualify for a *Ute* free pass from having to establish reliance, it looks like when the dust settles plaintiffs may no longer be able to rely on *Affiliated Ute*, except in the very rare cases that sound primarily in non-disclosure-related forms of fraud. After *Macquarie*, all plaintiffs may be required to allege misrepresentations or at least half-truths (or actions such as dissemination of misrepresentations as in *Lorenzo* if they are alleging scheme liability), and so won't be able to argue that *Affiliated Ute* allows them to avoid having to fight about class certification and reliance by pleading a case which is entirely or primarily based on pure omissions.

Private parties can still sue for half-truths and the government can still sue for omissions under 303. However, it seems that private plaintiffs will no longer be able to establish a case based entirely on "pure" omissions with no corresponding prior contrary statement[1], nor will they be entitled to a virtually irrebuttable presumption of reliance. This is a welcome development for corporate defendants. It was always counter-intuitive that plaintiffs who couldn't allege any affirmative misrepresentations should have a litigation advantage over ones that could; sins of commission are generally regarded as more serious than sins of omission, smoking guns are considered more damning than missing guns. *Macquarie* seems to have addressed this inequity, albeit silently and subtly. This could lead to fewer securities class actions being filed and/or more cases being dismissed on initial motion.

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[1] One reason why this seems fair is this: if there was really no prior contrary statement, then arguably neither the company nor the investors previously considered the topic in question to be material.

Purdue Pharma secures litigation ceasefire after US Supreme Court ruling

reuters.com/legal/purdue-pharma-seeks-litigation-ceasefire-after-scotus-ruling-2024-07-09

Dietrich Knauth

The U.S. Supreme Court building is seen in Washington, U.S., May 20, 2024. REUTERS/Evelyn Hockstein/File Photo Purchase Licensing Rights, opens new tab

NEW YORK, July 9 (Reuters) - Purdue Pharma on Tuesday received U.S. court approval for a 60-day freeze on lawsuits against its owners, members of the wealthy Sackler family, in its first court appearance since a landmark Supreme Court ruling upended its bankruptcy settlement.
U.S. Bankruptcy Judge Sean Lane granted an injunction at a court hearing in White Plains, New York, saying that a litigation ceasefire will give Purdue a chance to renegotiate a comprehensive settlement of lawsuits alleging that its painkiller OxyContin spurred an opioid addiction crisis in the U.S.

The U.S. Supreme Court ruled on June 27 that Purdue Pharma's bankruptcy settlement cannot shield the Sacklers, who did not file for bankruptcy themselves, over their role in the nation's deadly opioid epidemic.

The ruling sent Purdue back to the drawing board after nearly five years in bankruptcy and imperils billions of dollars in funding that the company and the Sacklers had promised to pay toward addressing the harms from the crisis.

Lawsuits against Purdue and Sackler family members by state and local governments, as well as by individual plaintiffs, have accused them of fueling the opioid crisis through deceptive marketing of its pain medication. The company pleaded guilty to misbranding and fraud charges related to its marketing of OxyContin in 2007 and 2020.

Purdue's bankruptcy has stopped the opioid lawsuits from proceeding against the Stamford, Connecticut-based drugmaker since 2019, and Purdue has extended that legal protection to the Sacklers as well.

Purdue's attorney, Marshall Huebner, said the company will engage in "a high-speed, high-stakes mediation" with the Sacklers, state and local governments, and other stakeholders. Protecting the Sacklers during a "modest" 60-day negotiating period will give Purdue a real chance to negotiate a new bankruptcy settlement and put money toward stopping opioid overdoses and treating addiction, Huebner said.

"Every single day of delay continues to come at a tragic, tragic cost," Huebner said.

Several stakeholders expressed hope for a settlement, but said that mediation should not be extended beyond the 60-day schedule proposed by Purdue.

"It is essential to all parties in this case that we bring this five-year Chapter 11 case to a conclusion," said Kenneth Eckstein, an attorney representing a coalition of state and local governments.

During the hearing, Lane also appointed two mediators to aid settlement talks, including retired bankruptcy judge Shelley Chapman, who brokered a previous deal under which the Sacklers agreed to pay up to $6 billion to settle the opioid lawsuits. Eric Green will serve as the other mediator.
If mediation fails, Purdue has said a court-appointed committee representing its creditors should be allowed to sue the Sacklers over claims that they drained over $11 billion from the company and that their conduct made Purdue liable for other lawsuits.
The Sacklers have said the creditors' proposed litigation is counterproductive and based on "factual errors." Members of the family have denied wrongdoing and would fiercely oppose any litigation if the settlement talks break down, their attorneys said.

"No one is assured of a recovery in this court or any other court," said Gerard Uzzi, an attorney representing members of the Sackler family.

Purdue's previous bankruptcy settlement was supported by attorneys general from all 50 states, as well as local governments and a large majority of the individual opioid victims who voted on it. But it has also had detractors, like Carrie McGaha, who has had repeated overdoses and said Tuesday that individuals have been placed at the "bottom of the heap" throughout Purdue's bankruptcy.

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

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Purdue Pharma Bankruptcy Ruling Sidesteps Chapter 15 Implications

By Michelle McGreal, Douglas Deutsch, and Robert Johnson2024-07-10T10:05:23000-04:00

- *Clifford Chance attorneys analyze nonconsensual release ban*
- *Large Chapter 11 cases affected most by Supreme Court ruling*

The US Supreme Court's ruling striking down nonconsensual third-party releases in *Harrington v. Purdue Pharma* will have a meaningful impact on large Chapter 11 cases as these releases have become common, if not essential, to larger restructurings.

The ruling also will likely encourage more multinational companies to file bankruptcy outside the US, as a number of foreign bankruptcy regimes permit nonconsensual third-party releases.

Once a company files for bankruptcy in one of these countries, the company could then use another part of the Bankruptcy Code, Chapter 15, to recognize and effectuate the foreign bankruptcy relief in the US, including with respect to any third-party releases approved by the foreign court.

This circuitous route to obtaining relief that *Purdue* now prohibits under Chapter 11 is possible because the *Purdue* ruling focuses on the statutory text of Chapter 11, sidestepping other constitutional and due process issues that might otherwise have implicated Chapter 15's public policy exception.

Limitations

Accordingly, Chapter 15 of the Bankruptcy Code governs the process for foreign debtors to obtain assistance from US courts, including recognition of foreign insolvency proceedings and domestication and enforcement of orders entered in those proceedings. Chapter 15 is based on the Model Law on Cross-Border Insolvency, a product of the UN Commission on International Trade Law that's been adopted in more than 60 jurisdictions.

The model law's recognition and enforcement mechanisms operate largely without regard to differences in substantive insolvency laws.

Courts in one jurisdiction may—and often do—recognize orders from another jurisdiction where the laws of the two countries differ, and where relief in one jurisdiction exceeds (or is less than) what would be available to the debtor if its insolvency proceeding was pending in the other—as long as the foreign proceeding affords parties some level of due process protections.

Despite this permissiveness, the model law doesn't require recognition and enforcement of all relief granted by a foreign insolvency court. Instead, the law allows courts to refuse to grant relief that is "manifestly contrary to the public policy" of their own jurisdiction.

Chapter 15 allows US courts to refuse to grant relief in aid of a foreign proceeding that would violate US law or contradict the US's most fundamental policies. The bar for this exception is high, and it has been invoked successfully in only a few cases since Chapter 15 was enacted.

In *Purdue*, the objectors raised constitutional arguments, namely that nonconsensual third-party releases violate the Due Process Clause and the Takings Clause. If the Supreme Court were to prohibit such releases on these grounds, it could have provided the basis for a "public policy" objection to Chapter 15 recognition of a foreign plan that included such a release.

Third-Party Releases

Third-party releases have long been a hot topic in Chapter 11. The idea is simple: A debtor that files for bankruptcy and confirms a Chapter 11 plan typically receives a discharge of claims against it, which are replaced by the restructured obligations set forth in the plan.

A third-party release (approved by the bankruptcy court) allows non-debtors—"third parties" to the proceeding—to effectively obtain a bankruptcy discharge without consent of affected claimholders, and without having to seek bankruptcy relief or submit themselves to the rigors of the bankruptcy process. This is often ostensibly because those parties contributed in some way to the debtor's restructuring.

As noted by the *Purdue* majority, the Bankruptcy Code explicitly authorizes nonconsensual third-party releases where a debtor faces liability arising from asbestos exposure. Such releases have formed the linchpin of many mass tort bankruptcies that resulted in meaningful compensation to victims even outside of the asbestos context.

In recent years, however, use of these releases has expanded well beyond the mass tort arena. Debtors of all types now regularly seek nonconsensual third-party releases of officers and directors, shareholders, equity sponsors, and even lenders or other creditors that support a Chapter 11 plan—all on the theory that these releases contribute to the debtor's reorganization.

While many courts have obliged in granting these releases, objections to such releases are common and other courts have refused to approve them on statutory and other grounds, including due process and other constitutional concerns.

Purdue Pharma sought bankruptcy relief in 2019 and confirmed a Chapter 11 plan that provided for nonconsensual third-party releases of its (non-debtor) controlling shareholders in exchange for more than $6 billion in contributions. While substantial, it was still far less than those shareholders' total fortunes.

This week, Southern District of New York judge Sean Lane granted Purdue Pharma two months to negotiate a new agreement with members of the Sackler family in anticipation of additional civil opioid lawsuits against the company.

The Supreme Court's 5-4 ruling reversed the lower courts' approval of the third-party releases in Purdue's plan. Over a vigorous dissent, the majority focused primarily on what it believed to be the clear language of the Bankruptcy Code, which it read to provide no basis for US courts to approve nonconsensual releases. The court didn't cite any constitutional or due process concerns, avoiding an issue that could have had far-reaching consequences outside of Chapter 11.

With respect to Chapter 11 cases, the court expressly declined to call into question the approval of consensual releases or express a view on what qualifies as a consensual release.

