

Zymergen Investors Advance Class Suit Against Venture Funds (1)

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- Funds sufficiently alleged to control Zymergen before IPO
- Trillion-dollar 'opportunity' allegedly fizzled within months

By Martina Barash

(Bloomberg Law) --

SoftBank Group Corp. units and two other venture capital funds must face Zymergen Inc. investors' claims that they are responsible for misleading IPO papers before the biological manufacturing company imploded, a federal court ruled.

The investors adequately alleged that SoftBank's SB Investment Advisers (US) Inc., DCVC Management Co., and True Venture Management LLC—and their funds that invested in Zymergen—controlled the company in the lead-up to its initial public offering, Judge P. Casey Pitts said Wednesday for the US District Court for the Northern District of California.

Zymergen's registration statement estimated a \$1.2 trillion opportunity across 20 industries, the investors say. But the company allegedly revealed "pipeline" issues about four months after the 2021 initial public offering and was ultimately purchased for less than a tenth of its IPO valuation.

In October 2023, Zymergen—then a subsidiary of Ginkgo Bioworks Holdings Inc.—filed a Chapter 11 bankruptcy petition, according to the court.

The venture capital companies sought to exit the class action, arguing that the claims against them were time-barred and inadequately pleaded.

But the funds failed to show that their statute of limitations defense would be certain to apply, Pitts said. And the pleading is mostly sufficient, he ruled.

Claims can proceed against two of the venture capital organizations—SoftBank and True Venture, known as True Ventures—for their alleged pre-IPO "control" of the Zymergen board members they appointed, he said. Both board members were employees of the respective funds and lacked full decision-making authority, he said.

But the board member appointed by DCVC was a co-owner of that company, not an employee, the judge said. Lead plaintiff Biao Wang will have a chance to re-plead that claim.

Claims that the funds controlled Zymergen itself can proceed against all three, he said. Each allegedly “had the power to prevent Zymergen from going public,” and they allegedly had an agreements that approval from two of them was needed for most business decisions and that they would vote together on some issues, he said.

The plaintiffs can also proceed with claims that SoftBank and True Ventures are secondarily liable through agency relationships with the board members they appointed, Pitts said. But their agency allegations against DCVC—whose board member wasn’t an employee—fall short, he said.

A class was certified in August 2023.

Robbins Geller Rudman & Dowd LLP is class counsel. Quinn Emanuel Urquhart Sullivan LLP represents SoftBank. Gibson, Dunn & Crutcher LLP and Wilmer Cutler Pickering Hale & Dorr LLP represent DCVC. Goodwin Procter LLP represents True Ventures.

The case is *Wang v. Zymergen Inc.*, N.D. Cal., No. 5:21-cv-06028, 8/14/24.

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(Updates with additional court analysis throughout.)



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NEWS

Intel Again Accused of Misleading Investors on Foundry Finances

It's the second case bringing similar allegations against Intel in the Delaware court.

August 14, 2024 at 03:43 PM

Corporate Governance



Ellen Bardash



A new derivative lawsuit in the Delaware Court of Chancery brings breach of fiduciary claims against Intel Corp. directors and officers, alleging misleading statements were made about the financial success of the company’s internal foundry segment.

Wilmington attorney Brian Long and White Plains, New York, firm Rowley Law filed the [complaint](#) on Tuesday, claiming misstatements about financial performance led to stockholders not being fully informed when voting to re-elect Intel’s board.

It’s the second case bringing similar allegations against Intel in the Delaware court, with Rigrodsky Law and Grabar Law Offices filing a [lawsuit](#) on behalf of another investor in June.

The new complaint states between January and March, Intel directors and senior executives misled investors with statements about the expected growth of Internal Foundry Services, a business segment of Intel announced in 2021 when Silicon Valley-based Intel began separating the manufacturing and design elements of its business and committed \$20 billion to building two semiconductor chip manufacturing facilities.

The shift to the internal foundry operating model, implemented at the beginning of 2024, allowed Intel to make semiconductors for its own computer processors as well as for other companies, and Internal Foundry Services was tasked with financial reporting on semiconductors manufactured for both internal and external clients.

The move was touted as one that would increase transparency and generate higher returns by cutting costs, with a 10-K filed in January of this year stating the strategy was expected to be successful in 2024.

In April, Intel indicated in a retrospective SEC filing and in its financial results for the first quarter of 2024 that Internal Foundry Services had recorded \$7 billion in losses and in 2023 earned revenue \$8.6 billion less than was generated the previous year. Between April 2, when that filing was made, and April 26, Intel’s share price fell from \$43.94 to \$31.88.

Named as defendants in the case are Intel’s board members, including CEO Patrick Gelsinger, as well as its executive vice president and CFO, David Zinsner. The complaint alleges management was negligent in including misleading

statements in Intel’s proxy statements, but the case doesn’t claim any recklessness or fraud took place.

“In reality, the director defendants were utterly failing in their oversight duties by allowing the company to operate with inadequate internal controls which resulted in the failure to disclose or prevent the defendants from causing the company to make materially false and misleading statements concerning the financial success of the Internal Foundry Services business segment,” the complaint stated.

Intel is also the subject of multiple securities class actions in the Northern District of California, where it is headquartered. Robbins Geller Rudman & Dowd filed the most recent of those cases Aug. 7 on behalf of the Construction Laborers Pension Trust of Greater St. Louis, and another case involving similar allegations is pending in the District of Delaware.

A spokesperson for Intel did not immediately respond for comment.

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NEWS

Upholding \$266.7M Fee Award, Del. Supreme Court Rejects Diminishing>Returns Curb on Bigger Wins

The opinion by Chief Justice Collins J. Seitz Jr. states Delaware precedent doesn't support requiring a declining percentage fee model like the one used in federal courts.

August 15, 2024 at 03:19 PM

Corporate Governance



Ellen Bardash



The original version of this story was published on [Delaware Business Court Insider](#)

The Delaware Supreme Court on Wednesday upheld a \$266.7 million fee award for counsel representing Dell shareholders, determining the Court of Chancery didn't abuse its discretion by not ordering a proportionately lower payout on a \$1 billion settlement.

The [opinion](#), authored by Chief Justice Collins J. Seitz Jr., states Delaware precedent doesn't support requiring a declining percentage fee model like the one used in federal courts to calculate fees awarded in securities litigation, noting the court has historically declined to make binding rules about fee awards.

The decision not to reduce fee awards solely based on the size of a recovery is a win for Dell shareholders' co-lead counsel at Labaton Sucharow and Quinn Emanuel Urquhart & Sullivan, as well as Andrews & Springer, Robbins Geller Rudman & Dowd and Friedman Oster & Tejtzel.

Pentwater Capital Management, joined by seven other investment funds, brought its fee objection to the Supreme Court, arguing the award was disproportionate to the overall value to shareholders and advocating instead for the court to apply a formula in which the percentage of a recovered amount awarded to the attorneys who achieved it decreases as the size of the recovery increases.

Pentwater's counsel at Bayard declined to comment on the decision.

After Dell Inc. was taken private in 2013, its successor, Dell Technologies, used a combination of cash and its publicly traded Class V stock to acquire data storage firm EMC Corp. in a transaction valued at \$67 billion. Dell Technologies offered investment funds that held Class V stock either a share of Class C stock valued at \$120 or the same amount in cash for each Class V share, and a committee agreed to the same terms for all other Class V shareholders, 61% of whom voted in favor of the redemption.

Lawsuits from former Class V shareholders were filed, seeking damages for unfair redemption of their shares and alleging Dell directors breached their fiduciary duties by approving the redemption, pushing Class V shareholders to vote for it and completing it at the negotiated price.

The underlying class action suit was filed in 2018, and a settlement was reached weeks before trial in 2022 and approved in April 2023. Laster issued a [decision](#) on the fee request in August 2023, granting an award equal to 26.67% of the \$1 billion cash settlement, lower than the 28.5% class counsel had requested.

A \$285 million fee would have been the second-largest award ever granted to attorneys in the Court of Chancery, matched only by the award in *Americas Mining v. Theriault*, the first instance in which the court addressed a “megafund” case. Laster decided on a 26.7% award based on the Dell case having required extensive litigation but settling before trial began.

“After *Americas Mining*, we follow the consensus in the federal courts that it is within the discretion of the court to reduce a fee percentage to account for the size of the award,” Seitz wrote. “On appeal, this court will not usually disturb the Court of Chancery’s ruling if the court adequately explains its reasons and properly exercises its discretion when it applies the *Sugarland (Industries, Inc. v. Thomas)* factors.”

The court didn’t endorse every element of Laster’s opinion, specifically mentioning the section of the opinion in which Laster wrote there’s an irony in investment fund managers advocating for declining percentage methods when their own business practices don’t include something similar.

“In our view, the court should not deter meritorious objections from stockholders who have been harmed by subjecting their business practices to scrutiny as part of fee award proceedings,” Seitz wrote.

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Bloomberg Law News 2024-08-15T11:04:53766194725-04:00

Big Lawyer Paydays in Risky Cases Affirmed by Delaware Court (2)

By Jennifer Kay 2024-08-14T15:20:20000-04:00

- Hedge fund challenged \$267 million fee award in Dell deal
- Tesla faces massive fee requests in two separate lawsuits

Huge paydays for the attorneys who pursue high-risk cases in the country's premier venue for corporate litigation is a Delaware precedent that must be upheld, the Delaware Supreme Court ruled Wednesday.

A \$267 million fee award for the attorneys who negotiated a historic \$1 billion settlement with Dell Technologies Inc. makes sense because the trial court that approved the award acted within its discretion, Chief Justice Collins J. Seitz Jr. said in an [opinion](#) for the court's full five-member panel.

"In Delaware, we are used to big numbers," Seitz said. "We agree with the court's observations that it was a highly contentious litigation, spanning two and a half years, with nearly 100 lawyers entering appearance for the defense."

The ruling may be a concern for Tesla Inc., which faces unusually large fee applications in two separate lawsuits involving CEO Elon Musk's pay package and compensation for the electric vehicle maker's board.

While the fee requests in the Dell and Tesla cases have [made headlines](#) over the last year, nine-figure awards for plaintiffs' attorneys are rare in Delaware. The high court's full five-member panel appeared skeptical of disturbing the state's precedents for determining fee awards during [oral arguments](#) in May.

\$267 Million

Pentwater Capital Management LP challenged the Dell fee award, arguing the Chancery Court abused its discretion in approving "a windfall" amounting to 27% of the settlement that resolved

claims over a 2018 stock conversion. Reached 19 days before trial, it set a Chancery Court record for stockholder settlements.

The \$267 million fee award was the second-highest fee award in the court's history. The largest came in a 2011 case involving the takeover of a Mexican mining company, amounting to \$304 million—15% of the \$2 billion in damages awarded after trial.

Pentwater wanted the Chancery Court to follow federal court methodology that constricts payouts in cases involving big settlements. The Chancery Court had rejected the federal method, saying it conflicted with Delaware's multi-factor test to ensure legal fees are fair. Those factors include a case's complexity and the stage it reaches, the attorneys' experience and ability, and any contingency arrangement that leaves them vulnerable to not being paid at all.

"Consistent with the cases preceding it, in *Americas Mining* we refused to adopt rigid rules in fee award cases," Seitz said. The high court agrees with the Chancery Court that, following that 2011 case, the factors Delaware considers for determining fee awards "control a megafund fee award, rather than any per se rule, whether declining percentage or any other rule," he said.

"After *Americas Mining*, we follow the consensus in the federal courts that it is within the discretion of the court to reduce a fee percentage to account for the size of the award. On appeal, this Court will not usually disturb the Court of Chancery's ruling if the court adequately explains its reasons and properly exercises its discretion" when applying those determining factors, Seitz said.

While the high court found that the Chancery Court had "more than adequately justified its fee award," Vice Chancellor J. Travis Laster had been wrong to say that Pentwater's objection had "come with ill grace," Seitz said. Laster had [chided](#) the hedge fund for seeking a declining-percentage methodology when they don't use such models themselves.

Pentwater "did not make unreasonable or frivolous arguments," Seitz said. "In our view, the court should not deter meritorious objections from stockholders who have been harmed by subjecting their business practices to scrutiny as part of fee award proceedings. Their non-frivolous objections, when appropriate, act as another check on the reasonableness of the fees sought by counsel from a common fund."

The Dell appeal came amid two huge fee award requests in the Tesla lawsuits in Chancery Court. In one case, lawyers want a \$230 million payout for representing a pension fund that pushed Tesla to a

pending \$919 million settlement over board compensation. Tesla contends \$63.5 million for attorneys' fees would be reasonable.

Chancellor Kathaleen St. Jude McCormick has said whether she approves that settlement and fee award depends on how she decides what fees are reasonable for the lawyers representing an investor who successfully [challenged](#) Musk's CEO pay. She heard arguments [July 8](#) about their request to be paid in 29 million Tesla shares worth about \$7 billion.

The Delaware Supreme Court opinion includes cautionary language about the public perception of huge fees.

It's fair to ask "outside our somewhat insular legal universe, whether the public would ever believe that lawyers must be awarded many hundreds of millions of dollars in any given case to motivate them to pursue representative litigation or to discourage counsel from settling cases for less than they are worth," Seitz said. "At some point, the percentage of fees awarded in a megafund case exceed their value as an incentive to take representative cases and turn into a windfall."

Pentwater is represented by Bayard PA. The pension fund that brought the Dell case is represented by Labaton Keller Sucharow, Quinn Emanuel, Andrews & Springer, Robbins Geller, and Friedman Oster & Tejtzel.

The case is [In re Dell Tech. Inc. Class V S'holders Litig.](#) , Del., No. 349,2023, opinion 8/14/24 .

(Updates with additional material from the opinion in fifteenth and sixteenth paragraphs.)

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Tom Hals, Jonathan Stempel



The logo of Dell Technologies at the Milipol Paris, the worldwide exhibition dedicated to homeland security and safety, in Villepinte near Paris, France, November 15, 2023.

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WILMINGTON, Delaware, Aug 14 (Reuters) - Five law firms should receive \$267 million in legal fees for obtaining a \$1 billion settlement for shareholders of Dell Technologies (DELL.N)  , opens new tab, the Delaware Supreme Court ruled on Wednesday, rejecting arguments that the payment was a windfall.

The fee is one of the largest ever for U.S. shareholder litigation.

A Delaware trial court is weighing two other requests for huge legal fees, both in cases involving Tesla (TSLA.O)  , opens new tab, and the ruling contained language that might be seen as helpful for the carmaker's efforts to fight those fees.

Plaintiffs in the Dell case alleged that they and other shareholders were short-changed in a controversial \$23.9 billion transaction in 2018 that marked Dell's return as a publicly traded company.

The settlement was announced in November 2022, averting a trial scheduled to begin the next month.

Last year, a Court of Chancery judge awarded the \$267 million fee paid from the settlement to the five law firms that brought the lawsuit, including Labaton Keller Sucharow and Quinn Emanuel Urquhart & Sullivan, finding it in line with Delaware legal precedent.

But a group of large investors led by Pentwater Capital Management asked Delaware's top court to reduce the fee and base it on a model used in federal courts.

As settlements of federal securities litigation grow in size, the percentage awarded in attorneys' fees generally declines.