The case is Harrington v. Purdue Pharma , U.S., 23-124, decided 6/27/24 .

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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UnitedHealth Leaders Sued by Investor Over Antitrust Firewall

By Matthew Bultman

- **COURT:** D. Minn.
- **TRACK DOCKET:** No. 0:24-cv-02643

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UnitedHealth Leaders Sued by Investor Over Antitrust Firewall

By Matthew Bultman 2024-07-09T11:48:54000-04:00

- **COURT:** D. Minn.
- **TRACK DOCKET:** No. 0:24-cv-02643

UnitedHealth Group Inc. directors are being sued by a shareholder who alleges investors were misled about the health insurer's efforts to separate business units after acquiring Change Healthcare Inc.

The derivative lawsuit follows reports that the Department of Justice opened an antitrust investigation into the relationships between UnitedHealth's business segments. A proposed class action was brought by investors in May.

The new complaint, filed Monday in the US District Court for the District of Minnesota, said the directors' alleged misconduct will cost the company significant amounts of money, requiring internal investigations and defense of the proposed class action.

It seeks damages for UnitedHealth and a court order directing the company to improve its corporate governance, including strengthening the board's supervision of operations and compliance with laws.

UnitedHealth didn't immediately respond to a request for comment.

The deal by UnitedHealth's Optum arm to acquire Change went through in September 2022, following a DOJ challenge. The DOJ argued the acquisition would give UnitedHealth unparalleled access to information about health insurers and individuals.

Part of the rationale for a court's decision allowing the deal to go through was UnitedHealth's commitment to create a firewall to prevent sensitive customer information from being shared between Optum and the UnitedHealthcare insurance unit, the complaint said.

The complaint alleges the directors allowed false and misleading statements to be made about the firewall.

"UnitedHealth never established proper firewalls between Optum and UnitedHealthcare as required by its own policy, as it told the court in the antitrust action, the DOJ and investors it would do," the lawsuit said.

Rigrodsky Law PA, Grabar Law Office, and Altman Law PLLC represent the investor.

The case is McCollum v. Witty , D. Minn., No. 24-cv-02643, 7/8/24 .

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Peloton, Investors Notch Final OK for $14 Million Settlement

B bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XATVL9PO000000

The Peloton Interactive Inc. logo is displayed on a stationary bicycle on display at the company's showroom on Madison Avenue in New York City.

Photographer: Jeenah Moon/Bloomberg

Peloton Interactive Inc.'s agreement to pay $14 million to settle a securities fraud class action related to treadmill safety issues merits final approval, a federal court ruled.

Attorneys' fees of $3.9 million, or 28% of the settlement amount, are reasonable, Magistrate Judge Peggy Kuo said Tuesday for the US District Court for the Eastern District of New York.

- The investors alleged Peloton and its leadership failed to disclose safety threats posed by the Tread+, inflating the stock and causing investment losses when the issues came to light
- Seven investors opted out of the settlement and none objected, Kuo said
- Peloton and its board are engaged in class and derivative litigation over statements about the sustainability of its Covid-19-era profits and alleged insider trading

Faruqi & Faruqi LLP was class counsel. Latham & Watkins LLP represented Peloton.
The case is In re Peloton Interactive Inc. Sec. Litig., E.D.N.Y., No. 1:21-cv-02369, 7/9/24 .

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Sagaliam SPAC Investors Can Proceed With Lawsuit to Wind It Down

By Martina Barash

- November 2023 vote to extend merger deadline was halted
- Claim OK that vote would violate incorporation papers

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Sagaliam SPAC Investors Can Proceed With Lawsuit to Wind It Down

By Martina Barash 2024-07-09T12:10:36000-04:00

- November 2023 vote to extend merger deadline was halted
- Claim OK that vote would violate incorporation papers

Two investment funds successfully stated a claim for a declaration that a deadline for their blank-check company to complete a merger has passed and it must wind down, a federal court ruled.

The funds sued the special purpose acquisition company, Sagaliam Acquision Corp., in November 2023 when it was contemplating a merger with drugmaker Enzolytics Inc., and soon succeeded in getting a preliminary injunction to stop a vote to extend the deadline.

Two other claims remain on the table and one is out after Judge Richard G. Andrews' decision for the US District Court for the District of Delaware Monday.

SPAC mergers gained popularity as a way for companies to go public, but litigation followed as some investors alleged the deals created distorted incentives for SPAC principals.

The funds suing Sagaliam, GLD Partners LP and GLD Sponsor Member LLC, alleged that the SPAC never mailed them the proxy statement for the deadline-extension vote and that they "learned about the special meeting only because another shareholder reached out to them to ask about what was going on."

The proxy statement was "rife with false and misleading statements and omissions," they said. It was too late to revive Sagaliam's deadline for a business combination, and insider considerations led Sagaliam to improperly issue and transfer shares to biotechnology developer Enzolytics and its shareholders without payment or a merger, they said.

Sagaliam didn't try to knock down the funds' proxy misstatement claim or its invalid share issuance claim, so Andrews didn't address those claims.

But the SPAC persuaded Andrews to trim away a claim based on an asserted duty to disclose. That is essentially a fraud claim—and the funds didn't adequately plead their reliance on Sagaliam's representations, he said.

The funds' claim to stop the vote and wind down the SPAC based on its certificate of incorporation, however, can proceed, the judge said.

Bellew LLC and Akerman LLP represent the GLD funds. Antranig Garibian, who practices in New York, Jenkintown, Pa., and Wilmington, Del., represents Sagaliam.

The case is GLD Partners, L.P. v. Sagaliam Acquisition Corp. , D. Del., No. 1:23-cv-01266, 7/8/24 .

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Securities Law News

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Bitwise Hit With Fraud Lawsuit Over Crypto Fund's Conversion (1)

By Mike Leonard

- Investors duped into consenting, reinvesting, lawsuit says
- Billionaires backing Bitwise not accused of any wrongdoing

Bloomberg Law News 2024-07-10T09:26:03936072836-04:00

Bitwise Hit With Fraud Lawsuit Over Crypto Fund's Conversion (1)

By Mike Leonard 2024-07-09T10:23:43000-04:00

- Investors duped into consenting, reinvesting, lawsuit says
- Billionaires backing Bitwise not accused of any wrongdoing

Bitwise Asset Management Inc. defrauded a group of cryptocurrency investors into converting its flagship product to a publicly traded trust and keeping their money with the volatile new fund, a lawsuit filed in Manhattan says.

The investors sued Bitwise and its top executives for fraud Monday, saying the fund managers tricked them into consenting to the conversion and reinvesting in an underperforming trust, the Bitwise 10 Crypto Index Fund, that charged unusually high fees.

Bitwise—which manages around $3 billion in assets—is allegedly backed by high-profile finance titans including billionaires Daniel Loeb, Daniel Och, Stanley Druckenmiller, and Henry Kravis, who aren't named as defendants.

The lawsuit by three members of the Mukamal family, who allegedly had $1.3 million in the privately traded fund, says Bitwise CEO Hunter Horsley coerced them into participating in the transactions in April 2020—when the Covid-19 pandemic was battering crypto markets—by offering them a "choice between converting or selling out at a fire sale price."

Horsley called the allegations meritless and false in a statement Tuesday. "Theodore Mukamal, who also refers to himself as Tootsie Warhol," signed multiple documents indicating he understood and accepted the risk of investing in the crypto funds, according to Horsley's statement.

Mukamal "is an experienced accredited investor who has been profitably investing in digital assets with Bitwise since 2018," Horsley said. "Earlier this year he reached out to Bitwise threatening to sue and smear Bitwise's reputation in the press unless he was paid a large sum of money. Theodore has a history of threatening and suing other people, former employers, and companies to pursue personal gain."

According to the Mukamals' court complaint, Horsley sought to allay their concerns about the volatility of the over-the-counter capital markets by assuring them the fund would include a "carve-out" giving them the chance to continue investing through private placements.

He then duped them into facilitating the formation of a "liquid secondary market" by withdrawing their money with the intention of reinvesting it the same day, "as you have in the past," the suit says. That allegedly conveyed the misleading impression that the reinvestment would be priced at the net value of the assets held by the trust rather than its public trading price.

Based on those promises, the Mukamals ultimately put $4.85 million into the fund, which trades under the symbol BITW, according to the complaint filed in the trial-level New York County Supreme Court. But it was all a lie, the lawsuit says.

The moves allegedly cost the three family members more than $1.9 million in total—the difference between the net asset value and the over-the-counter price when they reinvested and when they cashed out in March and April of this year. The Mukamals also suffered "severe tax consequences" that Horsley should have warned them about, the suit says.

The Mukamals are represented by Westerman Ball Ederer Miller Zucker & Sharfstein LLP. Bitwise hasn't yet made a court appearance.

The case is Vandelay Indus. TM LLC v. BitWise Hold 10 Pvt. Index Fund LLC , N.Y. Sup. Ct., complaint filed 7/8/24 .

(Updates with Horsley's statement in fifth and sixth paragraphs.)

NEWS

J&J Loses Bid to Subpoena Beasley Allen Over Talc Financing

Retired U.S. Magistrate Judge Joel Schneider, of the District of New Jersey, found on Tuesday that there was not good cause to allow Johnson & Johnson to pursue discovery about Beasley Allen's litigation financing.

July 09, 2024 at 08:32 PM

Mass Torts

Amanda Bronstad
staff reporter

What You Need to Know

- The subpoenas come as J& has a pending motion to disqualify Beasley Allen, based in Montgomery, Alabama, from leadership of the talc litigation.
- J&J, which needs at least 75% of talc claimants to approve its proposed bankruptcy plan by July 26, has insisted that Beasley Allen continues to oppose its proposed talc settlement due common benefit fees it stands to receive in the multidistrict litigation.
- Retired U.S. Magistrate Judge Joel Schneider wrote: 'Parties may not roam at leisure through their adversary's files regarding all matters that are of interest to them.'

Johnson & Johnson lost its bid to subpoena Beasley Allen and others in an escalating fight over its planned $6.48 billion talc bankruptcy after a special master on Tuesday granted motions to quash the requests.

Retired U.S. Magistrate Judge Joel Schneider, of the District of New Jersey, ruled that there was not good cause to allow J&J to pursue discovery about Beasley Allen's litigation financing.

"Although discovery in federal litigation is recognized as broad, it is not unlimited," he wrote. "Parties may not roam at leisure through their adversary's files regarding all matters that are of interest to them."

J&J's subpoenas, he concluded, fall "outside the boundary of what is authorized, appropriate and necessary."

The subpoenas come as J&J has a pending motion to disqualify Beasley Allen, based in Montgomery, Alabama, from leadership of the talc litigation.

J&J Worldwide Vice President of Litigation Erik Haas said in a statement: “We respectfully disagree with and will appeal the special master’s refusal to require Beasley Allen to make disclosures of the third party that financed its talc claims as required by the court’s Local Rule 7.1.1. and where, as here, the evidence indicates that Beasley Allen is placing its own financial interests above those of its clients.”

“We look forward to moving past these sideshow distractions and to the trial of these cases on the merits,” Chris Placitella, of Cohen, Placitella & Roth in Red Bank, New Jersey, who is liaison counsel in the talc multidistrict litigation, said in an email to Law.com.

J&J’s proposed subpoenas sought information from Beasley Allen and co-counsel the Smith Law Firm about litigation financing of lawsuits alleging its talcum powder products caused ovarian cancer.

J&J, which needs at least 75% of talc claimants to approve its proposed bankruptcy plan by July 26, has insisted that Beasley Allen continues to oppose its proposed talc settlement due to common benefit fees it stands to receive in the multidistrict litigation.

Beasley Allen denied accepting any litigation funding, while litigation funder Fortress Investment Group, a private equity firm, admitted to investing in a $24 million loan to the Smith Law Firm, based in Ridgeland, Mississippi. That funding, as of three years ago, came from hedge fund Ellington Management Group.

In Tuesday’s order, Schneider granted motions to quash the subpoenas filed by Beasley Allen, the Smith Law Firm and the plaintiffs’ steering committee in the talc multidistrict litigation. He found that Beasley Allen had already attested to not accepting litigation funding in the talc litigation, and he criticized “sketchy” allegations that the Smith Law Firm referred cases that were backed by litigation funders.

“The special master will not bless discovery that is based on this sort of speculation and conjecture,” he wrote. “The fact that Smith may have partnered with Beasley Allen in the past on talc litigation is not competent evidence that the firm’s financing impacts Beasley Allen’s settlement position in this litigation.”

“To the extent defendants want to fish around to discover Beasley Allen’s general financial condition,” he continued, “the request is denied. The subject area is out of bounds.”

The special master also found that Beasley Allen’s opposition to the proposed talc settlement wasn’t insidious, then addressed J&J’s claim that a May 14 email sent to its outside counsel by one of Beasley Allen’s clients necessitated the subpoenas. J&J claims that the email, which asked about the proposed bankruptcy plan, revealed Beasley Allen wasn’t communicating with its clients about settlement options.

Schneider wrote, “The SM is unwilling to open the door to litigation financing discovery based on the referenced email exchange with one of Beasley Allen’s 11,000 clients.”

Montana to ask state top court to overturn landmark climate ruling

reuters.com/legal/montana-ask-state-top-court-overturn-landmark-climate-ruling-2024-07-10

Nate Raymond

An extension of Denbury Inc's Greencore carbon pipeline is ready to be lowered into its trench, in Montana, U.S., 2021. Denbury/Handout via REUTERS/File Photo Purchase Licensing Rights, opens new tab

July 10 (Reuters) - Montana's top court is set to hear the state's appeal of a landmark ruling holding that it was violating the rights of young people to a clean and healthful environment by barring regulators from considering the impacts on climate change when approving fossil fuel projects.

The Republican-led state will urge the Montana Supreme Court to conclude that the lawsuit by 16 young people should never have gone to trial in the first place because they lack legal standing to challenge a restriction on agencies' ability to consider the impact of greenhouse gas emissions.

The state is asking the court to reverse an August 2023 ruling by District Court Judge Kathy Seeley in Helena in the closely watched case. It was the first lawsuit in the United States by young environmental activists challenging state and federal policies they say are exacerbating climate change to go to trial.

The youth-led lawsuits have taken aim at government policies at the state and federal level that they say encourage or allow the extraction and burning of fossil fuels and violate their rights under U.S. or state constitutions.

While some of those cases have faltered, the youth activists last month scored a major victory when the state of Hawaii agreed as part of a first-in-the-nation settlement to take action to decarbonize its transportation system by 2045.
The 16 Montana plaintiffs sued in 2020, when they were ages 2 to 18, alleging the state's fossil fuel-based energy system and permitting of projects like coal and natural gas production exacerbated green house gas emissions and climate change.

Through lawyers at the non-profit law firm Our Children's Trust, the plaintiffs have argued that a state law that barred Montana officials from considering the impacts of climate change when conducting environmental reviews of proposed projects violated their rights under Montana's state constitution.

Seeley agreed, saying the young people had a fundamental constitutional right to a clean and healthful environment under a 1972 amendment to Montana's constitution requiring the state to protect and improve the environment.

She said the state's failure to consider greenhouse gas emissions and climate change had harmed the young people's mental and physical health as well as their recreational interests, cultural traditions, economic security and happiness.

"The evidence we put on trial shows how greenhouse gas emissions both within a state, regionally and globally are injuring citizens, particularly our youngest citizens and future generations," said Phil Gregory, a lawyer for the plaintiffs.

Chase Scheuer, a spokesperson for Republican Montana Attorney General Austin Knudsen, said Seeley should have tossed the case from the outset instead of giving the plaintiffs a "show trial" that he called a "taxpayer-funded publicity stunt."

The state in a brief said Seeley should have concluded the young people had failed to establish they had legal standing to challenge the law because a single Montana statute could not be the cause of their alleged injuries since to curb climate change the world's energy system would have to be transformed.

The plaintiffs' lawyers counter that they had suffered concrete harms as a result of Montana's unfettered permitting of fossil fuel projects, which they say have caused an increase in greenhouse gas emissions and have degraded Montana's environment.

Reporting by Nate Raymond in Boston, Editing by Alexia Garamfalvi and Sandra Maler

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Musk Beats $500 Million Severance Suit Over Mass Twitter Layoff

By Robert Burnson2024-07-09T21:10:05522-04:00

X Corp. and owner Elon Musk defeated one of the lawsuits filed over the firing of thousands of employees after the billionaire's takeover of the social media platform in October 2022.

The suit alleged that X, formerly known as Twitter, and Musk owed at least $500 million in severance pay to about 6,000 laid-off employees under provisions of the federal Employee Retirement Income Security Act, which sets rules for benefit plans. The two plaintiffs, the company's former global head of compensation and benefits and another ex-manager, said workers got severance equal to only one month's pay.

But US District Judge Trina Thompson in San Francisco ruled Tuesday that the employees' claims weren't covered under ERISA because the company told employees after Musk's takeover that any who were let go would only get cash payouts.

Read More: Musk, X Corp. Face $500 Million Suit Over Twitter Severance

Several similar cases filed by former Twitter employees and executives are moving through the courts.

The case is McMillian v. Musk, 23-cv-03461, US District Court, Northern District of California (San Francisco).

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Securities Law News
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Boies Schiller Star's Ski Accident Tests Strength—and Builds It

By David Lat

Column

Columnist David Lat talks with Boies Schiller's Sigrid McCawley about her recovery from a devastating ski accident, and the new reservoirs of strength she found while learning to navigate asking for help.

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Boies Schiller Star's Ski Accident Tests Strength—and Builds It

By David Lat2024-07-10T04:30:51000-04:00

What does it mean to be a "survivor"? How do people make it through adversity? And what do we learn from these experiences?

I've thought about these questions a lot since 2020 when a near-death experience with Covid-19 sent me to the hospital for about three weeks, including almost a week on a ventilator. It profoundly affected me—and, among other things, brought me back to writing.

Survivorship isn't a foreign concept to Sigrid McCawley, managing partner at Boies Schiller Flexner and one of the nation's leading litigators. In addition to handling complex commercial litigation, McCawley represents survivors of sexual abuse and sex trafficking—most notably, victims of late financier Jeffrey Epstein.

Sigrid McCawley and David Lat in Manhattan, New York City in June 2024.
Photo courtesy of Sigrid McCawley.

And in light of something difficult she went through earlier this year, I asked McCawley: Might she be a survivor herself?

She politely rejected the term, insisting she is in no way comparable to the true survivors she has the privilege of representing. But regardless of the label, there’s no doubt she endured a life-threatening, life-altering experience—and will never be the same, in ways both good and bad.

This past winter, McCawley and her husband took their four children on an annual family ski trip to Vail in February. One day, after working in the morning, McCawley hit the slopes with her oldest son. While taking a run on a mountain she had skied “hundreds of times,” her boot came out of her ski, and she fell—hard.

Sigrid McCawley and her family in Vail, Colo. the day before her accident in February 2024.
Photo courtesy of Sigrid McCawley.

The pain was immediate. And excruciating.

"I have never felt pain like this in my entire life—and I've delivered four kids," McCawley told me. "I thought my leg had come off my body."

McCawley had broken her femur—in five places. Running from the hip to the knee, the femur is the longest and strongest bone in the body—and one of the most painful to fracture, given the tremendous amount of force required to break it. Because of the complications it can cause, a femoral fracture can even be life-threatening if not addressed immediately.

Upon arriving at Vail Hospital, McCawley was rushed into four hours of emergency surgery. A metal rod and supporting wires were inserted into her right leg—and will remain there the rest of her life.