In the 10 largest federal securities cases, lawyers collected on average less than 10% of the recoveries as fees, compared with 27% in the Dell case, according to Pentwater.

Chief Justice Collins Seitz said the potential for large fees gives lawyers an incentive to take tough cases, and risk getting paid nothing if they lose.

"It was a highly contentious litigation, spanning two and a half years, with nearly 100 lawyers entering appearance for the defense," Seitz wrote. "The underlying transaction was complex, and counsel achieved an excellent settlement for the class on the eve of trial."

The fee in the Dell case is the second largest in Delaware and would rank fifth largest in federal securities litigation, according to data from Stanford Law School cited in Pentwater's court filings.

Delaware is the legal home to a majority of U.S. publicly traded companies.

This in part reflects the predictability of its court system, which relies on specialized judges instead of juries in shareholder litigation, but the courts' approach to legal fees has been a point of contention for business groups.

Seitz warned that huge fee awards can become windfalls. He said it was legitimate to ask "whether the public would ever believe that lawyers must be awarded many hundreds of millions of dollars in any given case to motivate them to pursue representative litigation or to discourage counsel from settling cases for less than they are worth."

Tesla is fighting fee requests for \$230 million in a case that alleged its directors were overpaid and around \$7 billion in a case challenging CEO Elon Musk's \$56 billion pay package.

Those fee requests work out to hourly rates of \$10,690 and more than \$280,000, according to the attorneys that requested the payments.

The hourly rate in the Dell case came out to \$5,000, which Seitz described as "at the high end."

The judge in the Tesla cases, Chancellor Kathaleen McCormick, has not said when she will rule on the fee requests.

The shareholder law firms in the Dell case are Labaton Keller Sucharow, Quinn Emanuel Urquhart & Sullivan, Friedman Oster & Tejtzel, Andrews & Springer, and Robbins Geller Rudman & Dowd. The defendants were represented by nine law firms.

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Reporting by Tom Hals in Wilmington, Delaware; Editing by Jonathan Oatis and Daniel Wallis

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Tom Hals is an award-winning reporter with 25 years of experience working in Asia, Europe and the United States. Since 2009 he has covered legal issues and high-stakes court battles, ranging from challenges to pandemic policies to Elon Musk's campaign to end his deal for Twitter.

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Legal Fee Tracker: Lawyers play the long game in \$2.7 billion NCAA settlement

 [reuters.com/legal/legalindustry/legal-fee-tracker-lawyers-play-long-game-27-billion-ncaa-settlement-2024-08-15](https://www.reuters.com/legal/legalindustry/legal-fee-tracker-lawyers-play-long-game-27-billion-ncaa-settlement-2024-08-15)

David Thomas



Jun 4, 2024; Eugene, OR, USA; A NCAA logo flag at Hayward Field. Mandatory Credit: Kirby Lee-USA TODAY Sports Purchase Licensing Rights , opens new tab

Aug 15 (Reuters) - Two U.S. law firms are poised to earn hundreds of millions of dollars after negotiating a \$2.7 billion settlement with the National Collegiate Athletic Association that would allow student athletes to be paid for the first time.

But first they have to persuade a judge to approve the landmark deal -- and the unusual, multifaceted fee structure they proposed.

The firms have until Friday to respond to groups of students who have already objected to the July settlement, and more litigation is likely once they submit more details of their fee request.

The settlement , opens new tab would resolve antitrust lawsuits focused on NCAA's longstanding rules prohibiting payments to athletes, including restrictions on compensation for competing, for the commercial use of players' names, images and likenesses, and payments tied to athletes' academic achievements.

The firms that spearheaded the litigation, Hagens Berman Sobol Shapiro and Winston & Strawn, told U.S. District Judge Claudia Wilken in Oakland, California that the settlement's total value is over \$20 billion, based largely on student athletes' future earnings.

THE FEES

The plaintiffs' lawyers, led by Steve Berman of Hagens Berman and Winston's Jeffrey Kessler, said in court papers that they've sunk more than 72,000 hours into the cases since 2020.

To start, they told Wilken they will ask for a \$20 million upfront payment for their work. It would be split evenly between the firms, Berman told Reuters.

They said they will also request up to \$495.2 million based on a percentage of settlement funds the NCAA agreed to pay over the next decade, including 20% of \$1.976 billion slated for college athletes who were denied compensation for the use of their names, images, and likenesses and for their athletic service.

The most novel part of their fee request would also allow the lawyers to seek an annual stake in the compensation that schools would now be cleared to pay student athletes, based on 0.75% to 1.25% of the NCAA schools' sporting revenues over 10 years.

The plaintiffs estimated that pool to be worth around \$20 billion over a decade, leading to potential aggregate legal fees as high as \$250 million.

Both Berman and Kessler said the ongoing fees they envision are fair given the size and historic nature of the settlement.

"Frankly, I think it is an extremely modest request given the case law and the value to the class," Kessler said. He noted each yearly fee installment would require court approval.

An NCAA spokesperson did not immediately respond to a request for comment on the fees. The organization last month said the settlement provided a sustainable path to increased benefits for student athletes.

Asked about the fee provisions, Berman said they are focused on responding to the objections and winning the judge's preliminary settlement approval for now.

"My parents always taught me don't count your chickens before they hatch," Berman said in an email.

One of the groups challenging the proposed NCAA settlement said in court papers [\[link\]](#), opens new tab that the deal was biased toward male athletes. The group also objected to the plaintiffs firms' \$20 million upfront fee request, describing it as a "classic 'clear sailing provision' that raises the question what class counsel bargained away to get it."

The MoloLamken attorneys who filed that objection did not immediately respond to a request for comment. The other pending objections argued the settlement would unfairly insulate the NCAA from separate antitrust lawsuits.

Kessler called the objection to the \$20 million "insulting," and said it was "only negotiated after all of the other terms of the settlement were reached."

"We stand by our record for what we've done for athletes," he said.

- In other legal fee news, the Delaware Supreme Court on Wednesday upheld a \$267 million fee award for five law firms that obtained a \$1 billion settlement for Dell Technologies shareholders.

The court ruled that the near-record Delaware award was not an improper windfall to the law firms who represented the plaintiffs -- Labaton Sucharow; Quinn Emanuel Urquhart & Sullivan; Andrews & Springer; Robbins Geller Rudman & Dowd; and Friedman Oster & Tejtel.

- Attorneys who negotiated a proposed settlement with seafood giant StarKist, its parent Dongwon Industries and private equity firm Lion Capital said Tuesday they will seek just over \$50 million in legal fees.

The proposed fee award for law firm Wolf Haldenstein Adler Freeman & Herz would take into account two class action settlements -- Tuesday's proposed deal, worth \$136 million, and a 2022 deal with Chicken of the Sea and its parent Thai Union Group, worth \$16 million.

(Legal Fee Tracker is a weekly feature exploring attorney compensation awards and disputes in class actions, bankruptcies and other matters. Please send tips or suggestions to D.Thomas@thomsonreuters.com , opens new tab.)

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(Additional reporting by Mike Scarcella)

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Law

Shareholders' lawyers in \$1bn Dell case clinch \$267mn fee award

Closely watched decision from Delaware's top court comes as Tesla fights even bigger request in Elon Musk pay suit



The Delaware Supreme Court ruled Wednesday that a lower court had 'more than adequately justified' the award © Reuters

Sujeet Indap in New York YESTERDAY



Delaware's top court has approved \$267mn in fees for lawyers representing shareholders who secured \$1bn in a lawsuit over an acquisition involving Dell Technologies, rejecting claims that the award was excessive.

The [ruling on Wednesday](#) had been highly anticipated by legal observers looking to see how corporate law in Delaware, where most large US companies are domiciled, would treat blockbuster fees awarded in cases involving allegations of significant wrongdoing in corporate governance.

It also comes as another court in Delaware weighs a potential multibillion-dollar award to lawyers who had successfully convinced the court to cancel [a \\$56bn pay package for Elon Musk](#) earlier this year.

The latest judgment stems from a 2019 deal in which Michael Dell and private equity firm Silver Lake Partners had acquired shares of a Dell Technologies affiliate that they did not own, engineering a reverse merger that listed the broader Dell group at a \$100bn enterprise valuation.

After the deal closed, shareholders sued, accusing Michael Dell, Silver Lake and its bankers at Goldman Sachs of breaching their fiduciary duties by acquiring the public shares too cheaply. The [sides settled in 2022](#), just prior to a trial, for \$1bn in cash, one the largest settlements in Delaware history.

[Lawyers](#) for the plaintiffs, led by the firms Labaton Sucharow and Quinn Emanuel, were ultimately granted \$267mn in fees by the lower court. But a hedge fund who held shares in Dell, Pentwater, had argued that giving the lawyers an award equal to roughly 27 per cent of the \$1bn settlement was excessive. Instead they said a sliding percentage scale typically employed by US federal courts would justify about a 15 per cent ratio.

The Delaware Supreme Court, however, agreed the lower Chancery Court had “more than adequately justified its fee award”.

Delaware courts have been encouraging plaintiffs’ lawyers to pursue meaningful cases rather than nuisance suits, in part by dangling large fees for plaintiffs’ lawyers, who typically work on contingency — meaning they only get paid if they succeed.

“The potential for large fees incentivises counsel to accept challenging cases,” the Supreme Court wrote. “They assume the risk of recovering nothing in the end.”

Still the court was aware of striking the right balance between incentives and excessive awards.

“In Delaware, we are used to big numbers,” the state Supreme Court wrote. “But it is also legitimate to ask, outside our somewhat insular legal universe, whether the public would ever believe that lawyers must be awarded many hundreds of millions of dollars in any given case to motivate them to pursue representative litigation or to discourage counsel from settling cases for less than they are worth.”

It added: “At some point, the percentage of fees awarded in a megafund case exceeds their value as an incentive to take representative cases and turn into a windfall.”

A similar argument against a large plaintiffs' fee has been deployed by lawyers for Tesla in the Musk case. They have told the court that the request for 29mn Tesla shares — currently worth around \$6bn — “defies established Delaware case law, mangles basic economics, and seeks to evade entirely the fairness checks this court imposes on fees”.

The lower chancery court is expected to rule later this year both on the fee and on whether a recent Tesla shareholder vote to reapprove the Musk pay package has any impact on the earlier decision to cancel it.

The Delaware Supreme Court's decision on Wednesday also pushed back against criticism of Pentwater from the lower court, saying that it had the right to protest about a fee award it believed was unfair.

“Although it might sound quaint, lawyers are not in the same position as investment bankers and fund managers when it comes to class action settlements — they are fiduciaries for the class.”

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Dell atty fee of \$266.7 million okayed by Del SCt; presumably this will give some guidance to McCormick in the Tesla case (if she rejects the new pay vote):

courts.delaware.gov/Opinions/Downl...

12:26 PM · Aug 14, 2024 · **7,954** Views



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is are a particular concern in megafund cases. As lawyers and al that representative litigation performs a valuable ser the individually might not have the resources or the will to breach of their duties. The potential for large fees incu pt challenging cases. They assume the risk of recovering no aware, we are used to big numbers.

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plaintiff's recovery, "[t]he risk of a non-recovery in this case was significant, and the risk intensified as trial approached. . . . That 'the recovery of \$1 billion does not constitute a windfall to plaintiff' is not true in the circumstances of the case."¹¹⁸ We agree with the court's reasoning in this contentious litigation, spanning two and a half years, and the brief appearance for the defense.¹¹⁹ The





@annmlipton@esq.social @AnnMLipton · Aug 14

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In Tesla, depending on where the stock is, the fee sought by the plaintiffs of over \$5 bill in Tesla stock works out to \$288K per hour (though they also recently offered an alternative ask: a flat \$1 bill in cash):

Under the second *Sugarland* factor, the time and effort of counsel, Pentwater contends that the Court of Chancery did not properly cross-check the time and effort of counsel against the size of the award.¹³¹ According to Pentwater, the implied rate of counsels' time is at the high end of Delaware fee awards, meaning it signals a windfall to counsel. The court determined, however, that "the implied rate of approximately \$5,000 per hour is lower than rates this court has approved for smaller recoveries" and "[t]he multiple to lodestar of 7x . . . would not raise a federal eyebrow."¹³² While the amount is at the high end, it is not so unusual that we are required to undo the court's thorough consideration of all the *Sugarland* factors.

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Also - assuming McCormick rejects the ratification vote etc etc - one thing that does matter in Tesla is that, unlike in Dell, it went to trial. Also unlike in Dell, Musk has kind of made it a calling card to always go to trial on these and never settle, which upped the risk

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@annmlipton@esq.social @AnnMLipton · 23h

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Anyway, the last thing I'll say is how fascinated I am by this line, mostly bc I'm interested in when Del courts explicitly recognize the role of public opinion/legitimacy in shaping corporate law

But it is also legitimate to ask, outside our somewhat insular legal universe, whether the public would ever believe that lawyers must be awarded many hundreds of millions of dollars in any given case to motivate them to pursue representative

2



6

636





1man  @1mantruthsquad · Aug 14

...

"the results achieved is the primary factor for consideration" ... looking at "benefit accruing to the class" ...



116



KSalberta @k_salberta@masto.ai @ksalberta.bsky.so · @k_salberta · 23h ...

"On appeal, this Court will not usually disturb the Court of Chancery's ruling if the court adequately explains its reasons and properly exercises its discretion when it applies the Sugarland factors." and



165



KSalberta @k_salberta@masto.ai @ksalberta.bsky.so · @k_salberta · 23h ...

"We note that it is not inconsistent with the incentive structure in Americas Mining for the court to decrease the percentage of fees in a megafund case." It's a Chancellor's guide to SC thinking on this issue. Also interesting is the censure of the criticism of objectors.



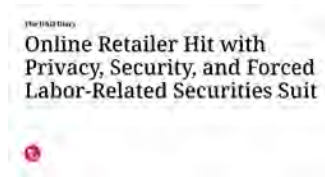
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Online Retailer Hit with Privacy, Security, and Forced Labor-Related Securities Suit

K dandodiary.com/2024/08/articles/securities-litigation/online-retailer-hit-with-privacy-security-and-forced-labor-related-securities-suit

August 15, 2024



By Kevin LaCroix on August 15, 2024

Posted in Securities Litigation

PDD Holdings

Here at *The D&O Diary*, we track new securities class action lawsuit filings to identify emerging litigation trends and to track filings that reflect existing trends. Every now and then, we spot new suits that reflect multiple different trends in a single complaint. A new securities lawsuit filed earlier this week against Chinese online retailer PDD Holdings

(formerly known as Pinduoduo) is an example of one of these multi-trend suits. As discussed below, the lawsuit shows how privacy-related issues, cybersecurity issues, and geopolitical issues can translate into securities class action litigation. A copy of the August 13, 2024, complaint against PDD can be found [here](#).

Background

PDD Holdings owns and operates ecommerce platforms. The company was known as Pinduoduo until February 2023, when it changed its name to PDD. PDD is a Grand Cayman company with its headquarters in Ireland. The company operates the Pinduoduo platform in China. In September 2022, the company launched Temu, based in Boston, as a service to ship goods directly to consumers from Chinese factories. PDD's American Depositary Shares trade on Nasdaq.