She wound up staying in the hospital for five days. And while McCawley was most definitely immobilized, her work continued apace.

Three days after the accident, she and her partner David Boies filed *Bensky v. Indyke* , a lawsuit against Jeffrey Epstein's longtime lawyer and accountant for allegedly "aiding, abetting, and facilitating" his sex trafficking. McCawley reviewed and edited drafts from her hospital bed—but let her trusted colleagues take the lead, given she was still in great pain (and on "serious painkillers").

The surgery and hospital stay were only the beginning of a long and laborious recovery. She left the hospital in a wheelchair. Over the months that followed, she transitioned from a wheelchair to a walker to crutches to a cane (in a shiny rose gold).

A few weeks ago, she resumed walking. But it remains painful, and running is off-limits until the fall—which has been tough for McCawley, an avid runner who completed the New York City Marathon in 2021. Her skiing days might also be over, according to her orthopedist.

So the first half of 2024 has been uniquely challenging for Sigrid McCawley. She has had to juggle her recovery—involving ongoing pain, difficulty sleeping, numerous doctor visits, physical therapy sessions that leave her exhausted (and often in more pain)—with the demands placed on her as a top trial lawyer, leader of a major law firm, and mother of four.

But in a series of chats we've had over the past few months, McCawley showed nothing but good cheer, grace, and gratitude—for her doctors, physical therapists, and Boies Schiller colleagues, among others. I asked her what she has taken away from this experience.

In a comment that definitely resonated with my own Covid ordeal, when I received get-well wishes from around the world—McCawley cited "the loveliness of the human spirit. I feel so blessed to be surrounded by so much love—from my kids, spouse, family, friends, BSF colleagues, and the many other people in my life who worried and cared for me."

McCawley—who for years has been a leader and a doer, someone who clients, colleagues, and family members have depended upon—has had to depend on others. She's had no choice in this—for example, having to have associates or her son carry her bags—"but the role reversal has been tough, and I still feel guilty."

Sigrid McCawley and her daughter at a Taylor Swift concert in Edinburgh, Scotland in June 2024. Photo courtesy of Sigrid McCawley.

And some of her discomfort with vulnerability—which led her to be initially circumspect about her accident and its consequences, with both clients and colleagues—might have a gendered aspect: "As a woman in litigation, I've always felt that I have to be strong and look strong, and that I can't flinch. Maybe this is all in my own head, but I've always felt this way."

McCawley told me, "I've never had anything that knocked me out quite like this—and I feel I've learned how brave I can be. And I've always thought of myself as empathetic, but this experience has taken it to a new level."

For our final conversation, McCawley and I met up in person in New York City late last month. She came up from Fort Lauderdale for oral argument on motions to dismiss in *Bensky,* the case she filed from her hospital bed back in February—and her return to the courtroom struck me as a return to form for the hard-charging litigator.

During the lengthy proceedings—which pitted her against veteran litigators from two top firms, Hughes Hubbard & Reed and Patterson Belknap—McCawley deftly fielded tough questions from District Judge Arun Subramanian of the Southern District of New York. And while he hasn't yet issued a ruling, it appeared to me, based on the judge's comments from the bench, that *Bensky* isn't getting dismissed (at least not in its entirety).

After the hearing, McCawley and I adjourned to a nearby café. Wearing a white dress suit, a smart choice given the summer weather, she navigated the uneven Manhattan sidewalks with ease—in heels, while wheeling a roll-aboard suitcase (which I offered to handle for her, but she refused).

As usual, she was in good spirits. She had celebrated her birthday just two days ago, and two weeks ago she had returned from a European vacation with extended family.

Although she had to take it relatively easy, hanging back at times with some older members of the group, she was pleased she had been able to do a good amount of walking. She was even able to stand for hours—and dance a little—at a Taylor Swift concert in Edinburgh.

Sipping a vanilla latte, McCawley recalled to me how five years ago, in July 2019, Jeffrey Epstein was arrested on federal sex-trafficking charges—and the world became aware of his predations. It was a watershed event for McCawley, who had been representing Epstein survivors since 2014—and whose work contributed to the arrests of Epstein and his co-conspirator, Ghislaine Maxwell.

Over the years, McCawley and her Boies Schiller colleagues have represented survivors who have obtained many millions in Epstein-related settlements—including $365 million in a class action filed against two major banks that had Epstein as a client.

But while she did some reflecting on the past, marveling at how dramatically her life and career have changed over the last five years, McCawley focused on the future. She talked about an important new client: the family of John Barnett, the Boeing whistleblower who died by suicide this past March.

And McCawley, who chairs the pro bono committee at Boies Schiller, is exploring how the firm's considerable resources—which over the years have aided survivors of sex abuse and trafficking, LGBTQ couples seeking to get married, and undocumented immigrants—can be used to advance the rights of people with disabilities. She is hosting an event at the firm on July 30 for Disability Pride Month—featuring a fellow Florida lawyer, disability-rights advocate Haley Moss.

"Until now, I've never had to deal with any physical disability or limitation," McCawley said. But the past few months have given her a new sense of perspective, after she has had to endure accessibility challenges at gas stations, hospitals (of all places), and her own house (which she had to radically revamp).

"Today I have an even more profound respect for people with disabilities than I did before," she said. "It has been mind-blowing to me to see what they have to deal with every day. And I'm eager to hear from organizations interested in working with us at Boies Schiller to elevate these conversations, push things forward, and have an impact on the law."

David Lat , a lawyer turned writer, publishes Original Jurisdiction . He founded Above the Law and Underneath Their Robes, and is author of the novel "Supreme Ambitions."

Read More Exclusive Jurisdiction

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Senators accuse JPMorgan's Jamie Dimon of backtracking on climate commitments

theguardian.com/business/article/2024/jul/10/jpmorgan-jamie-dimon-climate-change-us-senator

Jonathan Watts July 10, 2024

Jamie Dimon, Chairman of the Board and CEO of JPMorgan Chase in 2023. Photograph: Marco Bello/Reuters

Exclusive: Letter from senators, led by Elizabeth Warren, says JPMorgan may have misled investors and public

JPMorgan Chase, the world's biggest investor in fossil fuels, may have misled investors and the public by backtracking on its already weak climate and environmental commitments, six US senators have warned in a letter to the CEO Jamie Dimon.

Although a climate-disrupted world demands stronger action by the financial sector to reduce emissions and protect nature, the Wall Street firm is heading in the opposite direction, say the upper chamber legislators, who include Senate banking committee member Elizabeth Warren.

They have demanded clarification about the intentions of the world's biggest bank. Senator Warren said: "If JPMorgan Chase has misled investors and the public, both Congress and regulators have a range of tools to respond as necessary." They have given the bank until 24 July to reply.

The letter, shared exclusively with the Guardian, reflects growing concern that JPMorgan Chase is watering down public commitments it has made over decades. Campaigners say this poses a structural risk because short-term interests are taking precedence over long-term climate – and financial – stability.

JPMorgan Chase, which has $4tn in assets, has been criticised for making profits while the world burns. The letter notes that the company has financed over $430bn in fossil fuel projects since 2016, more than any other institution on the planet.

Concerns rose earlier this year when Dimon announced a shift in policy that suggested JPMorgan Chase would dilute its environmental goals. In an 8 April letter to shareholders, he indicated the company was "going to use the word 'commitment' much more reservedly in the future, clearly differentiating between aspirations we are actively striving toward and binding commitments".

The senators’ letter said the company reversed its previous promise by pulling out of the Climate Action 100+ and the Equator Principles, which serve as a common baseline for institutions to manage environmental and social risks when financing projects.

Elizabeth Warren listens during a Senate hearing in Washington DC on 18 April 2023. Photograph: Amanda Andrade-Rhoades/Reuters

Instead of being proactive about the climate threat, Dimon said JPMorgan Chase would wait for “proper government action . . . [that is] not there yet”.

The firm also swapped its clear Paris Climate Agreement goal to reduce its emissions intensity with a blurry new “Energy Mix” target that makes it impossible, the senators say, for an investor to know if JPMorgan Chase is doing anything at all to reduce its oil and gas financing because it now dumps this into a blender with clean energy.

“Your full set of comments indicated JPMorgan was completely abdicating any role in addressing climate change,” says the letter, which is also signed by Senators Sheldon Whitehouse, Peter Welch, Bernie Sanders, Ed Markey and Jeff Merkley. “This raises questions about the impact of these policy changes moving forward, and about whether you were misleading investors and the public when you made these commitments.”

Concerns are also growing that other major US banks are sliding away from their promises of climate and biodiversity action. Citi, Bank of America and Wells Fargo also quit the Equator Principles earlier this year, a move that climate groups condemned as “shocking” and “cowardly”.

At a time of record temperatures and deadly storms, this has led to a public backlash. On the streets, the climate finance movement has staged protests outside several Wall Street institutions, including Citi, Bank of America and major insurers.

Pressure also came in the annual banking on climate chaos report, produced by a coalition of environmental groups, which details the investments of JPMorgan Chase and other majors bankers in climate destabilising projects. BlackRock also limited its involvement.

Last month, the financial watchdog NGO Stand.earth highlighted JPMorgan Chase among five of the world’s biggest banks, whose environmental and social guidelines fail to cover more than 70% of the Amazon rainforest. The report found JPMorgan Chase made $2.4bn in capital available to companies that operate oil and gas projects in the Amazon and its biodiversity protections applied to only Unesco world heritage sites that cover just 2% of the region. By contrast, the study commended the British bank HSBC, which was once a major funder of destructive projects in the region but has not provided any financing since it adopted a 100% Amazon exclusion policy in December 2022.