The recently filed securities complaint contains lengthy block quotations from the company's various SEC filings addressing the company's commitment to data protection and cybersecurity, and to the privacy of its customers' data. The company filings stated the company's commitment to compliance with laws regarding the collection and use of personal information. The company stated that it had adopted and implemented strict security policies and measures to protect customer data. The statements from the SEC filings also include extensive quotations identifying risks to the company from changing international trade

policies of the U.S. and of other countries. Among other things these statements about international trade included the statement that the company strives to comply with applicable trade requirements.

The complaint alleges that due to two sets of adverse news reports about the company and its operations, the company's share price has declined. The first set of reports, which began in March 2023, include news stories stating that the company's apps exploited Android system vulnerabilities to install backdoors and gain unauthorized access to user data. The reports said that the Pinduoduo app can bypass users' cell phone security to monitor activity in other apps, check notifications, read private message, and change settings. One report quoted a cybersecurity expert as saying that the company "has taken violations of privacy and data security to the next level." The complaint also notes that in June 2024, the Arkansas Attorney General launched a lawsuit against Temu for violations of the Arkansas Deceptive Trade Practices Act in connection with the platform's alleged use of malware and spyware.

The second set of news report, which began in June 2023, reflected stories that the company had failed to take sufficient steps to prevent the import to the U.S. of products from Xinjiang produced through forced labor in factories and mines. A report of a U.S. House of Representatives committee accused the company of providing "an unchecked channel that allows goods made with forced labor to flow into the United States." The stories contained quotations from politicians and others saying that the company may be in violation of the Uyghur Forced Labor Protection Act (UFLPA).

The complaint alleges that as these news reports emerged, the company's share price declined.

The Lawsuit

On August 13, 2024, a plaintiff shareholder filed a securities class action lawsuit in the Eastern District of New York against PDD and certain of its executives. The complaint purports to be filed on behalf of a class of investors who purchased the company's ADSs between April 30, 2021, and June 25, 2024.

The complaint alleges that during the class period, the defendants failed to disclose that: "(1) PDD's applications contained malware, which was designed to obtain user data without the user's consent, including reading private text messages; (2) PDD has no meaningful system to prevent goods made by forced labor from being sold on its platform, and has openly sold banned products on its Temu platform; (3) the foregoing subjected the Company to heightened risk of legal and political scrutiny; and (4) as a result, Defendants' statements about its business, operations, and prospects, were materially false and misleading and/or lacked a reasonable basis at all relevant times."

The complaint alleges that the defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The complaint seeks to recover damages on behalf of the plaintiff class.

Discussion

It could be argued that this new lawsuit is about the extraordinary adverse publicity that has surrounded the company since early 2023, stoking outrage about two different sets of scandals. At one level, the securities suit is about the company's statements concerning its compliance with privacy, security, and forced labor laws; at another level, however, it is about specific actions the company took or failed to take, including its alleged installation of malware on its customers' devices and its alleged failure to take steps to ensure that products sold on its platform were not the product of forced labor.

The allegations against the company in this complaint cut across a wide range of securities class action trends. First, the company involves allegations pertaining to privacy. As I have stated in numerous prior posts (for example, [here](#)), I have long thought that the potential for privacy-related claims may be among the most important emerging D&O liability exposures. Indeed, privacy issues have been at the heart of a host of recent corporate and securities lawsuits, including, by way of example, the Alphabet/Google+ lawsuit that settled earlier this year for \$350 million (as discussed [here](#)). This new lawsuit highlights the ways in which privacy related issues can translate into litigation. Indeed, part of the emotional weight of this lawsuit comes from the outrageous sense of violation of its customers' privacy.

Second, while this lawsuit undoubtedly arises in significant part from privacy related issues, at the same time it also arises in significant part out of cybersecurity issues. The allegations that the company deliberately installed malware intended to override security measures on their customers' devices adds another layer of outrage. D&O claims arising out of cybersecurity issues typically involved alleged disclosures about cyber intrusions by hostile third-party actors; this case, by contrast, involves allegations that the defendant company itself was a hostile actor actively using malware to circumvent cybersecurity controls. Thus, while this lawsuit unquestionably is in significant part cybersecurity-related, it involves very different kinds of cybersecurity allegations than have the type of allegations that have made their way into D&O lawsuit.

Third, with respect to the complaint's allegations that the company is failing to take sufficient steps to ensure that products sold on its platform were not made by forced labor, this new complaint represents an example of how geopolitical concerns can translate into D&O claims risks. As I have noted in prior posts (for example, [here](#)), in a complex world in which two hot wars are ongoing and superpower tensions are at their highest point in decades, geopolitical risks represent an important part of the environment in which all companies must operate.

International trade issues can be particularly fraught, especially these days for companies doing business in or with China. I have previously noted (for example [here](#)) securities suits arising from enforcement of trade and export controls.

Finally, and again with respect to the allegations concerning the company's alleged failure to take steps to ensure that the company was not selling on its platforms products made by forced labor, I note that this new lawsuit is also an ESG-related lawsuit – that is, the complaint's allegations about the company's alleged failure to comply with anti-forced labor laws make this case a “S” case, in that it deals with the kinds of social issues that are encompassed within the ESG framework.

In most contexts, when people refer to ESG, they usually are talking about climate change. But the “S” pillar encompasses a host of other concerns unrelated to climate change. In the U.S., references to the “S” pillar are usually related to DEI issues (diversity, equity, and inclusion). But the “S” pillar encompasses so much more beyond DEI, including, for example, child labor laws, conflict mineral laws, and human trafficking concerns. The “S” pillar also encompasses anti-forced labor laws, such as the Uyghur Forced Labor Protection Act, meaning that along with everything else, this new lawsuit is also an ESG-related lawsuit.

Many readers undoubtedly are familiar with Bloomberg columnist Matt Levine's oft-quoted quip that “Everything, Everywhere is Securities Fraud.” With that famous quote as context, I have to say that to me this new suit feels like everything everywhere in one securities class action complaint.

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Securities Law News

Aug. 14, 2024, 12:40 PM PDT

Nvidia Asks Justices to Negate Investors' Use of Revenue Expert

By Martina Barash

- High court took Nvidia, Meta cases about suits' early stages
- Ruling from 9th Cir. should be reversed, Nvidia says in brief

Bloomberg Law News 2024-08-15T10:04:12731790047-04:00

Nvidia Asks Justices to Negate Investors' Use of Revenue Expert

By Martina Barash 2024-08-14T15:40:46000-04:00

- High court took Nvidia, Meta cases about suits' early stages
- Ruling from 9th Cir. should be reversed, Nvidia says in brief

Nvidia Corp. investors can't buttress an otherwise flawed false statements case by relying upon a hired expert's "invented" data about the chip maker's revenue sources, the company said in a brief to the US Supreme Court.

Seeking reversal of a federal appeals court decision to let the case proceed, the company also asked the justices to clarify the standard for such a suit to survive an early-stage dismissal under the Private Securities Litigation Reform Act.

The US Court of Appeals for the Ninth Circuit in 2023 revived the proposed class action, which alleges the company and its CEO, Jensen Huang, misled investors about how dependent it was on revenue from crypto mining before a 2018 market downturn.

"The panel's decision badly misunderstands the PSLRA and eviscerates the guardrails that Congress erected to protect the public from abusive securities litigation," Nvidia said Tuesday in a brief on the merits.

The high court granted Nvidia's petition for review June 17, shortly after it accepted a case against Meta Platforms Inc. over a data-harvesting scandal involving Cambridge Analytica. Central to that case are risk disclosures made by Meta, then known as Facebook. Both cases touch on threshold issues in shareholder litigation—and conflicting approaches from the Second and Ninth Circuits.

In its brief, Nvidia pointed to two pleading standards heightened by the PSLRA: one requiring that facts, including those related to intent, be pleaded with particularity; the other requiring a "strong inference" of intent, or scienter. The plaintiffs fell short on both, the Santa Clara, Calif.-based company said.

No Particularized Allegation

The investors' allegations of intent don't satisfy the PSLRA, Nvidia said. "Where, as here, a plaintiff seeks to establish scienter by relying on allegations that internal company documents contradicted public statements, the plaintiff must allege the contents of those documents," it said.

But nothing in the complaint qualifies as a particularized allegation that Huang would have seen such documents, it said.

And the investors' allegations of the falsity of company statements rest on "generic market research and unexplained or unjustified assumptions," Nvidia said.

"If a plaintiff may simply hire an expert to create data that contradicts a company's public statements, and then assert that internal records 'would have' reflected the expert's data, the PSLRA's heightened pleading standards will be easy for any plaintiff to surmount merely by paying an expert," it said.

The investors "lacked a factual basis to claim that NVIDIA's statements were false, so they hired an expert to manufacture the facts they needed," Nvidia said. "That is precisely the kind of fishing expedition that the PSLRA was supposed to stop."

The investors' brief is due Sept. 25.

Gupta Wessler LLP represents the investors. Hogan Lovells US LLP and Cooley LLP represent Nvidia.

The case is NVIDIA Corp. v. E. Ohman Jr or Fonder AB, U.S., No. 23-970, brief 8/13/24.

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Nvidia Illegally Scraped YouTube Videos to Train AI, Suit Says

By Annelise Gilbert 2024-08-15T05:01:07000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. [24-cv-05157](#)

Nvidia Corp. scraped millions of YouTube videos without the consent of creators to train and develop its AI model that generates video content, according to a new federal lawsuit.

Users have retained ownership rights in their uploaded videos and the “surreptitious, non-consensual” use and collection of their content violates YouTube’s terms of service, according to a [complaint](#) filed Wednesday in the US District Court for the Northern District of California.

The proposed class action is brought by David Millette, who [sued](#) OpenAI Inc. less than two weeks ago on similar claims.

Nvidia allegedly instructed its employees to use tools to download full-length videos and evade detection and avoid blocks by YouTube, the complaint said. The videos were then used to create training datasets for Nvidia’s Cosmos AI project.

The proposed class action asserts a claim for unjust enrichment or restitution, and a claim for unfair competition under California law.

Millette seeks monetary relief, injunctive relief, and reasonable attorneys’ fees, among other requests.

Nvidia didn’t immediately respond to Bloomberg Law’s request for comment.

Bursor & Fisher represents Millette and the proposed class.

The case is [Millette v. Nvidia Corp.](#) , N.D. Cal., No. 24-cv-05157, complaint filed 8/14/24 .

To contact the reporter on this story: Annelise Gilbert at agilbert1@bloombergindustry.com



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'Samsung' Highlights the Costs of Arbitrating Mass Claims

Judge Shira Scheindlin uses the recent case 'Wallrich v. Samsung' to illustrate the significant financial issues surrounding arbitration fees for mass claims.

August 14, 2024 at 03:20 PM

Alternative Dispute Resolution

By Shira A. Scheindlin | August 14, 2024 at 03:20 PM



The arbitration of mass claims is now available through all of the major ADR providers. The American Arbitration Association (AAA), JAMS, FedArb and CPR have developed special rules to govern the resolution of such claims.

A bit of history is warranted. Most consumer contracts require that all disputes be resolved by arbitration. These contracts generally cover relationships with many financial institutions, the sale of consumer goods, and employment agreements. Many of these contracts agree that the employer, seller, or institution will pay the costs of the arbitration.

Plaintiffs' lawyers were not happy that their consumer and employment cases could no longer be brought as class actions in state and federal court. Their efforts to challenge these agreements as unconscionable or contracts of adhesion or both were unsuccessful. The U.S. Supreme Court has repeatedly ruled in favor of enforcing such agreements. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Having been compelled to arbitrate, and unable to proceed on behalf of a class due to contractual waivers of class actions, plaintiffs began bringing arbitration claims on behalf of hundreds or thousands of claimants each alleging a similar injury. Each individual claim required the respondent to pay the entire cost of the arbitration, beginning with the initial filing fee.

Respondents quickly realized they had created a significant financial problem of their own making. The filing fees alone, in claims brought on behalf of a thousand or more claimants, often exceed several million dollars.

A recent case, *Wallrich v. Samsung*, is illustrative. The case began in the district court for the Northern District of Illinois. Petitioners were 49,986 users of Samsung electronic device users claiming violations of Illinois' Biometric Information Privacy Act. The user contracts specified that all disputes must be resolved in arbitration and contained class action waivers.

Petitioners brought 50,000 individual claims to the AAA. Pursuant to the AAA Supplementary Rules for Multiple Case Filings, governing cases where the same counsel files 25 or more claims against the same Respondent, Claimants paid their portion of the filing fees.

But Samsung refused to pay the initial administrative filing fees totaling \$4,125,000. When Samsung continued to refuse, the AAA administratively closed all the cases. At that point, claimants (now petitioners) asked the court to compel arbitration by requiring Samsung to arbitrate and to pay its share of the arbitration fees.

Although the AAA had administratively closed the case the court found that the user agreement required dispute resolution “exclusively through final and binding arbitration...” and that this had not yet occurred. 691 F. Supp. 2d 867, 879 (N.D. Ill. 2023).

The court then found that petitioners had entered into a valid agreement to arbitrate disputes arising under its purchase agreements with Samsung. The court next found that any dispute regarding the scope of the arbitration clause was clearly and unmistakably delegated to the arbitrator through the plain language of the agreement and through the reference to and incorporation of the AAA rules.

The final issue for the court was whether Samsung’s refusal to pay the AAA’s fees for each individual claimant constituted a breach of its own arbitration agreement. Samsung argued that petitioners had a choice: They could either advance Samsung’s share of the filing fee (subject to recoupment at the close of the arbitration) or they could forgo arbitration and proceed in court. The court rejected these suggestions. It found that a dispute over fees was substantive and involved the exercise of the right to arbitrate.

Noting that courts have reached different decisions on this issue, it nonetheless decided that it could and should compel Samsung to pay the administrative fee noting that Samsung was “hoist with its own petard.” *Id.* at 884. It relied, in particular, on a New York state court decision in *Uber Tech., Inc. v. American Arbitration Assn., Inc.*, 204 A.D.3d 506, 510 (1st Dept 2022), which noted that the fees that Uber was required to pay were a direct result of its “business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers”

The 7th U.S. Circuit Court of Appeals reversed the decision of the district court. *See Wallrich v. Samsung*, (7th Cir. July 1, 2024). The court found that the consumers could not compel Samsung to pay the AAA’s administrative fees. The reasoning of the appellate court was straightforward. It found that the parties had agreed to abide by the rules and procedures of the AAA.

As noted, the AAA terminated the proceedings, based on the failure of both parties to pay the full administrative fee, noting that petitioners could have advanced Samsung’s fees, and invited the parties to resolve their dispute in the district court. The court found that at that point the arbitration was, and the dispute would now have to be resolved in the district court.

This battle is not over. This issue may well result in a Circuit split that reaches the Supreme Court. It will be interesting to see if the Supreme Court’s general predilection to favor arbitration will still apply in the unusual circumstance where a company refuses to pay its share of the fees in a consumer mass action.

For now, this decision is not good news for the plaintiffs’ bar which had thought that large companies had been hoisted on their own petard by requiring consumers to proceed in arbitration rather than by a class action in court. It is hard to imagine a more circular outcome. Plaintiffs are back in court where they have always preferred to be. Truth is stranger than fiction!

Shira A. Scheindlin served for a total of 27 years on the federal bench as a Magistrate Judge in the U.S. District Court for the Eastern District of New York and later as a U.S. District Court Judge for the Southern District of New York. She now serves as an arbitrator and mediator with AAA, FedArb, and CPR and is a Fellow of the College of Commercial Arbitrators.

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<https://www.law.com/therecorder/2024/08/14/irreversible-suffering-apple-hit-with-class-action-over-lack-of-safety-guardrails-for-children/>



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NEWS

'Irreversible Suffering': Apple Hit With Class Action Over Lack of Safety 'Guardrails' for Children

The suit, filed Tuesday in the U.S. District Court for the Northern District of California by the Buche Law Firm and Eisenberg & Baum, claims that Apple has escaped accountability for the proliferation of CSAM on iCloud by engaging in "privacy-washing," which it defines as "a deceptive marketing tactic where Apple touts its commitment to protect the privacy of its consumers but neglect[s] to meaningfully implement its stated ideas to practice."

August 14, 2024 at 11:38 PM



Kat Black



What You Need to Know

- Apple was hit with a class action alleging violations of sex-trafficking laws and consumer protection laws, breach of contract, misrepresentation and unjust enrichment.
- The suit was brought by Buche Law Firm and Eisenberg & Baum on behalf of a 9-year-old child and her guardian, who allege that she was the victim of child sexual abuse on Apple's iCloud platform.
- The complaint argues that Apple has intentionally failed to implement child sexual abuse material (CSAM) detection tools.

A new class action brought on behalf of a 9-year-old plaintiff and her guardian accuses Apple of intentionally failing to address a recurring problem with child sexual abuse material on its data storage platform, iCloud.

The suit, filed Tuesday in the U.S. District Court for the Northern District of California by the Buche Law Firm and Eisenberg & Baum, claims that Apple has escaped accountability for the proliferation of child sexual abuse material on iCloud by engaging in “privacy-washing,” which it defines as “a deceptive marketing tactic where Apple touts its commitment to protect the privacy of its consumers but neglect[s] to meaningfully implement its stated ideas to practice.” It alleges violations of sex trafficking laws and consumer protection laws, breach of contract, misrepresentation and unjust enrichment.

This action was surfaced by [Law.com Radar](#).

According to the complaint, the plaintiff—listed as “Jane Doe”—is a victim of child sexual abuse that was “facilitated on iMessage and stored on iCloud.”

“As a result of this interaction, Plaintiff is severely harmed, mentally and physically,” it said. “Plaintiff is currently seeking psychotherapy and mental health care. ... Plaintiff’s mother laments that Plaintiff’s innocence and carefree childhood has been ripped away from her.”

The claim asserts that Apple has been aware of distribution on iCloud for years but has intentionally neglected to implement CSAM detection tools to preserve a semblance of user privacy at the expense of child safety. Apple’s anti-fraud chief, Eric Friedman, [admitted](#) in a February 2020 iMessage exhumed during the 2021 *Epic Games v. Apple* trial that “we are the greatest platform for distributing child porn,” it said.

The suit claims that Apple “underreports” CSAM to agencies such as the National Center for Missing & Exploited Children (NCMEC), a nonprofit established by former President Ronald Reagan in 1984 that works with law enforcement. “For example, in 2023, while four leading tech companies submitted over 32 million reports of CSAM to NCMEC, Apple submitted only 267,” it said. It also cited a 2023 Forbes investigative [article](#) finding that “the company’s systems have been used to store and transmit thousands of items of CSAM between 2014 and 2023.”

The plaintiffs’ attorneys argued that without CSAM detection, iCloud’s encryption protocols are effectively designed to shield child sexual abuse perpetrators from consequences, noting that “Apple has not created or invested in user-reporting channels specifically for images or videos of CSAM” and that the company abandoned plans to introduce a CSAM detection tool called “NeuralHash” that it announced in August 2021. Failure to do so, they continued, is a “business choice” that puts it at odds with other Big Tech companies like Google, Facebook and Snapchat, which have all integrated the PhotoDNA tool to detect and report images of child exploitation.

“Privacy and safety online must go hand in hand, especially when children are involved,” said Eric Baum and Juyoun Han, attorneys for the plaintiff at Eisenberg & Baum, in an emailed statement. “The complaint alleges that Apple engaged in privacy-washing by advertising its commitment to privacy while endangering its users by knowingly allowing CSAM perpetrators to upload, store and distribute CSAM via Apple iCloud. This lawsuit brings to light the experience of a 9-year-old victim and their family who face irreversible suffering as a result of Apple’s lack of guardrails.”

Apple did not immediately respond to a request for comment.

Class members are seeking declaratory and injunctive relief, compensatory and punitive damages and attorney’s fees and costs.

This action was surfaced by Law.com Radar, which delivers AI-enhanced case summaries and daily case reports from more than 2,200 state and federal courts. [Click here](#) to get started and be first to act on opportunities in your region, practice area or client sector.

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Bloomberg Law News 2024-08-15T13:22:44426395647-04:00

Appeals Court Dismisses Burford Appeal of 'Fatally Flawed' Order

By Emily R. Siegel 2024-08-15T12:45:16000-04:00

- Burford gave Sysco \$140 million for meat price-fixing suits
- Funder took over claims after a fight over settlements

Burford Capital's appeal of an order that granted a motion to enforce settlements in Sysco Corp.'s meat price-fixing lawsuits was dismissed Wednesday for a lack of jurisdiction.

The US Court of Appeals for the Seventh Circuit said the order is "fatally flawed" because it "fails to provide any relief whatsoever." The order places appellants under no obligations because it is not an injunction, thus depriving the appellate court of jurisdiction, the judges wrote.

Litigation funder Burford gave Sysco \$140 million to pursue price-fixing lawsuits against meat producers. Burford later sought to scuttle settlements in at least two of the suits, calling the dollar amounts too low.

Sysco later agreed to allow a Burford affiliate to take over the claims. Meat producers, however, have opposed efforts to substitute Burford, arguing that the funder lacks a direct connection to the litigation.

Judge Thomas Durkin of the Northern District of Illinois ruled in June that one of the settlements was enforceable, even though Sysco didn't sign it and later transferred its claims to Burford. Sysco agreed to the "heart" of the deal in email communications and draft documents, Durkin found.

The terms of the deal have not been made public. Burford declined to comment.

The case is: Carina Ventures LLC v. Pilgrim's Pride Corporation, 7th Cir., 24-2100, 8/14/24

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Air Force Says Supreme Court Gave It Right to Poison Drinking Water

 newrepublic.com/post/184799/air-force-supreme-court-chevron-arizona-water

August 12, 2024



Breaking News

from Washington and beyond

↑ Most Recent Post

Edith Olmsted/

August 12, 2024/2:40 p.m. ET

The EPA says Tucson's drinking water is contaminated, but the Air Force says it doesn't have to do anything thanks to the Chevron ruling.

Andrew Caballero-Reynolds/AFP/Getty Images

An Arizona Game and Fish Department volunteer checks water levels in a wildlife water catchment south of Tucson.

The U.S. Air Force is claiming that it cannot depollute drinking water that it contaminated with dangerous forever chemicals because the U.S. Supreme Court has stripped federal regulators of the authority to make it clean it up.

In June, the Supreme Court overturned the Chevron deference, a 40-year-old doctrine that required judges to defer to a federal agency when determining the meaning of any ambiguous laws that agency should try to enforce. The Air Force has claimed that without the Chevron deference, the Environmental Protection Agency cannot order it to address its own pollution, *The Guardian* reported Monday.

In Tucson, Arizona, several Air Force bases have been polluting the drinking water, contaminating it with trichloroethylene, a volatile organic compound produced in industrial work, and PFAS, or “forever chemicals,” which do not naturally break down. These chemicals can accumulate inside the human body and have been linked to a myriad of severe health problems.

In May, the Environmental Protection Agency ordered the Air Force and National Guard to develop a plan to address the pollution, which would cost them an estimated \$25 million—just 0.1 percent of the Air Force’s budget. The Air Force refused, stating that “the EPA’s order can not withstand review” and therefore it wouldn’t be beholden to it, according to *The Guardian*.

The Supreme Court overturned Chevron deference in the ruling for *Loper Bright Enterprises v. Raimondo*, leading many to fear that agencies such as the EPA would be stripped of their regulatory power. The court’s decision allows the federal judiciary to take on the role of scientists and policymakers, instead of administrative agencies that are staffed by experts on the issue at hand.

Former EPA officials and legal experts told *The Guardian* that the ruling would likely not apply in this case, because the new precedent only affects rule-making, not enforcement. To challenge the EPA’s regulatory order, the Air Force would need to sue the EPA, which it legally can’t do because one branch of government cannot sue another. A business, however, could challenge the order.

Deborah Ann Sivas, director of the Stanford University Environmental Law Clinic, told *The Guardian* that the Air Force seemed to be testing just how far it could push the new precedent, which has severely kneecapped regulators.

“It feels almost like an intimidation tactic, but it will be interesting to see if others take this approach and it bleeds over,” Sivas said.

Last year, a report from the Department of Defense found that at least 245 U.S. military bases had contaminated or threatened to contaminate nearby drinking water with PFAS. The Department of Defense is one of the biggest contributors to PFAS pollution in the country. Read more about the Chevron ruling:

Elena Kagan Torches Supreme Court for Overturning Chevron

↑ Most Recent Post

Hafiz Rashid/

August 12, 2024/2:19 p.m. ET

Bloomberg Law News 2024-08-15T13:14:27001033066-04:00

UnitedHealth 8th Cir. Billing Tactic Win Won't Be Reconsidered

By Jacklyn Wille 2024-08-15T07:40:53000-04:00

- Eighth Circuit rejected ERISA lawsuit on standing grounds
- Failure to receive contract benefits is injury, patients say

UnitedHealth Group Inc. patients challenging the insurer's controversial billing practice of reimbursing doctors through debt cancellation failed to secure reconsideration of an Eighth Circuit decision tossing their lawsuit on standing grounds.

The patients had [asked](#) the US Court of Appeals for the Eighth Circuit to rethink its July 8 [decision](#) rejecting their challenge to a United billing practice called cross-plan offsetting. The practice is explicitly authorized by the patients' health plan, the Eighth Circuit said in the decision, and the patients didn't allege that United breached a contractual term or otherwise injured them through its conduct.

The appeals court denied the petition in an [order](#) issued Wednesday. The order didn't include a written explanation for the decision.

Cross-plan offsetting is a common and lucrative insurance billing tactic that has invited litigation over its legality and [opposition](#) from the US Department of Labor. Under the practice, an insurer claws back money it says was overpaid to a medical provider on behalf of one patient by reducing future payments made to the provider in connection with a different patient covered by a different health plan.

The Eighth Circuit previously addressed the practice in 2019, [saying](#) that nothing in United's health plans "even comes close" to authorizing cross-plan offsetting, while suggesting it could violate the Employee Retirement Income Security Act. The insurer amended its health plans to authorize the practice in the wake of that ruling, according to the district court's recent [decision](#) in this case.

In its latest ruling, the Eighth Circuit said the patients hadn't shown that they'd been injured by the practice in a way that would give them standing to sue. The patients said they'd been harmed

because United's failure to fully pay their medical bills in cash meant they were vulnerable to collection actions from their doctors, but "speculation about the unfettered choices made by independent actors" isn't the type of injury that establishes standing to sue, according to the court.

O'Melveny & Myers LLP and Dorsey & Whitney LLP represent United. Berger Montague PC, Zuckerman Spaeder LLP, and Lockridge Grindal Nauen PLLP represent the patients.

The case is [Smith v. UnitedHealth Grp. Inc.](#) , 8th Cir., No. 23-2369, 8/14/24 .

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<https://www.law.com/litigationdaily/2024/08/14/litigators-of-the-past-week-tackling-a-4-7-billion-verdict-post-trial-for-the-nfl-in-sunday-ticket-antitrust-litigation/>



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[Q&A](#)

Litigators of the (Past) Week: Tackling a \$4.7 Billion Verdict Post-Trial for the NFL in 'Sunday Ticket' Antitrust Litigation

Beth Wilkinson, Brian Stekloff and Rakesh Kilaru of Wilkinson Stekloff and John Playforth of Covington & Burling secured a ruling from a federal judge in Los Angeles excluding the plaintiffs' experts and knocking out the jury's damages calculation.

August 14, 2024 at 07:30 AM



Ross Todd
Editor/columnist



Big wins are often sweeter when you come from behind.

Our Litigators of the Week are **Beth Wilkinson, Brian Stekloff** and **Rakesh Kilaru** of **Wilkinson Stekloff** and **John Playforth** of **Covington & Burling**. On Aug. 1, they secured a ruling from U.S. District Judge Philip Gutierrez in Los Angeles, [knocking out a \\$4.7 billion jury verdict](#) against the National Football League in antitrust litigation alleging the league conspired to inflate the price of DirecTV's "Sunday Ticket" package. The judge excluded the plaintiffs' experts and knocked out the jury's damages calculation.

Lit Daily: I have to ask this first: what was your immediate reaction to the jury's damages award?

Beth Wilkinson: I think our immediate reaction was shock. We had tried a great case using terrific witnesses from the NFL, the networks and the teams to convey the key facts and important themes. Our cross-examinations of plaintiffs' experts revealed the fundamental flaws in the case and our experts put the icing on the cake by explaining in common sense terms how plaintiffs' theories ignored the real world. Every day in court felt like a good day for us. Those feelings were reinforced by comments the judge made throughout the trial about the weaknesses in plaintiffs' case and the unreliability of their experts. He even went so far as to invite a Rule 50 motion on the *Daubert* issues before the jury began its deliberations. So to take a \$4.7 billion verdict after all that was hard to digest. But as soon as we heard the damages numbers—which bore no resemblance to anything in the record—we knew the fight wasn't over.

What went wrong for you at trial and what went right?

Brian Stekloff: As Beth said, we felt really good about our trial presentation. She, Rakesh and I handled all the witness examinations and we thought everyone who testified—including Commissioner Goodell, Jerry Jones, and other senior executives at the NFL, CBS, and Fox—reinforced our key themes that the NFL's broadcasting system works well for all NFL fans by making sure they can see all local games and the most popular games for free on broadcast television on Sunday afternoons while also providing them additional options at different price points to purchase even more games.

Unfortunately, we believe the jury ignored the court's instructions to assess the reasonableness of the broadcasting model and instead asked themselves if they wished the price of Sunday Ticket had been lower. It is not surprising their answer to that question was yes, even though that was not what they were supposed to decide. Fortunately, we had exposed the flaws in the plaintiffs' models through our cross-examinations of Dr. Rascher and Dr. Zona, and even the jury did not accept their unbelievable models. Persuading the jury to reject the models very likely helped us in ultimately prevailing on our Rule 50 motion for judgment notwithstanding the verdict with the court.

Who all is on the team and how did you divide the work—both at trial and in the motions work that resulted in the judgment for the NFL?

Wilkinson: We often tell our clients we believe in the theory of overwhelming force—particularly in massive cases like this one. At trial, we had a large team of rockstar lawyers, including our partner **Jeremy Barber** and many standout counsel and associates. If you look over the lifespan of this case, which has lasted for almost a decade, even more fantastic lawyers have been involved in the effort. And of course our team wasn't just our lawyers—it also included our all-star paralegals, legal support staff, IT department and legal interns, among others. It turned out that we needed every single one of the folks who worked on the case over the years. We served as lead counsel throughout the case, making the final call on everything, including briefing, depositions, exhibits, examinations and logistics and case strategy. And of course, we were lucky to have Covington alongside us the whole way.