Ernesto Archila of the Public Citizen's Climate Program, said banks needed to be brought into line. “They made commitments when it was politically expedient and now they are walking them back. It is really important for senators to call attention to this issue,” he said. “This underlines the need for regulators to take urgent action. Banks should be compelled to take a serious look at their financed emissions, and make effective and transparent plans to address the financial risks associated with climate change. It is clear that a short-term profit motive is driving the behaviour of the banks. It is now up to regulators to step in and prevent those short-term interests from creating structural risks.”

JPMorgan Chase declined to comment on the record. A representative shared materials showing the company is a major financier of clean energy, as well as fossil fuels. On its website, the bank says it has broken down the elements in its Energy Mix Target to show oil and gas financing. A recent op-ed by a senior executive said banks have a role in supporting the energy transition with capital, but stressed that governments need to take the lead: “To transform the energy mix, boost new industrial activity, and build sustainable infrastructure at speed and scale, governments need to lead by setting necessary enabling regulatory frameworks and policy incentives to transform regional and local economies, reskill global workforces, unblock permitting to develop the backlog of necessary infrastructure, and so on.”

SEC blasts Pfizer's bid for $75 million from insider trading victims' fund

reuters.com/legal/government/column-sec-blasts-pfizers-bid-75-million-insider-trading-victims-fund-2024-07-09

Alison Frankel

A person walks past the Pfizer Headquarters building in the Manhattan borough of New York City, New York, U.S., November 9, 2020. REUTERS/Carlo Allegri/File Photo Purchase Licensing Rights, opens new tab

July 9 (Reuters) - One of the most notorious insider trading schemes in U.S. history has led to a $75 million fight between drugmaker Pfizer and the U.S. Securities and Exchange Commission.

That sum is what remains of a fund to compensate victims of insider trading by the now-shuttered hedge fund SAC Capital, which reaped more than $275 million in profits in 2008 from trading on unlawfully obtained clinical data about a prospective Alzheimer's drug. SAC Capital and related entities paid more than $600 million in 2013 to resolve the SEC's case, opens new tab, in the largest insider trading settlement in U.S. history.

About $275 million was a civil penalty. The rest was deemed disgorgement and pre-judgment interest.

The government distributed most of the money – about $531 million – to about 5,000 investors who lost money as a result of SAC’s illegal trades based on misappropriated information about a drug being developed by Wyeth and Elan. All of the investors who provided evidence of their losses were repaid in full, according to the SEC’s report, opens new tab last March to U.S. District Judge Victor Marrero of Manhattan, who is overseeing the agency's case.

The SEC asked Marrero to order the remaining $75 million to be transferred to the U.S. Treasury, which, by statute, is the designated recipient of penalties obtained by the agency.

But Pfizer (PFE.N), opens new tab has different ideas about who should get the money, as I told you in May.
Pfizer acquired Wyeth in 2009, before SAC Capital’s insider trading scheme was revealed. And ever since the SEC’s settlement with the hedge fund, Pfizer has maintained that its subsidiary was a victim of the scheme.

It was a Wyeth consultant, after all, who leaked confidential clinical data to SAC portfolio manager Mathew Martoma, in a breach of the consultant's duty to the company. (The consultant, a medical researcher, made a non-prosecution deal with the government. Martoma was convicted in 2014.)

Even the U.S. government, Pfizer has said, acknowledged during a 2013 hearing in the parallel criminal case against SAC and related funds that the “prime victims” of the funds’ illegal trades were the companies whose confidential information was stolen -- Wyeth and Elan.

Pfizer first pitched that argument to the SEC in 2014 but agreed to wait to press its case until all of the injured Wyeth and Elan investors were made whole. Last May, after the SEC informed Marrero that $75 million remained in the fund after investors had been repaid in full, the company told the judge , opens new tab why it believes it is entitled to the leftover funds.
The gist of its argument: Because Wyeth was actually victimized by the misappropriation of its confidential data, its parent, Pfizer, is a more deserving recipient than the U.S. Treasury. (Elan, which sought restitution via the criminal case against SAC and related funds, reached a settlement with the funds and has not pressed for a share of the SEC settlement money.)

Pfizer offered two theories to quantify its purported financial losses. The stolen data, it argued, was worth about $7 billion, based on the decline in Wyeth’s share price when the disappointing clinical trial results were publicly announced, so Pfizer is entitled to recoup 1% of the value of the information to compensate the company for the theft.

Alternatively, Pfizer said, it valued Wyeth’s goodwill at $4 billion when it acquired the company in 2009, before Wyeth’s reputation was dinged by the misconduct of its consultant. $75 million, or 2%, Pfizer said, is a conservative estimate of Wyeth’s reputational harm from the insider trading scheme.

The SEC fired back at Pfizer in a brief , opens new tab filed on Monday. The agency’s primary argument: Pfizer hasn’t demonstrated any measurable loss from the theft of Wyeth’s confidential information so it’s not entitled to recover money from the victims’ fund.
Pfizer’s arguments about the value of the stolen information and the harm to Wyeth’s reputation are “arbitrary and irrelevant,” the SEC said. Insider trading didn’t cause Wyeth’s share price to plunge when the disappointing trial results were announced, the SEC said. Nor has Pfizer ever before claimed that it overvalued Wyeth’s reputation in their 2009 merger.

Investors who were repaid from the $600 million fund had to prove they lost money as a result of the insider trading scheme, the SEC said. There is no reason to relax that requirement for Pfizer, the agency said.

Pfizer and the SEC are also fighting about whether the leftover money should be characterized as a disgorgement by SAC or as a penalty -- and that dispute is not just a matter of semantics.

The U.S. Supreme Court ruled , opens new tab in 2020 that money disgorged by defendants in SEC enforcement actions should generally be distributed to victims. The 2nd U.S. Circuit Court of Appeals subsequently held in a 2023 decision , opens new tab that disgorged funds “must be ‘awarded for victims.’”
Citing those decisions, Pfizer said in it brief last May that if the leftover money is a disgorgment, it can’t go to the U.S. Treasury.

But the SEC said in Monday’s brief that the entire remaining $75 million comes from the penalty portion of the hedge fund’s settlement because, as a rule, disgorged money is paid out to investors before penalty funds, and payments to SAC victims have already surpassed the hedge fund’s disgorgement.

Pfizer has said there is no case law backing the SEC’s purported order-of-payment rule. The agency retorted in Monday’s brief that its position tracks statutory language from the law establishing fair funds to recompense victims of financial fraud.

An SEC spokesperson declined to comment on the Pfizer dispute.

Pfizer, which is represented by Skadden, Arps, Slate, Meagher & Flom, said in an email statement, “We believe under governing legal and equitable principles that the remaining settlement proceeds should be paid to Wyeth, which was a victim of the conduct at issue.” A Pfizer spokesperson did not respond to a follow-up query about the SEC’s specific arguments in Monday’s brief.

The company will get one final chance to argue its case in a brief next month.

Read more:

Pfizer wants the $75 mln left from SAC Capital’s insider trading settlement with SEC
Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting By Alison Frankel

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Securities Law News
July 9, 2024, 1:53 PM PDT

Freeze on Humanigen Director's Assets Affirmed in Insider Case

By Martina Barash

- Two circuits diverge on test for freezes sought by SEC
- Commission met more stringent injunction test, 3d Cir. says

Bloomberg Law News 2024-07-10T09:45:58060714132-04:00

Freeze on Humanigen Director's Assets Affirmed in Insider Case

By Martina Barash 2024-07-09T16:53:43000-04:00

- Two circuits diverge on test for freezes sought by SEC
- Commission met more stringent injunction test, 3d Cir. says

Dale Chappell, a Humanigen Inc. board member, is properly subject to an asset freeze in an SEC case alleging he avoided $38 million in losses through insider trading, the Third Circuit ruled Tuesday.

Chappell, who is also the drugmaker's chief scientific officer, will be allowed the equivalent of his Humanigen salary—$5,637.50 every two weeks—as a carveout from the asset freeze, along with money for legal fees and other specified family expenses, according to the court. The Swiss resident, who allegedly traded on information related to a prospective Covid-19 treatment, "certainly will not be living like a pauper," Judge Kent A. Jordan said.

The US Court of Appeals for the Third Circuit parted ways with the Second Circuit over the test for asset freezes initiated by the Securities and Exchange Commission. The Second Circuit's lower bar for such injunctions isn't supported by the statutory language in the securities laws, Jordan said for the unanimous Third Circuit panel.

Even though the lower court relied on the less stringent Second Circuit standard, the SEC still meets the requirements for a preliminary injunction, Jordan said.

Chappell and his wife have most of the stake in investment funds that make up a controlling stockholder bloc at Humanigen, according to the court. The funds—Black Horse Capital LP, Black Horse Capital Master Fund Ltd., and Cheval Holdings, Ltd.—are also defendants in the suit and under the asset freeze.

The SEC alleges that Chappell set up a trading plan to sell 9% of his funds' Humanigen holdings at a premium before negative feedback from the Food and Drug Administration about an emergency use approval for the company's Covid-19 treatment candidate. The stock's prices didn't trigger the stock sale, according to the commission. But later, after Chappell received material nonpublic information that the FDA wouldn't approve the drug without a separate confirmatory study, he allegedly set up a trading plan to sell 25% of his funds' holdings at a loss, the SEC said.

The trial court correctly held that the SEC was likely to succeed on the merits of its insider trading claims, Jordan said. The information was material, and the SEC will probably be able to show Chappell's intent, he said.

Other factors—not considered by the district court because it followed the Second Circuit's standard—are also satisfied, he said, joined by Judges Stephanos Bibas and Thomas L. Ambro.

The Humanigen board was separately sued in a shareholder derivative suit over statements about the outlook of its drug, lenzilumab.

The SEC represented itself. Kleinberg, Kaplan, Wolff & Cohen PC represented Chappell and his funds.

The case is SEC v. Chappell , 3d Cir., No. 23-2776, 7/9/24 .

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Moral Money **Boeing Co**

Boeing's deadly scandal holds lessons for investors

Compromising on product safety to pursue profit gains isn't just bad for society

A Boeing 737 Max plane. The manufacturer has agreed to plead guilty to fraud in the wake of two deadly crashes involving the aircraft model © REUTERS

Simon Mundy 5 HOURS AGO

This article is an onsite version of our Moral Money newsletter. Premium subscribers can sign up here to get the newsletter delivered three times a week. Standard subscribers can upgrade to Premium here, or explore all FT newsletters.

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Thanks to shoddy management and deliberate deceit at the world's biggest aerospace company, 346 people are dead — killed in wholly avoidable crashes following squarely from obsessive cost-cutting that undermined the safety of Boeing aircraft.

Boeing's new plea deal with US authorities means that the company will become, in effect, a corporate felon. But it agreed to pay a strikingly small fine, and the deal has angered bereaved families who want to see the company's top brass held accountable. There's no sign that those lavishly paid executives will face prosecution for the deadly corporate culture that they presided over.

But it has brought real costs for shareholders — and a reminder that even the hardest-nosed financial investors ignore issues of social responsibility at their peril.

CORPORATE ACCOUNTABILITY

Boeing's self-defeating quest for shareholder value

Sunday might have looked like a day of unprecedented shame for Boeing, as the 108-year-old aircraft manufacturer agreed to plead guilty to fraud and pay a fine to US authorities. But investors seemed rather pleased, sending Boeing shares up 3 per cent when the stock market opened on Monday morning. This was the latest turn in an ugly saga with lessons for companies and investors far beyond the US aviation sector.

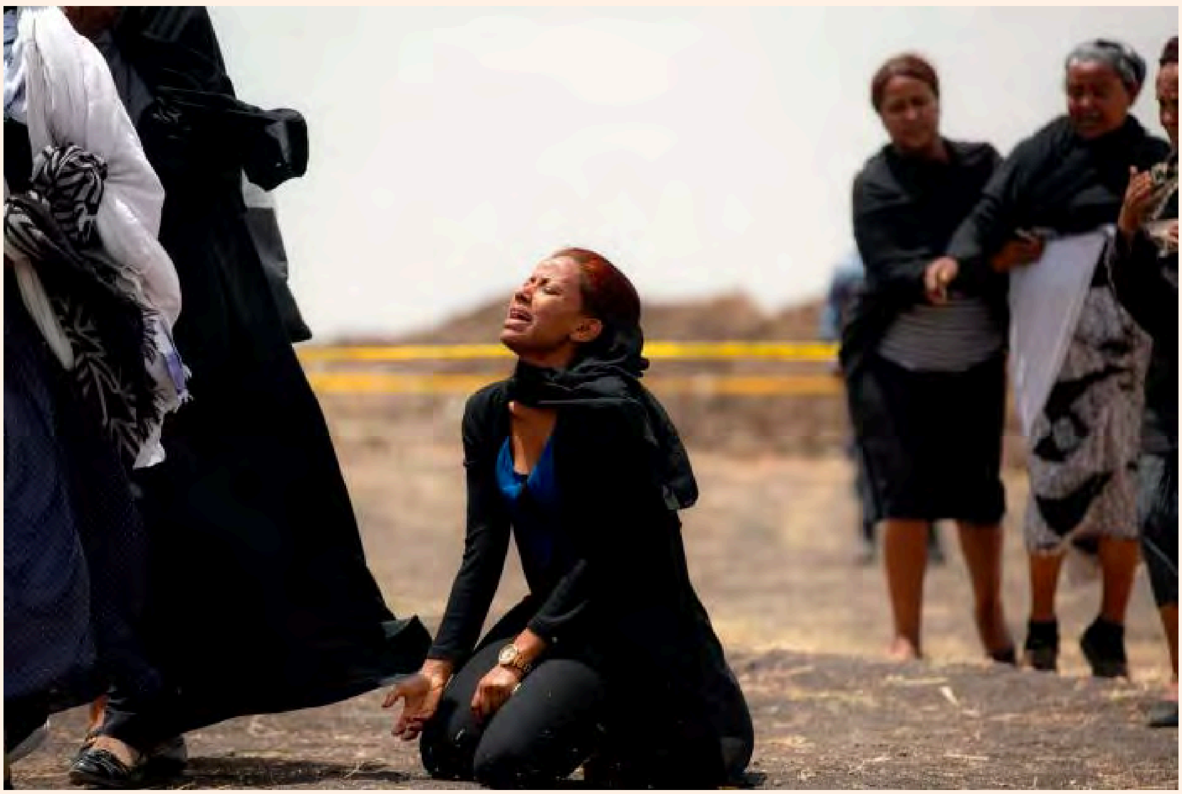
In October 2018, a Boeing plane — the recently launched 737 Max model — crashed soon after take-off in Indonesia, killing all 189 people on board. A faulty sensor had triggered software that forced its nose to dip, revealing a dangerous vulnerability in the aircraft.

Instead of moving to address the flaw in other planes, Boeing fought to calm fears and keep the 737 Max flying — until another crash five months later in Ethiopia, which killed a further 157 people. Finally, regulators took action, and 737 Max planes were grounded globally for nearly two years. In 2021, Boeing reached a deal with US prosecutors, in which it paid a fine of $244mn and avoided prosecution, provided it adhered to a new compliance programme.

After a door panel blew out during an Alaska Airlines flight in January, the US justice department ruled that Boeing had breached the terms of that earlier agreement. Under the latest deal, Boeing has admitted to misleading US regulators over the safety problems on the 737 Max, and agreed to pay a further $244mn fine.

The positive investor response has two obvious drivers. First, the deal has given clarity on this matter, and removed the threat of a drawn out criminal trial. Then there's the fact that the new fine is so small — just 0.3 per cent of Boeing's revenue last year. (It's interesting to compare it with the far larger fines that US authorities have imposed for financial crimes — say, the $4.3bn that cryptocurrency exchange Binance agreed to pay last November over money laundering and sanctions charges.)

The penalty "will have little effect on Boeing's finances or operations," analysts at Moody's Ratings wrote yesterday. "The company can readily fund the fine with no noticeable effect on liquidity."



Relatives mourned at the site after a Boeing 737 Max crash in Ethiopia killed 157 people in 2019 © AP

The scandal at Boeing has cast a harsh light on the workings of the US government in more ways than one. It has raised doubts about the light-touch regulatory approach of recent decades, with the Federal Aviation Administration delegating much of its inspection and monitoring work to Boeing employees. The latest settlement also raises new questions about the justice department's practice of arranging plea bargains and fines instead of pursuing criminal trials of companies and their senior executives.

In theory, Boeing's corporate guilty plea itself is a serious thing — companies found guilty of felonies are commonly barred from federal contracts. But as the FT's Claire Bushey reported yesterday, lawyers see this as unlikely in Boeing's case, given its status as a key supplier to the US military, and its wider strategic importance to the economy.

Meanwhile, despite the urging of families bereaved by the 737 Max crashes, there is no indication that senior Boeing executives are to be prosecuted in relation to the disasters (one test pilot was tried and acquitted in 2022 of deceiving regulators).

By choosing not to pursue top managers despite the avoidable deaths of 346 people, the justice department has missed an opportunity to set an important precedent around executive accountability.

In May, Dave Calhoun — a longtime Boeing board director who has been chief executive since 2020 — was awarded a pay package of $32.8mn. His predecessor, Dennis Muilenburg, who presided over the 737 Max rollout and the disastrous response to the crashes, walked away with a golden parachute of $62.2mn.

In the book *Flying Blind*, journalist Peter Robison described how incentives for managers at various levels of Boeing shifted in recent decades, with bonuses increasingly linked to financial rather than operational targets. That was part of a wider cultural shift towards eking out profit gains and cost cuts, which led to various shortcuts and compromises that helped to cause the 737 Max crashes.

Boeing chief executive Dave Calhoun testified to a US Senate subcommittee last month, as people held photos of crash victims behind him © AP

It was reflected, too, in the company's tireless pursuit of share buybacks — worth \$43bn between 2013 and 2019 — which helped juice the share price (and top executives' stock-based bonuses), but bled capital that could otherwise have gone towards long-term product investment.

Boeing also jumped on the outsourcing bandwagon, relying on outside suppliers for much of its manufacturing. That strategy has worked brilliantly for Apple — but what works for smartphones may not be the most responsible strategy for a product that can kill hundreds if it fails.

January's door panel blowout stemmed from shoddy work by Spirit AeroSystems, on which Boeing has relied to build the fuselage of its planes since spinning the supplier out in 2005. Boeing workers had to remove the door panel to repair defective rivets in the fuselage, and then failed to insert all the bolts needed to hold the panel in place. Last week, Boeing announced that it was buying back Spirit in a \$4.7bn all-stock deal. That looks like an effort to reverse at least one part of Boeing's cultural shift away from a clear focus on in-house manufacturing excellence.

The long-term outlook for Boeing's culture will be shaped largely by the company's next chief executive, with Calhoun due to depart at the end of this year. The board's decision on the new boss, and what that person does once in post, will show whether Boeing has learned the right lessons from this ignominious chapter in its century-long history.

In a grim irony, management's obsessive focus on profit and shareholder returns has ended up undermining both. Boeing has now suffered four consecutive annual losses, totalling $14.6bn. The knock to its reputation has helped drive a dramatic loss of market share to European rival Airbus, which now has nearly Boeing's sales volumes in the crucial category of large single-aisle aircraft.

Airbus has outstripped rival Boeing in the stock market

Share prices rebased in $ terms

Source: LSEG via markets.ft.com

Airbus shares have risen 157 per cent over the past decade, well over triple the gains for Boeing stock, which is down by over a quarter so far this year. (Airbus chief executive Guillaume Faury, incidentally, got a pay package worth less than a fifth of Calhoun's in the past financial year.)

So there's an important lesson here, even for companies whose strategic importance to their government means they are shielded from the worst consequences of their wrongdoing. Compromising on product safety to pursue investor returns isn't just bad for society. It's bad for investor returns too.