John Playforth: The on-site Covington team focused on the legal aspects of the case during trial, including trial briefing, jury instructions and ensuring we had a Rule 50(a) motion that was ready to go when the presentation of evidence was complete. More generally, and especially as the case progressed to trial, the expert work and the legal briefing were two of the areas in which Covington and Wilkinson collaborated most closely, and those were the areas that ultimately proved decisive.

How did this matter come to you and your firms?

Wilkinson: I've joked that this matter is so old that it existed even before our law firm. The NFL actually reached out and hired me to serve as lead counsel when I was at **Paul Weiss**, months before Brian and I founded Wilkinson Stekloff. I had represented Major League Baseball in a similar case in which we were able to persuade the judge to exclude plaintiffs' key expert on damages. It took a lot longer here, but we essentially achieved the same result. I will always be grateful to **Jeff Pash** and the folks at the NFL for standing with us as we started the firm and grew over the last eight years. We knew they were counting on us and ultimately making good on that trust and delivering the win is the greatest accomplishment of our firm.

Playforth: Covington has defended the NFL against antitrust challenges for many years. I represented the League along with my partners **Gregg Levy** and **Derek Ludwin** in two earlier antitrust litigations against the League, including the *American Needle* case, and we have defended the NFL in the Sunday Ticket litigation since the first cases were filed in 2015.

How did your examinations of the plaintiffs' experts tee up your post-trial *Daubert* motions?

Rakesh Kilaru: It's safe to say we would not have won our post-trial motions without Beth and Brian's masterful cross-examinations of the experts. Many of the arguments that the judge ultimately credited were, in substance, arguments that our experts had included in their reports and that we ourselves had advanced in briefs filed before trial. But there is a big difference between reading words in a brief or transcripts of a deposition, on the one hand, and seeing how witnesses react live to probing questions from the best in the business, on the other. Beth and Brian spent tons of time planning out their crosses to underscore the ways in which the experts' conclusions were most clearly at odds not just with basic economic principles, but also common sense. They then adapted on the fly to react and exploit what the experts were

saying in response to Beth and Brian’s well-crafted questions, and how the experts were saying it. The crosses clearly underscored to Judge Gutierrez the problems with the experts, and the proof is in the pudding: most of the record citations in the post-trial opinion are to Beth and Brian’s cross-examinations. It doesn’t get much better than that.

The judge was convinced by your explanation of how the jurors reached their damages calculation and found that they hadn’t followed his jury instructions. How did you figure out how they reached their number?

Stekloff: Some folks have asked if our economists did some fancy calculations, but it was actually Rakesh who figured it out. He and I were walking back from the courthouse after the jury read its verdict. We knew that the jury had probably invented its own methodology based on the questions they asked during deliberations and the fact that they awarded damages down to the cent that didn’t match anything that they had heard during trial. Rakesh had been working closely with the experts and the numbers in the case, and by the time we arrived back at our hotel—which was just two blocks from the courthouse—he had figured out how the jury had illogically turned the discounts consumers received into damages.

The judge did find that even without the testimony of Dr. Rascher and Dr. Zona, there was evidence in the record to support the jury’s finding of an unreasonable restraint of trade. Does that raise any potential issues for the NFL? Is it something the league and the teams intend to appeal?

Stekloff: We have the utmost respect for Judge Gutierrez, but we don’t agree. We think the evidence at trial showed that the NFL’s broadcast system is a reasonable way to give fans many different options to watch NFL games, including a great number of games for \$0. But ultimately, the judge granted the NFL judgment as a matter of law, which is a complete win however you slice it. Exactly how any appeal unfolds will be resolved at a later date, but we’re confident in the judge’s ruling.

When the Supreme Court previously denied cert in this case after the Ninth Circuit revived it, Justice Kavanaugh wrote that “the plaintiffs here did not purchase a product from the NFL or any team, and may therefore be barred from bringing suit against the NFL and its teams under *Illinois Brick*.” Does something like that give your client reassurance to continue to fight these claims?

Kilaru: First and foremost, I think the NFL is going to continue to fight these claims because it believes its broadcast model is great for fans. As we showed at trial, the numbers back it up—NFL games are the most popular entertainment in our country because so many of them are available for free, including all local games for local fans. No other sports league comes close to offering what the NFL offers. But we certainly agree with Justice Kavanaugh’s comments, including his separate observation that antitrust law likely doesn’t require the NFL and teams to compete with each other regarding television rights, which are among the many additional reasons the NFL should win this case even beyond the clearly correct rationales Judge Gutierrez laid out in his opinion.

What will you remember most about achieving this result?

Wilkinson: Our clients’ willingness to fight the big fight. Most clients would not have the patience or the wherewithal to stay the course for 10 years. Ultimately it’s proof of that old saying: good things come to those who wait. We’ve been working on this case for a very long time, and despite great efforts from our team the whole way, we didn’t win much over the last several years. Then we got the biggest win of all at the very end. I’m very proud of our team’s persistence to keep up the fight even when the odds may have seemed longest. The win is all the sweeter because it came after so many years of excellent collaboration, and because it is clear that the result would not have happened but for the contributions of our in-house clients and every single team member at both firms who’s touched the case over the years.

NOT FOR REPRINT

Judge Pamela Parker seeks out intricacies of each family court case

DJ [dailyjournal.com/judicial_profiles/10633](https://www.dailyjournal.com/judicial_profiles/10633)

Free until Aug. 19, 2024

Aug. 13, 2024

San Diego County family law judge has noticed more kids claiming domestic violence by their parents.

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Pamela Mante Parker

San Diego County Superior Court

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SAN DIEGO - Like many new bench officers, Superior Court Judge Pamela M. Parker could have rotated out of family law after three years but decided not to.

"I felt like I finally was getting actually pretty good at it, and I thought, 'Why would I leave now that I feel like I'm comfortable with it and the attorneys are getting comfortable with me, and they know me better?'" she explained.

Now, after more than a decade in family court, Parker said she has seen it all. "You are amazed at the innumerable ways human beings devise to make each other miserable," she said. But she's also been "pleasantly surprised at the many ways that parents can overcome their conflicts to focus on what is in the best interest of their children."

In her current role in long cause family law, she handles evidentiary hearings and trials. "It's one of the reasons why I love this assignment so much, because you're dealing with real human problems, and I get to interact with them directly as the fact finder and no intermediary in the form of a jury," she said.

But there are obvious downsides.

"It can be incredibly emotionally draining. You can hear up to 20 cases a day if, for example, you're handling a domestic violence calendar and you have to make decisions like this," she said, snapping her fingers. "You've got 20 minutes to make a decision on those things."

Between 2020 and 2022, Parker did take a break from divorces, parentage and child custody disputes. "At some point it does get intense, and the risk of burnout is pretty high," she said.

The judge rotated five times between two courthouses during those years, handling limited civil and misdemeanor cases. She also became a branch supervisor for the Vista Courthouse and an assistant supervisor for the family law division in downtown San Diego. She returned to the Central Courthouse in April 2022 when one of the long cause family court departments opened.

"It's a very manageable, very sane one because it is one or two cases a week maybe," she said. "And trials can pile up. I mean, you finish one trial, you immediately start another. If you need to write a statement, a decision, those decisions can back up a little bit but that hasn't been too much of an issue."

"You do see the same types of issues crop up over and over again, and you do see the same laws implicated over and over again in case law and statutory law, but almost every case has its own twist," she said.

One small fact can change the trajectory of a case and influence her decision. "So, in some senses, rather than looking for patterns, I am looking for something that diverges from the pattern. I'm looking for the differences. I'm looking for the intricacy. I'm looking for the complexities, because otherwise it's going to be fairly straightforward, right?"

Parker is a former civil plaintiffs' litigator - most notably handling cases from the 1989 Exxon Valdez oil spill - and an attorney at the 4th District Court of Appeal. She has learned, she said, since Gov. Jerry Brown appointed her to the superior court in 2014 to keep a professional distance in domestic violence cases.

"You are an impartial factfinder, and you have to compartmentalize the emotion from the facts that you're being told, and you have to judge the credibility of that emotion," she said. "There have been times when I have made findings that what I was seeing on the stand was crocodile tears."

Some parties try hard to push her buttons. "I try to remember the rules I learned as a young judge: If you feel like you're losing patience, take a deep breath, take a break. You know, just stop the proceedings, take a break, let everybody cool down, including yourself," she said.

Recently, the judge said she has noticed an uptick in cases of young children bringing domestic violence claims against their parents. "I don't want to overstate this. I don't know if statistically that's an inaccurate statement that there is in fact an uptick. I'm just saying I've seen it more often, and it concerns me because I feel that there are less drastic routes to go to to protect a child than to put them through a domestic violence trial," she said.

"If the child brings it, that means the child is going to testify," she said. "I don't think any of us like to have children testifying, especially not in a custody case, to have a child say, 'I want to be with this parent.' No, we don't want that scenario. We want to be able to get that information through our family court services reports, through minors' counsel, or if the parties can get over their hearsay objections through other parties."

Lawyers who regularly appear before her say Parker is especially knowledgeable on the intricacies of family law.

"She runs a tight courtroom and gets to the nub of complex matters quickly. If she has any questions or doubts about a position taken by counsel or their client, she will not hesitate to indicate as much and inquire further," Timothy J. Miranda of Antonyan Miranda LLP wrote in an email.

John N. Griffith of Griffith Young & Lass agreed. "She has always come into each trial with comprehensive knowledge of the issues and the relevant law," Griffith wrote in an email. "She is fair and balanced in her treatment to each side of the case -- no matter what the issues. She is also very direct with the attorneys and often gives specific direction as to what she prefers that the attorneys focus on."

Giffith said he was especially impressed by the thoroughness of Parker's written decisions. "It is apparent to me that she takes time with each issue and addresses all of the evidence relevant to each issue in her rulings," he said. "She also addresses the arguments made by each counsel with profound skill and competency. It is rare that I would read a ruling issued by Judge Parker and be left with the impression that she missed something."

While she finds writing rulings at turns pleasurable and exasperating, Parker said she often returns to her initial conclusions after considering all possibilities. "Most of my decisions are about 20 pages long," the judge said. "At the end of the day, at the end of this long career, whenever it ends, I'll probably be remembered as the person who wrote really long statements of decisions... but very thorough ones and very detailed ones!"

Jillian K. Duggan-Herd of Cage & Miles described the judge as "no nonsense, but realistic as to the 'wild west' possibilities in family law, and especially family law evidentiary hearings and trials."

"During the often emotive and tense circumstances, she maintains her neutrality and standards," Duggan-Herd wrote in an email. "She controls the courtroom, those who are within its walls, and how trials are conducted in a way that works to streamline presentations, get to the heart of what matters, and temper drama. Her statements of decision are detailed and thoughtful, demonstrating how closely she is paying attention to every second of the trial."

Off the bench, the judge and her husband, a retired marine biologist, enjoy the outdoors and spending time with friends and family.

Here are some of Judge Parker's recent cases and the attorneys involved:

Manning v. Manning, 21FL009135C - divorce with child

For petitioner: Jillian Duggan-Herd, Cage & Miles

For respondent: John N. Griffith, Griffith Young & Lass; Tiffany K. Brown, Blanchard Krasner & French APC (on a previous matter)

Polit v. Lathrop, 19FL010503N - divorce

For petitioner: David S. Schulman, Julie A. Westerman, Moore Schulman Moore APC

For respondent: Brian M. Cook, Brian's Family Law

Phillips v. Phillips, 17FL011576N - divorce with child

For petitioner: Pierre A. Domercq, Burke & Domercq, APC

For respondent: Kyle J. Siems, Wilkinson & Finkbeiner LLP

Viva v. Osgood, D525982 - parentage

For petitioner: Vanessa C. Duisters, Duisters Law

For respondent: Daniel C. Herbert, Higgs Fletcher & Mack LLP

Snyder v. Mayer, 20FL003912C - divorce with child

For petitioner: David S. Schulman, Moore Schulman Moore

For respondent: Timothy J. Miranda, Antonyan Miranda LLP

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Aug. 14, 2024, 9:00 AM PDT

Professors Fold ESG Into Accounting Classes to Spark Interest

By Avani Kalra

- Enrollment for one course skyrocketed after ESG was introduced
- PwC, KPMG accountants say ESG should be taught in schools

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Professors Fold ESG Into Accounting Classes to Spark Interest

By Avani Kalra 2024-08-14T12:00:48000-04:00

- Enrollment for one course skyrocketed after ESG was introduced
- PwC, KPMG accountants say ESG should be taught in schools

Professors gathered at the American Accounting Association's annual meeting said merging environmental, social, and governance topics with accounting principles is helping them generate more interest in the classroom.

Melissa Larson and other university professors have been tasked with countering a shortage in recruiting new accountants amid a growing demand for audit services. The industry is exploring fixes like raising accountant pay and loosening academic requirements to bolster an industry that has endured a 17% drop in registered accountants since the pandemic.

"Students don't know what accounting is, and whatever they've heard is not good," Larson, who teaches introduction to accounting at Brigham Young University, said. "But we bring sustainability in, they're all of a sudden like 'Oh this is what I want to do.'"

At BYU, Larson said, implementing ESG into the accounting curriculum has significantly increased interest. Enrollment in her introductory class has jumped by 400 students this year, marking an increase of nearly 30%, and many of those students came from BYU's environmental science program, she said.

Some students have asked the university to create an accounting minor after taking her course, in which students choose a company and analyze its sustainability commitments. Other undergraduates have created an extracurricular club to examine companies' greenhouse gas emissions disclosures. Most students in the club are either accounting or environmental science majors, Larson added.

"They're starting some synergy between environmental science and accounting with the club," Larson said. "And that's all driven by the students."

Tracie Miller, a professor at Franklin University, said she has noticed a similar trend. Most students walk into their first accounting class without a sense of ESG, but almost immediately latch onto the concept, she said.

"Once you start talking about it, they're like 'Oh, that is important to me. I would be interested in what Pepsi does on this issue. What Marriott does,'" Miller said.

In her class, Miller presents students with fictitious ESG data sets for several imaginary hotel chains that she created along with Wendy Tietz, a professor of business administration at Kent State University. Having students answer questions about the data helps them understand the "alphabet soup" of acronyms associated with ESG before they delve into an existing report, Miller said.

"They're very socially oriented, and they care a lot about the environment," Miller said. "My sole goal is to get students excited about accounting, and I talk about sustainability because it shows students that accountants do something other than debits and credits."

Hiring Advantage

Melanie Glover, a director at PricewaterhouseCoopers LLP, said the firm's ESG work is expected to expand. That means familiarizing students with ESG as undergraduates could pose a hiring advantage, she said.

Accounting majors are crucial to the expanding practice area. Accounting processes, controls and the regulatory environment are harder to teach than sustainability, so recruiters often look for accounting students to fill ESG-related roles, she said.

"We hire a mix of accounting and non-accounting majors," Glover said. "We take people with different skills and push them together, helping them to score the other skills that they didn't have before."

Corinne Dougherty, a partner at KPMG International Limited LLP, said her firm does not hire undergraduates directly into the ESG sphere. That's because students are often unfamiliar with the concept, and need foundational experience in accounting before tackling a new and evolving area.

She said professors should teach their students about ESG so firms can ultimately move away from that pattern.

"Having that foundational understanding of greenhouse gas emissions and how we assure that information is great," Dougherty said, referring to the process by which accountants confirm the accuracy of financial statements. "Adding that learning onto foundational accounting and auditing principles could be so valuable."

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Aug. 14, 2024, 1:20 PM PDT; Updated: Aug. 14, 2024, 6:06 PM PDT

Missouri ESG Investing Curbs Struck Down in Federal Court (1)

By Andrew Ramonas

- Regulations were unlawful, US district judge says
- Wall Street trade group sued to toss rules in 2023

Bloomberg Law News 2024-08-15T10:02:40200325042-04:00

Missouri ESG Investing Curbs Struck Down in Federal Court (1)

By Andrew Ramonas 2024-08-14T16:20:00000-04:00

- Regulations were unlawful, US district judge says
- Wall Street trade group sued to toss rules in 2023

A federal judge barred Missouri from enforcing 2023 rules restricting environmental, social, and governance investing after finding them unlawful on Wednesday.

The regulations violated federal law giving the Securities and Exchange Commission the power to regulate investment firms, Judge Stephen R. Bough of the US District Court for the Western District of Missouri said in an order. The rules require firms to get written consent from their Missouri clients before using any "social objective or other nonfinancial objective" when investing.

The Securities Industry and Financial Markets Association sued Missouri Secretary of State Jay Ashcroft (R) last year to stop the rules, saying they were "burdensome state regulation that Congress prohibited." Ashcroft disputed the Wall Street trade group's claims, asking Bough to toss the case.

Brokers and investment advisers needed their customers' written permission to invest based on matters such as "socially responsible criteria," "social or environmental goals," and "corporate governance structures based on social characteristics," according to Missouri's regulations, which are under headings labeled, "Dishonest or Unethical Business Practices."

"The Rules are preempted by federal law and violate Plaintiff's constitutional rights," Bough said in his order. "This significant harm outweighs any interest Defendants may have in the Rules and enforcing them."

The decision was necessary to prevent Missouri from hindering communications between financial professionals and their customers in the state, SIFMA CEO Kenneth E. Bentsen Jr. said.

"This decision marks a major victory not only for our national securities market system, but also for our nation," Bentsen said in a statement. (Bloomberg Law is an affiliate of Bloomberg LP, which is an associate member of SIFMA.)

Ashcroft is considering appealing the ruling to the US Court of Appeals for the Eighth Circuit as he reviews his options, according to a spokesperson for the secretary of state.

"Today's decision was not just legally deficient but also morally wrong and puts Missouri investors at risk," Ashcroft said in a statement. "The secretary of state's office will neither abandon its statutory duty to regulate securities nor allow Missouri investors to be preyed upon by investment individuals that are afraid to be upfront and honest about their investment advice."

The case is Securities Industry and Financial Markets Association v. Ashcroft , W.D. Mo., No. 2:23-cv-04154, order filed 8/14/24 .

(Updates with comments from Ashcroft and spokesperson in eighth and ninth paragraphs)

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Editorial: FirstEnergy deal wrong

B [toledoblade.com/opinion/editorials/2024/08/15/editorial-firstenergy-deal-wrong-ohio-attorney-general-yost-justice-corporate/stories/20240815020](https://www.toledoblade.com/opinion/editorials/2024/08/15/editorial-firstenergy-deal-wrong-ohio-attorney-general-yost-justice-corporate/stories/20240815020)



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The Blade Editorial Board

Aug 14, 2024

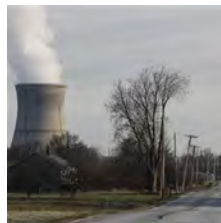
9:00 PM

Ohio Attorney General Dave Yost is following the U.S. Department of Justice down the path of coddling corporate crime. ("FirstEnergy to pay \$20M over scandal," Wednesday)

FirstEnergy will escape criminal liability for their corporate role in the \$61 million bribery scandal behind a \$1.3 billion bailout by Ohio government.

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Mr. Yost has agreed to wrap his civil and criminal investigations of FirstEnergy with a \$20 million fine, a requirement to cooperate with all investigations and prosecutions that stem from the scandal, and a review of political contributions by a compliance officer.



Jim Provance

FirstEnergy to pay \$20 million to avoid prosecution in scandal

Former FirstEnergy CEO Chuck Jones and Executive Vice President Michael Dowling face state felony charges for their role in corporate campaign contributions to a dark money political enterprise devoted to passing the bailout legislation.

The Justice Department settled with FirstEnergy for a \$230 million payment and cooperation agreement in the prosecution of former Ohio House Speaker Larry Householder and former Ohio Republican Party Chairman Matt Borges.

Householder and Borges were convicted, and both are now in federal prison for the scandal, but federal prosecutors have never charged FirstEnergy executives who authorized the corporate bribes.

FirstEnergy is also working on a \$100 million settlement with the Securities & Exchange Commission for investment law violations related to the bribery scheme.

Reports to the SEC on the Ohio settlement show AG Yost will get \$19,500,000 of the settlement while Summit County takes \$500,000. Ohio will subtract costs of the investigation and Mr. Yost will direct charitable contributions with the rest of the money.

Distributing the money to charities is a very bad precedent and too much power to give the Attorney General. The settlement should be treated like a fine and be sent to the state general fund. Connecting corporate crime and political philanthropy opens the door to the next Ohio government scandal.

The trend to turn corporate crime admissions into an expensive wrist slap is scandal enough. The Corporate Prosecution Registry shows 367 plea deals with the Department of Justice since 2020.

Crime costs are just another expense. The federal government has stopped holding anyone accountable for crime but corporate executives are held accountable for profit. Breaking the law has become a business strategy.

Mr. Yost's decision to follow the cynical path of the federal government is just another sign corruption rules at the Statehouse. The deal to wash dirty money through charities picked by a likely candidate for governor is something convicted former Speaker Householder would have concocted.

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US judge says 'monopolist' Google can't avoid app store reforms

 [reuters.com/legal/us-judge-says-monopolist-google-cant-avoid-app-store-reforms-2024-08-14](https://www.reuters.com/legal/us-judge-says-monopolist-google-cant-avoid-app-store-reforms-2024-08-14)

Mike Scarcella

The logo of Google is seen outside Google Bay View facilities during the Made by Google event in Mountain View, California, U.S. August 13, 2024. REUTERS/Manuel Orbezo/ File Photo Purchase Licensing Rights , opens new tab

U.S. District Judge James Donato in San Francisco heard from technology experts and lawyers for Epic and Google (GOOGL.O) , opens new tab about proposed reforms in the blockbuster antitrust case.

Donato showed impatience for Google's protests about the costs and difficulty of implementing many of Epic's proposals, and signaled he would issue a ruling that would maximize users' and developers' flexibility to download and distribute apps outside the Play store.

"You're going to end up paying something to make the world right after having been found to be a monopolist," Donato said.

He said his injunction will be about three pages long and will ensure Google knows what the "rules of the road are."

Donato said he will rule in the coming weeks and set up a three-person compliance and technical committee to implement and monitor the injunction.

"Google foreclosed competition for years and years and years. We're opening the gate now and letting competitors come in," Donato said.

Google and Epic declined to comment on the hearing.

Epic's lawsuit accused Google of monopolizing how consumers access apps on Android devices and how they pay for in-app transactions.

The Cary, North Carolina-based company persuaded a jury in December 2023 that Google unlawfully stifled competition through its controls over app distribution and payments.

Epic has asked Donato to require Google to make it easier for Android users to download apps from third-party app stores, such as Epic's, and from other internet sources. It also wants the court to forbid Google from automatically installing its Play store on Android devices.

Google has denied harming competition, and it told Donato that Epic's proposals "would make it nearly impossible" for the Alphabet unit to compete and harm consumer privacy and security.

Google lawyer Glenn Pomerantz told Donato on Wednesday that Google should not be forced to distribute its rivals' app stores. "Competition will be worse if you impose a duty that you have to deal with your competitor," Pomerantz said.

Epic's lawyer Gary Bornstein urged the court to direct Google to act quickly to implement his injunction.

Google faces another threat to its business practices in a separate government lawsuit in Washington, D.C. challenging the company's dominant search engine.

Last week, U.S. District Judge Amit Mehta ruled for the U.S. Justice Department and said Google had illegally monopolized web search, spending billions to become the internet's default search engine. Google has denied the claims.

Mehta has set a Sept. 6 hearing to discuss a timeline for the court to impose remedies on Google in that case.

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Reporting by Mike Scarcella Editing by David Bario and David Gregorio

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Aug. 14, 2024, 2:51 PM PDT

SEC Fines Firms \$393 Million in Latest WhatsApp Probe Cases (1)

By Ben Bain

Bloomberg Law News 2024-08-15T10:03:19503474741-04:00

SEC Fines Firms \$393 Million in Latest WhatsApp Probe Cases (1)

By Ben Bain2024-08-14T17:51:28912-04:00

Twenty-six financial firms agreed to pay about \$393 million in total fines after the US Securities and Exchange Commission said they failed to keep their employees' electronic communications, the latest fallout from the regulator's so-called WhatsApp investigations.

The SEC said that Ameriprise Financial Inc., Edward D. Jones & Co., LPL Financial Holdings Inc., Raymond James Financial Inc. will pay \$50 million each to settle cases with the agency. A Royal Bank of Canada unit will pay \$45 million, while parts of Toronto-Dominion Bank, Truist Financial Corp. and Bank of New York Mellon Corp. were also among those agreeing to penalties, the SEC said.

"As today's enforcement actions against more than two dozen firms reflect, we remain committed to ensuring compliance with the books and records requirements of the federal securities laws, which are essential to investor protection and well-functioning markets," **Gurbir Grewal**, director of the SEC's enforcement division, said in a statement on Wednesday.



Gurbir Grewal

Photographer: Mark Kauzlarich/Bloomberg

The fines add to the billions that big banks previously agreed to pay the SEC and the US Commodity Futures Trading Commission to settle similar investigations into use of messages on personal phones and WhatsApp. Financial firms are required to monitor and save communications involving their business to head off potential misconduct.

In its announcement, the SEC said the firms agreeing to pay penalties admitted to breaking record-keeping rules. The agency said its probes “uncovered pervasive and longstanding use of unapproved communication methods.” The CFTC also announced settlements with a few of the firms on Wednesday.

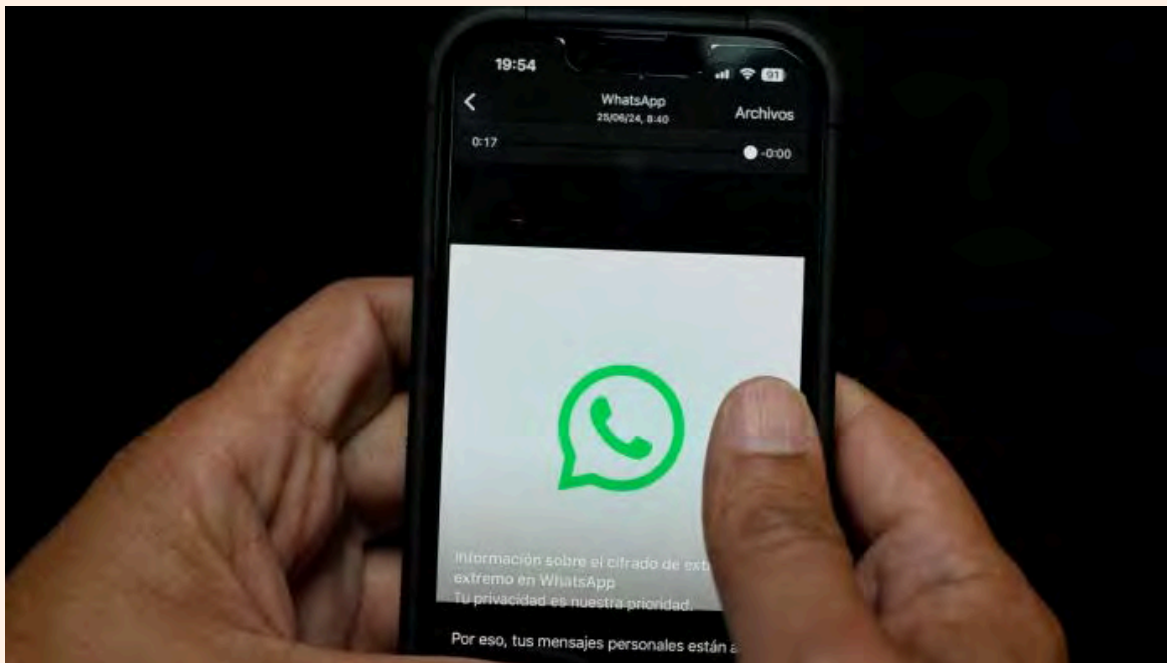
LPL said in a statement that it cooperated with the SEC’s probe and had taken corrective actions. RBC said it is focused on meeting regulatory requirements and “continuing to enhance our compliance protocols.” Edward Jones said it took the matter seriously, made changes and “will continue to make enhancements to our policies, procedures and practices.”

BNY said it takes its “regulatory responsibilities seriously and is pleased to have resolved this matter.” Representatives for Truist, TD and Ameriprise didn’t immediately respond to requests for comment. Raymond James declined to comment.

(Updates with statements from firms in the final two paragraphs.)

US financial regulation**Dozens of financial groups to pay nearly \$400mn in SEC texting probe**

Companies that self-reported violations are facing smaller fines than those which did not disclose the conduct



US securities regulators have been targeting firms that used private messaging platforms such as WhatsApp to circumvent monitored communications systems © AFP via Getty Images

Will Schmitt in New York 2 HOURS AGO



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Twenty-six Wall Street companies have agreed to pay \$393mn to the Securities and Exchange Commission to settle the latest round of charges over employee texting and messaging on platforms such as WhatsApp about business matters.

Ameriprise, Edward Jones, LPL Financial and Raymond James are among the financial groups settling with the [SEC](#), with each of those four paying \$50mn in penalties, the regulator announced on Wednesday. The fines range as high as \$50mn a company and as low as \$400,000, the regulator said, noting that the groups which self-reported violations will pay “significantly lower” penalties than they otherwise would have.

The fines underscore how far the agency's probe has expanded from its initial target of big investment banks to broker-dealers and investment advisers. Industry advocates protested the inquiry's expanding parameters, saying the SEC was overstepping its bounds because the [record-keeping rules](#) are slightly different for money managers.

Gurbir Grewal, who heads the SEC's enforcement division, said: "We remain committed to ensuring compliance with the books and records requirements of the federal securities laws, which are essential to investor protection and well-functioning markets."

Other fines include \$45mn for RBC Capital Markets, \$40mn for BNY Mellon and Pershing, and \$30mn for TD Securities and two affiliates, the SEC said.

The regulator's orders repeatedly say investigators found "pervasive off-channel communications at various seniority levels" of the groups agreeing to settlements. In the case of Piper Sandler, which agreed to pay a \$14mn penalty to the SEC, a department head sent "numerous" messages in 2021 with at least 20 colleagues and at least nine "external contacts in the securities industry" relating to brokerage business matters, the SEC said.