Smart reads

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- Many professional women are concerned about the "motherhood penalty" that could drag down their earnings if they have children. But some may instead enjoy a "child premium", recent research suggests.

https://www.wsj.com/articles/cfpb-orders-fifth-third-fined-for-illegal-auto-insurance-sales-practices-55353a40

RISK & COMPLIANCE JOURNAL

Fifth Third Fined By Consumer Watchdog for Auto Insurance, Sales Practices

Bank ordered to pay $20 million by CFPB, which said it forced auto insurance onto customers who were already covered and opened fake accounts in customers' names

By *Victor Swezey* Follow

July 9, 2024 11:23 am ET

Fifth Third also will be required to repay 35,000 harmed customers and will be banned from implementing the employee sales practices that the agency said incentivized the fake account openings. PHOTO: LIAM KENNEDY/BLOOMBERG NEWS

Fifth Third Bank was ordered to pay $20 million in fines by the Consumer Financial Protection Bureau, which said the bank forced auto insurance onto customers who were already covered and opened fake accounts in customers' names.

The CFPB ordered the Cincinnati-based bank to pay $5 million for what it described as more than 37,000 illegal car insurance charges, which the agency said resulted in nearly 1,000 families having their vehicles repossessed. The agency also filed a court order requiring the bank to pay a $15 million penalty for the use of “cross-selling” strategies to sell additional products to existing customers.

Fifth Third also will be required to repay 35,000 customers and will be banned from implementing the employee sales practices that the agency said incentivized the fake account openings.

Fifth Third said the fines settles long-running litigation and an investigation.

Susan Zaunbrecher, chief legal officer of Fifth Third, said the bank had “already taken significant action to address these legacy matters, including identifying issues and taking the initiative to set things right.”

The CFPB said the auto insurance enforcement action covers more than $12.7 million in alleged illegal fees paid between July 2011 and December 2020. More than half were allegedly charged to customers who had either always maintained coverage or obtained new coverage within a month of their previous policy lapsing.

The cross-selling penalty stems from a 2020 lawsuit alleging that the bank violated multiple laws including the Consumer Financial Protection Act and the Fair Credit Reporting Act.

The CFPB said it will deposit both penalties in its victims’ relief fund.

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Purdue Plans 'High-Speed' Bid For New Ch. 11 Plan

By **Rick Archer**

Law360 (July 9, 2024, 7:55 PM EDT) -- Purdue Pharma told a New York bankruptcy judge Tuesday that it plans a two-month "high-speed, high-stakes" attempt to replace the Chapter 11 plan shot down by the U.S. Supreme Court last month before unleashing litigation on its former owning family.

U.S. Bankruptcy Judge Sean H. Lane said he would approve Purdue's request to appoint two mediators to oversee plan talks and extend an injunction barring suits against its former owners in the Sackler family into September, after counsel for Purdue and its creditors said the Chapter 11 case will be drawing to a close, one way or another.

"It is essential to all parties that we bring this five-year Chapter 11 case to a conclusion," said Kenneth Eckstein, counsel for an ad hoc group of government opioid claimants.

Connecticut-based Purdue **filed for bankruptcy** in New York in September 2019 after reaching a deal with 24 state governments to resolve claims that its sales of OxyContin played a major role in spurring the U.S. opioid crisis. A Chapter 11 plan was confirmed in September 2021, in which the company's then-owners in the Sackler family agreed to contribute $5.5 billion to a trust fund to pay claims in exchange for releases from all opioid liability.

The amount was raised to $6 billion after a number of state governments dropped their appeal of the plan, but the U.S. Trustee's Office persisted in its opposition to the releases in the Sackler settlement. Its appeal reached the Supreme Court, which issued a **5-4 ruling June 27** that the Bankruptcy Code does not permit the nonconsensual release of third-party claims against nondebtors.

At Tuesday's hearing, Purdue counsel Marshall Huebner said Purdue, its creditors and stakeholders began preparing for this possibility several months ago and had come to a "near-universal consensus" that the next step would be 60 days of "high-speed, high-stakes mediation" to try to come up with a new plan — including a new Sackler settlement and the intercreditor deals included in the original plan — that conforms to the Supreme Court decision.

The company also requested that the bankruptcy court injunction barring suits against the Sacklers that has been in place since early in the case be extended until the end of the 60 days.

"The debtor's view is either we are getting to a broadly supported deal in mediation or the injunction ends," he said.

More than 900 lawsuits asserting opioid-related claims against members of the Sackler family are being held in abeyance by the injunction, he said.

The unsecured creditors committee has **filed a motion**, supported by Purdue, seeking standing to file suit against the Sacklers to claw back funds transferred out of Purdue before the bankruptcy, with committee counsel Arik Preis saying it will be seeking approval for the motion in 57 days.

"We all need to be prepared for a world where resolution is not reached," he said.

Eckstein — who said if the plan had gone into effect as originally scheduled, government claimants would have received $1.7 billion and individual claimants $1 billion by now — argued that if a new Sacker settlement can't be reached, the best solution would be the quick passage of a Chapter 11 plan with estate claims handed over to a litigation trust.

Judge Lane noted the length of the case, but urged claimants to be patient.

"I think we are coming to a point soon where we will have a pretty good idea of what the plan looks like," he said.

Purdue is represented by Marshall S. Huebner, Benjamin S. Kaminetzky, Eli J. Vonnegut and Christopher S. Robertson of Davis Polk & Wardwell LLP.

The unsecured creditors committee is represented by Mitchell P. Hurley, Arik Preis, Katherine Porter, Sara L. Brauner, Theodore James Salwen and Erin E. Parlar of Akin Gump Strauss Hauer & Feld LLP and Justin R. Alberto of Cole Schotz PC.

The ad hoc government committee is represented by Kenneth H. Eckstein, Rachael Ringer and David E. Blabey Jr. of Kramer Levin Naftalis & Frankel LLP, Kami E. Quinn of Gilbert LLP, David J. Molton and Gerard Cicero of Brown Rudnick LLP and Melanie L. Cyganowski and Jennifer S. Feeney of Otterbourg PC.

The case is In re: Purdue Pharma LP, case number 7:19-bk-23649, in the U.S. Bankruptcy Court for the Southern District of New York.

--Editing by Kelly Duncan.

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Del. Chancellor Sends SwervePay Merger Suit Toward Trial

By **Jeff Montgomery**

Law360 (July 9, 2024, 7:38 PM EDT) -- Delaware's Court of Chancery on Tuesday rejected dismissal for an amended complaint filed by e-payment venture SwervePay accusing buyers affiliated with payment collection business Ontario Systems LLC of overstating by tens of billions revenue-producing transactions expected under a proposed 2020 tie-up.

In a teleconference ruling, Chancellor Kathaleen St. J. McCormick declined motions to dismiss seven complaints in a third amended version of the dispute, which alleged fraudulent inducement and conspiracy, and sought a declaratory judgment that the membership interest purchase agreements involved were unenforceable.

The decision — which also rejected claims that some counts had timed out under the statute of limitations — bulked up a complaint that had been slimmed down in its initial form by a decision in August 2022 that dismissed all but two fraud claims from the original suit.

"Seller wins this round. Buyer's motion to dismiss is denied," the chancellor told the parties on Tuesday, observing at one point that SwervePay, after its complaint partially survived a motion to dismiss, uncovered documents "they think are smoking guns."

The court added later: "Here, discovery clearly revealed the claims are well-founded."

Three SwervePay officers filed a complaint in May 2021 alleging breach of contract, fraudulent inducement, conspiracy and seeking declaratory judgments in connection with the company's sale to the owners of office automation business Ontario Systems in May 2020. Named as defendants were private equity shops New Mountain Capital LLC, Blue Star Innovation Partners and five merger-related business entities.

SwervePay's complaint said that New Mountain acquired it to provide payment processing services to another New Mountain subsidiary for an up-front payment of $10 million and earnout payments of up to $55 million cash and $500 million in equity if SwervePay met certain contract milestones.

The suit alleged that, instead of the purported $40 billion to $50 billion volume of transactions touted by the owners of Ontario Systems as being potentially available, SwervePay's buyer actually had only $5 billion to $6 billion in "monetizable" payment volumes that could be serviced by the e-payment company's systems.

After ordering consolidation in August 2021 for dueling suits filed by SwervePay and those named in the suit, the chancellor in August 2022 pruned the initial complaint to SwervePay's fraud-related claims.

Chancellor McCormick said before the ruling Tuesday that the seven counts in the second amended complaint "rise or fall on findings of fraudulent inducement," with SwervePay accusing the buyer of fraudulently inducing the deal through concealed or omitted facts during negotiations.

Although a civil conspiracy count was dismissed during the 2022 ruling, the chancellor found that SwervePay salvaged the claim through discovery that allegedly showed a "coordinated strategy" on the part of the buyers to secure the deal.

"In total," the chancellor said, the second amended complaint "inferrably [shows] a meeting of the minds" to withhold information by the sellers.

Among the key allegations in the case were assertions that New Mountain relied on offers of profit incentive units — which grew with the payment volume moving through SwervePay — to encourage its CEO and other key individuals to support the deal.

But the PIUs, based on the $5 billion to $6 billion in monetizable payments, were found by SwervePay to be "close to worthless when the monetizable payment volume was reduced from $34 billion to the actual $5 billion," the vice chancellor said.

Counsel for the sellers didn't immediately respond to a request for comment Tuesday, and counsel for the buyers declined to comment.

Former SwervePay parties SPOSC Investment Holdings LLC, Jaeme Adams, Katrina Adams and Christopher Hamilton are represented by Peter J. Walsh Jr., Nicholas D. Mozal and Emily M. Marco of Potter Anderson & Corroon LLP, Orion Armon, Luke Cadigan, Alexandra Leeper Katelyn Kang and Alessandra V. Rafalson of Cooley LLP, and Bradley Levison and Carrie A. Herschman of Herschman Levison Hobfoll PLLC.