Broker-dealers and advisers are required to preserve certain employee communications relating to business matters to ensure compliance with securities laws, namely anti-fraud measures and standards of financial responsibility, the SEC noted. The regulator said the rules are necessary to protect investors, and that failure to comply can undermine investigations.

The settlements and fines reflect the latest fallout from the SEC's sprawling industry-wide probe since JPMorgan Chase agreed to pay \$200mn to the SEC and Commodity Futures Trading Commission in late 2021. The SEC has levied roughly \$2bn in financial penalties against dozens of companies through record-keeping investigations since late 2021.

"We are strongly concerned that the [SEC](#) is attempting to exceed its authority under the Advisers Act and engaging in rulemaking by enforcement through its current sweep regarding off-channel communications," the Investment Company Institute, which represents the interests of US asset managers, said in a previous letter to the SEC.

Wall Street firms to pay over \$470 million to settle with US regulators over texting

 [reuters.com/business/finance/wall-street-firms-pay-over-470-mln-settle-with-us-regulators-over-texting-2024-08-14](https://www.reuters.com/business/finance/wall-street-firms-pay-over-470-mln-settle-with-us-regulators-over-texting-2024-08-14)

Reuters

Street signs for Broad St. and Wall St. are seen outside of the New York Stock Exchange (NYSE) in New York, U.S., February 22, 2019. REUTERS/Brendan McDermid/File Photo
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Aug 14 (Reuters) - Another group of broker-dealer and investment advisers have agreed to pay over \$470 million to U.S. regulators to settle civil charges they violated recordkeeping rules, the U.S. Securities and Exchange Commission and Commodity Futures Trading Commission said in statements on Wednesday.

Toronto-Dominion Bank's TD Securities, BNY and Truist were among the Wall Street firms that settled charges they violated regulators' rules requiring broker-dealers and investment advisers to maintain records of work-related communications, the SEC and CFTC said.

Representatives for most firms did not respond immediately to requests for comment. A spokesperson for BNY said the firm takes its regulatory responsibilities seriously, while TD said it was investing in technology and improving its electronic communications policies. RBC said it would continue to enhance its compliance protocols.

The penalties mark the latest wave of a sweeping multi-year enforcement initiative targeting Wall Street's use of so-called "off channel" work communications such as text and WhatsApp messages in breach of rules which require firms to retain certain work-related communications.

Below is a full list of the firms and the penalties they agreed to pay.

Ameriprise Financial Services, LLC: \$50 million penalty to the SEC

Edward D. Jones & Co., L.P.: \$50 million penalty to the SEC

LPL Financial LLC: \$50 million penalty to the SEC

Raymond James & Associates, Inc.: \$50 million penalty to the SEC

RBC Capital Markets, LLC: \$45 million penalty to the SEC

BNY Mellon Securities Corporation, Pershing LLC: \$40 million penalty to the SEC

TD Securities (USA) LLC, TD Private Client Wealth LLC and Epoch Investment Partners, Inc: \$30 million penalty to the SEC, \$75 million to the CFTC

Osaic Services, Inc., Osaic Wealth, Inc.: \$18 million penalty to the SEC

Cowen and Company, LLC, Cowen Investment Management LLC: \$16.5 million penalty to the SEC, \$3 million to the CFTC

Piper Sandler & Co.: \$14 million penalty to the SEC

First Trust Portfolios L.P.: \$8 million penalty to the SEC

Apex Clearing Corporation: \$6 million penalty to the SEC

Truist Securities, Inc., Truist Investment Services, Inc. and Truist Advisory Services, Inc: \$5.5 million penalty to the SEC, \$3 million to CFTC

Cetera Advisor Networks LLC, Cetera Investment Services LLC: \$4.5 million penalty to the SEC

Great Point Capital, LLC: \$2 million penalty to the SEC

Hilltop Securities Inc.: to pay a \$1.6 million penalty to the SEC

P. Schoenfeld Asset Management LP: \$1.25 million penalty to the SEC

Haitong International Securities (USA) Inc.: \$400,000 penalty to the SEC

Stablecoins Can Have Bank Runs

Published: Thu Aug 15 14:27:39 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

Programming note: *Money Stuff* will be off next week, back on August 26.

Stablecoin capital

One thing that I say frequently around here is that crypto keeps learning the lessons of traditional finance at high speed. This is fun to watch. For one thing, sometimes it re-learns those lessons through funny catastrophes. But also, it has a tendency to learn those lessons in very clear, simplified, schematic ways. Crypto is a nice *teaching* tool. If you want to understand, like, credit crises, you can examine the causes and processes of the 2008 global financial crisis, but those are messy and complicated. Or you can examine the causes and processes of the 2022 crypto financial crisis, which are relatively contained and straightforward and funny, and everyone involved was like tweeting and giving YouTube interviews in real time. Many of the intuitions from the crypto crisis are useful in understanding real crises, but the presentation is simpler, funnier and more public. “Crypto,” I once wrote, “is what you get when you take the smart ambitious interns at traditional financial firms and put them in charge of their own play market.” That makes it educational.

A stablecoin is a crypto thing that is sort of an abstract form of a bank. You go to the stablecoin issuer and deposit \$1, and you get a receipt back — the stablecoin — that says “this is \$1.” And then you can *use* that stablecoin, in crypto contexts — on a blockchain, on a crypto exchange — as a dollar. It *trades*; you can take your \$1 of stablecoin and buy \$1 worth of Bitcoin, and then the person who sold you the Bitcoin will own your stablecoin. Meanwhile the stablecoin issuer has your \$1, and invests it, and tries to earn a profit, and the profit pays for its operating expenses and executive salaries and so forth. And you (or whoever holds the stablecoin) can, generally, hand the stablecoin in to the issuer and get your dollar *back* on relatively short notice,¹ and then the stablecoin issuer has to come up with the dollar.

This is all roughly speaking like a deposit at a bank, though there are differences.² And if you know about banks you will know some ways this can go wrong. Two famous ones are:

1. The bank/stablecoin issuer has your money. It gets to invest the money, and it gets to keep the profits.³ The more profits it generates from its depositors’ money, the more it keeps. On the

other hand, if it *loses* all the money, the depositors bear most of the losses: Most of the issuer's money belongs to the depositors, so if it loses it there's no more money to make it up to them. So the issuer has incentives to take risk: If the risks pay out, it makes a lot of money; if they don't, somebody else loses a lot of money.

2. There can be a "run on the bank." The stablecoin issuer might invest all your money in very safe things, but some of those things are long-term investments, and if *everyone* demands their money back *today*, the issuer might not be able to get it. It might have to dump those long-term investments at a loss, and then it won't have enough money to pay everyone back. And because this dynamic is well-known, it is self-reinforcing: If you think there might be a run on the bank, you should get your money out *first* (before the issuer runs out), and if everyone tries that then there *will* be a run on the bank.

These two problems are usually related — a common *reason* for a run on the bank is that the bank has made some bad investing decisions with the depositors' money — but they don't have to be. Banks can lose a ton of money on bad investments without anyone noticing, going bust before anyone has time for a run. And there can be runs that are *not* triggered by investment losses but are caused solely by the liquidity mismatch between the bank's demand liabilities and its illiquid assets.

And in banking there are some fairly standard solutions. The investing problem is addressed by (1) prudential supervision, where regulators keep an eye on the investments that banks make and try not to let them make bad ones, and (2) capital regulation, where banks are required to keep a decent chunk of extra money so that, if their investments *do* lose money, the bank has some non-depositor money to absorb the losses. The run problem is addressed by (1) liquidity regulation, where banks are required to keep *cash* around to pay out depositors who want it, (2) the "lender of last resort," where if a bank has good illiquid assets and everyone wants their money back at once, the Federal Reserve will lend the bank the money, knowing that it will eventually be good for it, and (3) deposit insurance, where the government says "if your bank does fail we'll give you your deposits back (up to some limit), so don't do a run on the bank."

And in stablecoins there are, roughly speaking, none of those things? There are various proposals for various subsets of them. But we have talked about Tether, the biggest stablecoin issuer, which got in trouble in 2019 for taking absolutely wild risks with customer money, and whose *published accounts* once said that it had a capital ratio of 0.2% (it got better). Or we have talked about TerraUSD, a stablecoin whose investment policy was more or less "tons of highly correlated magic beans,"⁴ and which got vaporized in a run in 2022.

What *would* good regulatory solutions for stablecoins look like? "Deposit insurance and access to the Federal Reserve discount window" would be a funny ask, and as I type that I realize it will probably happen within the first year of the next Trump administration. "Stablecoin issuers should invest the

money in pretty safe stuff, the stuff should be pretty liquid, and they should have some of their own capital so that even if the stuff goes down there's still enough money to pay out depositors" is the more straightforward answer, and then you have to figure out the details.

Here's a fascinating new paper by Gordon Liao, Dan Fishman and Jeremy Fox-Green, who work for stablecoin issuer Circle Internet Financial, about "Risk-based Capital for Stable Value Tokens." Obviously Circle has an interest in generous stablecoin regulation, but the paper makes some good points about how stablecoins relate to banking. One is that stablecoins are in many ways more *transparent* than banks. This is arguably good, particularly if you are a crypto enthusiast who distrusts the opacity of traditional finance. But that opacity is there for a reason. Liao, Fishman and Fox-Green write:

First, tokenization increases the likelihood of coordinated run risk on stable value claims holding all else the same. This is because tokenization enables the ability to *transfer* and *trade* the underlying values without the full control of the token issuer. Trading generates a secondary market price, which provides an observable signal, rendering the issuer more susceptible to runs. Transfers also can be observed if the ledger is public. The revelation of information through observable public signals can cause "overreaction" in financial markets and encourage market participants to coordinate a run in global games (Morris & Shin, 2001). That is, if token holders observe large secondary market price declines or large redemption volumes, they might also sell or redeem the token without regard to the fundamentals of the asset backing, as their belief in the stability of the tokens depends on the belief of others. ...

In traditional banking, the main reason to do a bank run is if you think everyone else is going to run on the bank. How can you tell? Oh, you know. Rumors. Bad earnings announcements. Panicked television appearances. The bank's *stock* could go down, which might be a sign that something's wrong with the deposits. But it is an imprecise science. But stablecoins trade publicly, and their price tells you directly how confident people are in them. If a stablecoin trades at \$1.0002 there is probably not currently a run, but if it trades at \$0.85 there probably is.

The solution is mostly that stablecoin issuers should keep most of their money pretty liquid:

This heightened likelihood for coordinated runs requires a differentiated approach to managing financial risks relative to traditional banks. For instance, fiat-backed stablecoins typically hold highly liquid assets, with minimum maturity mismatch and relatively little credit exposure compared to banks precisely because of the heightened risk of runs. As such, a stablecoin's capital buffers for financial loss absorbency is also less than those of banks given the resilience of the pool of assets that is segregated for the benefit of token holders. For tokenized deposits with traditional loans and fractional reserve backings,

tokenization likely raises the run risk for the reasons discussed above, and therefore the capital needed for tokenized deposit is likely more than that of traditional deposits even if the asset backings for the two forms of deposits are the same. By their very nature, tokenized deposits import the inherent asset-liability mismatch in a bank's balance sheet, and as such they may also require the application of similar capital and solvency regimes.

And then there's the "blockchain blockchain blockchain" aspect of stablecoins:

Second, aside from financial risks, tokenization and the use of distributed ledgers also introduces additional risk considerations with technology, infrastructure and operations. These non-financial risks have been highlighted in regulatory public consultations and proposals. Additionally, the adoption of advanced cryptography, permanent record keeping, and traceable transactions can also reduce certain security and compliance risks. The challenges with assessing capital on these risks, broadly termed "operational risks" in the traditional banking terminology, are that there is both a lack of sufficient historical data on operational losses and considerable dependency on the technology choices. In a context with rapidly evolving and constantly upgrading infrastructure, technological choices on the part of the issuer likely has a sizable impact on the loss absorbency capital that might be needed.

That is, it is plausible to imagine that stablecoin issuers would be *less* likely than traditional banks to just lose track of your money, because they are blockchain-based and transparent and traceable and digitally native in ways that banks aren't. Or it is plausible to imagine that they'd be *more* likely to lose track of the money, for roughly the same reasons.

There was a bit of a banking crisis in the US last year, which caused me to spend some time thinking about banking. I once wrote:

Banking is a way for people collectively to make long-term, risky bets without noticing them, a way to pool risks so that everyone is safer and better-off. You and I put our money in the bank because it is "money in the bank," it is very safe, and we can use it tomorrow to pay rent or buy a sandwich. And then the bank goes around making 30-year fixed-rate mortgage loans: Homeowners could never borrow money from *me* for 30 years, because I might need the money for a sandwich tomorrow, but they can borrow from *us collectively* because the bank has diversified that liquidity risk among lots of depositors. Or the bank makes small-business loans to businesses that might go bankrupt: Those businesses could never borrow from *me*, because I need the money and don't want to take the risk of losing it, but they can borrow from *us collectively* because the bank has diversified that credit risk among lots of depositors and also lots of borrowers.

The opacity of traditional banking gives it more ability to take risks with customers' money. And part of the explanation of last year's regional bank crisis might be that this opacity doesn't work as well as it used to: More information is available online, rumors and panics can spread electronically and globally, and people have more of a mark-to-market set of expectations. "Game's the same, just got more fierce," a Federal Deposit Insurance Corp. regulator said last year.

The traditional magic of banking is that a bank could make a bunch of risky investments, pool them together, and issue senior claims against them that just *were dollars*: A dollar in a bank account *is a dollar*, even though it is backed by a pulsing mass of risky assets. A stablecoin dispenses with that magic: A US dollar stablecoin is *close enough to a dollar* for most crypto purposes, but it trades at some price, which might be \$1.0002 or \$0.9998 if things are good or, you know, \$0.85 if they're not. It is banking without the guarantee that a dollar in the bank is worth a dollar, and with 24/7 real-time markets telling you how close it is to a dollar. It creates novel regulatory issues. It also might tell you something about the future of regular banking in the future.

Risk management

Another thing that I like to say around here is that, in the financial industry, losing a billion dollars can be good for your career. If you have lost a billion dollars at a job, that means (1) you were skilled and important enough to be trusted with a billion dollars, (2) you were doing something bold with the money, and (3) you have probably — maybe? — learned some valuable lessons about how *not* to lose a billion dollars next time. On a long enough timeline, perhaps, every trader will have a catastrophic loss, and you're a more attractive candidate once you've gotten yours out of the way.

Similarly, if you are a senior risk manager and you come into an interview for a new job and they are like "tell me about a crisis you have handled" and you say "I have never handled a crisis, the point of my job is to avoid crises, I have an unblemished record of not letting things develop into crises," I mean, abstractly that's a pretty good answer, but you can see why people might be skeptical. What if you've just been lucky so far, and developed a lot of blind spots?

Whereas if you come into that interview and they say "tell me about a crisis" and you say "well I did Enron," that's kind of cool? Kind of exciting? Lots of learnings there. Eventually everyone has a crisis, and one thing they want in a risk manager is someone who has dealt with crises. Perhaps dealing with crises makes you better at dealing with crises; perhaps it also makes you better at avoiding them. There is something a bit off about this logic — if you are a risk manager, should you try to cause crises, to have stuff to talk about in future interviews? — but it has a real appeal. We are all fallible humans, and you don't necessarily want to position yourself as the *most* fallible human, but a little failure is a plus. A big failure is somehow a bigger plus.