The buyer-related parties are represented by A. Thompson Bayliss, Joseph A. Sparco and Peter C. Cirka of Abrams & Bayliss LLP, Jay P. Lefkowitz, Matthew Solum, Mary T. Reale and Sophie Lipman of Kirkland & Ellis LLP, and David B. Hennes, Adam M. Harris, Alexander B. Simkin and Sarah M. Samaha of Ropes & Gray LLP.

The case is In re: SwervePay Acquisition LLP, case number 2021-0447, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.

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Chancery OKs $22M Golden Nugget Deal, Trims Fee To $4M

By **Leslie A. Pappas**

Law360, Wilmington, Del. (July 9, 2024, 3:48 PM EDT) -- Former stockholders of Golden Nugget Online Gaming Inc. who challenged the venture's $1.56 billion all-stock sale in May 2022 to DraftKings Inc. got approval Tuesday to settle their Delaware Chancery Court class action for $22 million cash, with $4 million of it going to class attorneys.

Nearly 20 attorneys at Block & Leviton LLP, Friedman Oster & Tejtel PLLC, Labaton Keller Sucharow LLP, Grant & Eisenhofer PA, Andrews & Springer LLC, Keskela Law LLC, and Julie & Holleman LLP will split the all-in attorney fee and expense award, which includes a $5,000 incentive fee for lead shareholder Steven Eschbach.

Vice Chancellor J. Travis Laster trimmed the award slightly from the $4.62 million that attorneys initially sought, saying he was having trouble figuring out which stage of litigation the settlement fell into.

Under Delaware law, settlements that occur at an "early stage" of litigation usually result in a lower attorney fee award. The suit, which was **consolidated in October 2022** and got class certification in October 2023, survived a motion to dismiss but settled far ahead of trial.

"I ultimately can't get comfortable with the $4.62 million given what was done, but dropping it to an early stage award" didn't seem fair either, the vice chancellor said at a bench ruling in Wilmington after shareholder arguments in favor of the settlement. "So I'm going to compromise at $4 million flat."

The former shareholders of Golden Nugget Online Gaming Inc. **begin filing the lawsuits in September 2022** against controlling stockholder Tilman J. Fertitta and others, alleging that various side deals alongside **the $1.56 billion merger** benefited Fertitta at the expense of the company and other shareholders.

The $1.56 billion sale, which shareholders also alleged came at too low of a price, sparked litigation in multiple jurisdictions, **including New York** and Nevada.

The $22 million settlement of the Chancery action — a 3% premium to the transaction price that will be paid in cash without insurance money — is a "strong risk-adjusted outcome" for a "very challenging case," shareholder attorney Kimberly A. Evans of Block & Leviton told the court at the hearing in Wilmington on Tuesday.

Winning the case "would not have been simple," she said. Details of the side agreements were "squishy" and sometimes, after extensive analysis, shareholder attorneys discovered that some aspects of the side deals actually were not favorable to Fertitta.

"We had to hunt to find out how those side agreements were arranged," she said.

Counsel spent more than 6,914 hours and incurred $164,485 in expenses from the time the action was filed until Jan. 26, when the parties informed the court they reached an agreement in principle to resolve the case.

Settlement terms were reached after a full day of mediation before Greg Danilow of Phillips ADR

Enterprises.

No one has raised any objections to the settlement, including shareholders in the Nevada litigation, Evans told the court.

"You're not cutting them in, in any way?" the vice chancellor asked.

"No, your honor," Evans replied.

The defendants did not oppose the settlement and did not make any comments at the hearing.

The shareholders are represented by Jason Leviton, Kimberly A. Evans, Lindsay K. Faccenda, and Robert Erikson of Block & Leviton LLP, Jeremy Friedman, David Tejtel, Sarah Kleinman, and Lindsay La Marca of Friedman Oster & Tejtel PLLC, Douglas E. Julie and W. Scott Holleman of Julie & Holleman LLP, D. Seamus Kaskela of Kaskela Law LLC, Ned Weinberger and Brendan Sullivan of Labaton Keller Sucharow LLP, Christine M. Mackintosh of Grant & Eisenhofer PA, and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach, and Jackson E. Warren of Andrews & Springer LLC.

DraftKings Inc. and Golden Nugget Online Gaming Inc. are represented by Raymond J. DiCamillo and Kevin M. Gallagher of Richards Layton & Finger PA and Brian T. Frawley and Charles H. Sullivan of Sullivan & Cromwell LLP.

Tilman Fertitta and non-party Fertitta Entertainment Inc. are represented by Martin S. Lessner, C. Barr Flinn, Paul J. Loughman and Daniel M. Kirshenbaum of Young Conaway Stargatt & Taylor LLP.

The case is In re Golden Nugget Online Gaming Inc. Stockholders Litigation, case number 2022-0797, in the Court of Chancery of the State of Delaware.

--Additional reporting by Ivan Moreno and Jeff Montgomery. Editing by Alyssa Miller.

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Chancery OKs $100K Incentive Fee In $18.8M Class Settlement

By **Jeff Montgomery**

Law360 (July 9, 2024, 9:56 PM EDT) -- An $18.8 million settlement ended Tuesday a Delaware Court of Chancery derivative suit alleging a $220 million breach of fiduciary duty by Guggenheim Funds Investment Advisors LLC and trustees of a closed-end fund client, with the court also approving a rare $100,000 plaintiff incentive fee.

Vice Chancellor Nathan A. Cook agreed to the incentive fee for lead stockholder J.B. and Margaret Blaugrund Foundation after noting that the foundation had rejected a larger offer than its share of the settlement from those sued in exchange for abandoning its claim and position as lead plaintiff.

"When we were completing our investigation and were on the verge of filing the complaint, defendants made a private settlement offer to the lead plaintiff," Andrew W. Robertson of Morris Kandinov LLP, counsel to the plaintiff said.

Although counsel for Guggenheim declined to share details of the defense offer during the settlement hearing before the vice chancellor, the terms were described as providing the Blaugrund Foundation with more than their prospective share of the $18.8 million.

"The foundation rejected that proposal as a matter of principle," Robertson said, and instead took "the position that all shareholders should have an opportunity to recover part of their loss."

In an earlier court filing, counsel for the stockholders observed that "while other class members could have stepped in to bring the claims, counsel was not aware of other class members with standing to assert the claims and willingness to engage in litigation against a large asset manager like Guggenheim."

Terms of the deal specified that the incentive fee will be paid out of the $4,107,222.06 carved out for attorney fees and $130,808.81 set aside for reimbursement of litigation expenses.

The investors said in their December 2021 complaint that Guggenheim adopted increasingly "reckless" leveraging beginning in 2017 to keep its fleet of energy assets under management. In that year and after, the venture increased its borrowing beyond limits ordinarily imposed by the Investment Company Act of 1940 in order to counter losses and problems.

According to the complaint, the fund's losses stemmed in part from the over-leveraging that by early 2020 resulted in asset "fire sales" to meet margin calls, with fund losses of 81% in the first quarter and subsequent huge tax liabilities tied to the sales. Those tax liabilities, discovered after the losses that prompted proposals to liquidate, were said to have prompted Guggenheim to recommend a merger for scant consideration with Kayne, which was viewed as unlikely to pursue derivative litigation.

Although the liquidation could have given investors a better recovery through preservation of the damage claims, their attorneys argued, the merger extinguished potential liabilities for trustees and managers.

Vice Chancellor Cook refused in February 2023 to dismiss most Guggenheim parties from the suit, with the Delaware Supreme Court rejecting a midcase appeal a month later. The case was moving toward certification of the stockholder class when the two sides sought a stay of the case based on a proposed settlement.

Robertson said the foundation endured "intrusive" and "scorched earth" questions and document requests before the settlement, and deserved the incentive fee for exemplary behavior.

Vice Chancellor Cook sought details on the Guggenheim offer to the fund during the hearing, asking at one point if it was a "whole number multiple" of the incentive fee.

David A. Kotler of Dechert LLP, counsel to Guggenheim and its senior official and chief legal officer, Amy J. Lee, declined to specify beyond ruling out the whole-number-multiple characterization. He added, "I take issue with the scorched earth aspect" of Guggenheim's discovery, noting that "the document requests were reasonable."

Vice Chancellor Cook cautioned that he was not commenting on anyone's position or discovery decisions in the litigation. During the hearing, however, he observed that a representative of the Blaugrund Foundation was deposed for six hours or more along the way.

"For a plaintiff having no involvement in the transaction in any way, that is quite a lot of time to be subjected to examination by, I have no doubt, quite experienced counsel," the vice chancellor said.

The J.B. and Margaret Blaugrund Foundation is represented by Gregory V. Varallo, Glenn R. McGillivray, Mae Oberste, Jeroen van Kwawegen and Thomas G. James of Bernstein Litowitz Berger & Grossmann LLP and Aaron T. Morris, Andrew W. Robertson and Leo Kandinov of Morris Kandinov LLP.

Guggenheim Funds Investment Advisors LLC and Amy J. Lee are represented by Martin S. Lessner, Tammy L. Mercer and Daniel M. Kirshenbaum of Young Conaway Stargatt & Taylor LLP and David A. Kotler and Joshua D.N. Hess of Dechert LLP.

Randall C. Barnes, Angela Brock-Kyle, Thomas F. Lydon, Jr., Ronald A. Nyberg, Sandra G.Sponem and Ronald E. Toupin Jr. are represented by M. Duncan Grant, Joanna J. Cline and Emily L. Wheatley of Troutman Pepper Hamilton Sanders LLP and Randall Lending of Vedder Price PC.

The case is J.B. and Margaret Blaugrund Foundation v. Guggenheim Funds Investment Advisors LLC et al., case number 2021-1094, in the Court of Chancery of the State of Delaware.

--Editing by Jay Jackson Jr.