Anyway here's this:

Lara Warner, the former Credit Suisse risk and compliance chief who departed in the wake of twin crises at Greensill Capital and Archegos Capital Management, has joined regulatory advisory group The Starling Trust.

Washington-based Starling announced on Wednesday that the Australian executive would join its industry and regulatory advisory board.

"Lara knows better than most how — and why — our current risk governance toolset is failing the industry," founder and chief executive Stephen Scott said in a statement. "Who better to help craft a new approach that's fit for purpose?"

"Knows better than most how our current risk governance toolset is failing the industry" is really good spin.

LMEs

We talked on Tuesday about the complex of things referred to as "liability management exercises," "creditor-on-creditor violence" and (my favorite) "capital solutions." In simple terms, the idea is that there is a company (often owned by private equity funds), it has too much debt, it needs to extend its debt and/or borrow new money, and it gets the money by finding some creative way to put the new lenders ahead of the old lenders in the line to be paid back. This generally *shouldn't* work — the old lenders generally *thought* that they had signed a credit agreement saying "you have to pay us back before everybody else, and you can't borrow new money and put it ahead of us" — but it repeatedly *does*, because lenders and sponsors find creative new loopholes in the financing documents that allow them to put new lenders ahead of old ones.

One debate here is about how to characterize the "violence." I quoted a Bloomberg News story quoting Diameter Capital:

The name has become something of a misnomer, Diameter wrote in its second-quarter update, referring to creditor-on-creditor violence. "It should really be thought of as sponsor-on-creditor violence, with select creditors being offered a choice between being killed or doing something about it."

That is, one way to think about it is that credit funds are taking money from each other by doing aggressive "capital solutions" trades, but another way to think about it is that private equity sponsors are taking money from their creditors by doing aggressive "liability management exercises." (Those two terms refer, roughly, to who initiates the trade: A hedge fund might have a capital solutions

business that calls up companies and says “hey would you like to stiff your other creditors to borrow more money from us,” while a company’s advisers might have a liability management team that calls up creditors and says “hey would you like to lend us more money if we stiff our other creditors?”) In the sponsor-on-creditor terminology, the credit funds don’t *want* to go around killing each other, but their borrowers leave them no choice.

But a reader emailed to say:

Not creditor on creditor, not sponsor on creditor. In most aggressive LMEs, the company ends up filing. Thus the attorneys get paid for the LME, and get paid for the eventual bankruptcy. It is attorney on creditor violence.

There is probably something to that? The creative creditors who lend new money in a liability management exercise in exchange for more seniority in the capital structure get some *expected* value for themselves: They move up in seniority, they get promised better terms in exchange for lending new money. But that value is generally at *risk*, and if the company ends up filing for bankruptcy anyway, the favored creditors could still lose a lot of money. (They probably do better than the disfavored creditors who got “killed” in the LME, though maybe not if they put in too much new money.)

Meanwhile the creative *advisers* — bankers and lawyers — who help the company, the sponsors and the creditors do the liability management exercise get paid in cash, when the LME happens, and if the company later goes bankrupt they’re just fine. Broadly speaking these exercises extract money *in expectation* from some creditors, give some of it *in expectation* to other creditors and to the company, and give some of it *in cash* to the lawyers. Sometimes none of the expectations work out and only the lawyers do well.

The other point here is of course that the lawyers are the ones who wrote the original credit documents, the ones that later lawyers pore over to find loopholes to allow aggressive liability management transactions. If you write porous credit agreements, that sets you up for lucrative liability management exercises, which can set you up for a lucrative bankruptcy.

Cell phones

Imagine how embarrassing it would be to be a bank or broker-dealer and *not* pay the US Securities and Exchange Commission a few million dollars in fines because some of your employees texted about work on their personal cell phones. At this point most of the big banks and brokerages have paid those fines, more are in the works, and yesterday the SEC got around to Raymond James & Associates and Truist Securities and Piper Sandler & Co. and Cetera Advisor Networks LLC and P. Schoenfeld Asset Management LP and a bunch of others, with fines ranging from \$400,000 to \$50

million. At this point if you haven't paid an SEC fine for cell phones, what does it say about you? I suppose the three possibilities are:

1. The SEC just doesn't think you're important enough to bother with;
2. Your employees are not committed enough to the job to discuss work on their personal phones;
or
3. You have such a strong culture of compliance that, even when they just want to communicate "running late to the meeting but in a cab now," your employees make sure to use only approved channels of communication, and they *always did*, even before the SEC decided that texting about work is illegal.

The third choice is simply not very plausible! I assert that, before the SEC decided that texting about work on your personal phone was illegal, there were zero banks and brokerages that had *no* employees who *ever* did that. I'd be surprised if there are any now, but at least now it is a big compliance focus. Before it was not. But everyone keeps getting fined for doing it before. (Yesterday's cases mostly say that each broker's "personnel sent and received off-channel communications that related to its ... business" starting "from at least" summer 2019, more than two years before the SEC started fining firms for doing that.)

Anyway three of yesterday's firms "self-reported their violations" and I suppose there's a long line of small brokers calling up the SEC to say "hey we use WhatsApp too, you should fine us."

Starbucks

We talked yesterday about my rough model of succession at Starbucks Corp., which is that Starbucks's board of directors decided, quite coolly and dispassionately, that (1) they wanted the best possible chief executive officer and (2) they didn't have him. So they got rid of their CEO and hired Brian Nicoll, the CEO of Chipotle Mexican Grill Inc., who they think is the best. ("In the industry, he's probably the most successful CEO right now," said the chairwoman of Starbucks's board.) I suggested that:

1. This was pretty good corporate governance: The board of directors, rather than being deferential to the CEO, took a hard look at him, decided he wasn't right for the job, and moved quickly and independently to replace him.
2. *But*, if you want the *best* CEO, you sort of have to give up on good governance: The *best* CEO is going to be in high demand, and so he will ask for a lot to come work for you, and the things he asks for will all have the form "I want the board to be pretty deferential to me." Who would want to come work at Starbucks only to be 86'ed like the previous guy?

You have good governance so that the board can get rid of underperforming CEOs, but sometimes

you have to spend down your good governance to get a high-performing CEO.

I was making that point in part about the fact that Niccol, unlike the previous CEO, will also be chairman of Starbucks's board of directors, a sign that he will have more power relative to the board. But there's other stuff too. Bloomberg's headlines include "Starbucks' \$113 Million Deal Puts Niccol Among Top-Paid CEOs" — though that story adds that "after the announcement, shares in Starbucks soared by 25%, the most ever, and added \$21.4 billion to the market capitalization," so \$113 million is a bargain — and "Starbucks CEO Allowed to Work 1,000 Miles From Headquarters," in Newport Beach rather than Seattle, though he "agreed to commute to the coffee chain's base and travel as needed to do his job." Starbucks moved a bit more toward having an imperial CEO, because that's the price of getting the CEO it really wanted.

Astrology

Sorry sorry but last week I made a random joke about big hedge funds probably not having astrology strategies, and then on Tuesday I updated that joke with reader feedback that was mostly *not* "I run an astrology strategy at a big hedge fund" but rather "well here's a way that that *could* make sense, maybe." Fine, fine. But yesterday I got an email from a fintech founder saying this (lightly edited):

I did once get told off by the CFPB for using astrological sign to predict consumer creditworthiness. (They said it was age discrimination but didn't end up deciding that was their strongest argument.)

You'd think making loans to fair-minded Libras makes a ton of sense, but if part of your business model is being the first paid back by someone whose debts exceed their ability to pay, Libras are actually not that good a bet. So, make loans to Libras whose credit is good (and will pay back when they can), but don't make loans to distressed Libras (who will spread their losses around rather than picking winners/hopefully you and losers/hopefully someone else). Astrological sign on its own was not significant, but in interaction with number of outstanding credit lines, statistically significant.

This was a machine learning model — the job of the data scientist was, put everything in, see what's significant, of that discard everything that's discriminatory, the rest is your model. Ultimately with twelve astrological signs it's over 50/50 that one will come out significant at 95%.

I thought it was elegant. "Astrological signs? Do you believe that?" my boss said. I said it wasn't a question of belief, I was a statistician and was going to follow the numbers rather than letting anyone's preexisting theories about the stars and planets influence the data science. I think he believed that meant I'd agreed to take it out.

Yes, that is the defense of astrology that I was looking for, perfect. Although it suggests that ... astrology is real? Libras are fair-minded in a financially relevant way? This time there are two relevant xkcds.

Elsewhere, here is a 2018 Bloomberg Businessweek article about Henry Weingarten, an astrology-based investment manager, so there you go. And here is an extremely fun 2000 article by George Mannes about an astrologer at the New York Society of Securities Analysts:

Probably one of the first lessons they learn is that to be a psychic investor, you don't need a firm grip on life's little details. The 36-year-old Goodwin, dressed in Armani glasses, a maroon shirt and a peach-colored tie, spends a lot of time in his allotted hour looking among his papers for overhead transparencies he can't find. At least he has a sense of humor about the obvious irony here. Rummaging for a Compaq chart he pulled off of Yahoo!, he chants, "I am searching for Compaq. I am searching for Compaq. Come to me, oh magic slide."

If I were the astrology analyst at a hedge fund I would *definitely* ham it up like that, crystal balls, robes, "will the stars tell me where I left my car keys," the whole business.

Things happen

Gamblers Are Dumping Stocks to Bet on Sports, New Study Says. Pension Funds, Creditors Vie Over Proceeds From Yellow Bankruptcy. Walmart Lifts Full-Year Outlook on Bargain-Hunting Shoppers. Why Falling Mortgage Rates Aren't a Quick Fix for Frustrated Homebuyers. Eric Schmidt Walks Back Claim Google Is Behind on AI Because of Remote Work. Klarna Takes on JPMorgan, BofA With Foray Into Bank Accounts. Soros, Druckenmiller Pared Megacap Holdings Ahead of Rout. Oslo struggles to solve 'mystery' of Norwegian krone's decline. Record Heat Is Testing Kraft Heinz's Efforts to Climate-Proof Its Ketchup. Crypto Hacks Double to \$1.6 Billion as Prices Jump, Report Shows. Why Has QuantumScape Moved to Seize the Home of Its Former Chief Strategy Officer? "The [Nord Stream pipeline sabotage] was born out of a night of heavy boozing and the iron determination of a handful of people who had the guts to risk their lives for their country." The Most Important Room in a Restaurant These Days Is the Bathroom.

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1. Many stablecoins have more of an authorized-participant system, where certain institutional partners can ask for their dollar back on short notice but random retail holders can't — they have to sell the stablecoin at the market price to someone who can. This is in large part for customer-relationship reasons: You can ask for your money back from the bank because you have an **account** with the bank, but in the general case that won't be true for a stablecoin; you can buy the stablecoin on the blockchain without ever communicating with the issuer.
2. Many bank deposits pay interest, while many stablecoins don't, is a big one. Also the point in the previous footnote about not having to have a customer relationship with the stablecoin issuer is a really big one, particularly from an anti-money-laundering/know-your-customer perspective. A stablecoin is among other things “a dollar-denominated bank deposit that doesn't require you to interact with the US dollar banking system.”
3. Again, a bank will probably pay interest to depositors out of its interest revenue, while a stablecoin issuer probably won't, but either way the bank/issuer won't **directly share** its interest revenue: It will pay some fixed costs (including its interest cost) and keep whatever it earns above them.
4. This is very abstract. TerraUSD was an algorithmic stablecoin and didn't invest in anything; you could get a TerraUSD by handing in \$1 worth of another token called Luna, and TerraUSD's issuer didn't keep or invest your money. But this is abstractly **like** the issuer getting your \$1 and investing it all in Luna, which went roughly to zero and zapped TerraUSD too. Actually the issuer was making enough money — by selling Luna for real money, etc. — that it was diversifying its reserves into dollars, gold, Bitcoin, etc., to **improve** its investment policy and make it better capitalized, but it didn't get there fast enough. “The basic structure of the trade is (1) Ponzi, (2) acceptance, (3) diversification, (4) permanence,” I once wrote, but Terra ran out of time.

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Matt Levine's Money Stuff: JAB Is an Expensive Family Office

By Matt Levine

Opinion

Bloomberg Law News 2024-08-15T10:06:19106125001-04:00

Matt Levine's Money Stuff: JAB Is an Expensive Family Office

By Matt Levine 2024-08-14T14:42:20602-04:00

Where are the Reimanns' yachts?

Let's say you're rich. Like really quite rich, billions of dollars, money that you inherited because your great-great-great-grandfather founded a big chemicals business. You will never need to work, and don't. But there is the question of how you should invest your money. Your choices include, in roughly ascending order of fanciness:

1. Box of cash under the bed. This is honestly very cool, but probably not feasible in the modern economy.
- 2. Go to the Vanguard website, open an account, go to some low-cost index funds, click the "buy" button, type "\$1,000,000,000" into the "amount" box, spend 20 minutes on this, get yourself a nice mix of stock and bond funds, never check the website again, and occasionally withdraw 0.1% of your money to buy a house.
- 3. Walk into your local Merrill Lynch office, find a financial adviser and pay her a fee for managing your money. She'll put you into a lot of index funds, probably, but also some racier stuff. "Ah you are an accredited investor," she'll tell you; "can I interest you in a private credit fund?" There is a range of fanciness here, and at your level of wealth you will probably be assigned to a very fancy private wealth adviser who can give you the raciest investments, the best tax and estate advice, help buying yachts, etc. But basically you are outsourcing your wealth management to someone who works for the bank and who has other clients.
- 4. Set up a *family office*, where you hire full-time professionals to run your money for you. They work only for you, not for a bank, and they evaluate investments independently and come up with their own ideas. Also they were probably not trained as wealth managers but rather as *investors*; probably they worked at hedge funds or private equity firms before coming to work for you. And you pay them like investors, not with some annual fee but with a large salary and bonus and a stake in the upside of your investments.

Which will get you the best performance? Well! There is pretty robust evidence that index investing is good and cheap. On the other hand, those professionals that you'd hire to run your family office, they are probably also pretty good. You hired them from fancy investment firms. They can make investments that are suited to your risk appetite, they can hedge against risks and try to get you good performance in all markets, they can buy stuff — whole companies! hot tech startups! over-the-counter derivatives! — that you can't get on the Vanguard website. With that broad range of opportunities, and their specialized skills, maybe they will outperform for you.

Which will be the most *fun*? I mean! We talked a few months ago about people who *pretend* to work at family offices, because family offices are cool and get you into a lot of parties and also a lot of deals. But you have billions of dollars, in this hypothetical, and you can have a *real* family office. This will get you into parties, and lucrative deals, but more generally it will allow you act on the world in specific ways that suit your tastes. Elon Musk is a rich guy who enjoyed using Twitter so he decided to *buy Twitter*, with mixed results, but he would have had a hard time doing that if he did all his investing through the Vanguard website. But he has a family office with professional managers and the ability to hire outside advisers and get outside financing, so he could tell his money manager “hey buy Twitter” and it happened. You could do that! Not Twitter — that's expensive, not something that regular billionaires could buy — but, I don't know, do you like Pret A Manger? You could probably buy Pret A Manger? That's something.

Here is a hilarious Bloomberg News article about JAB Holding Co., which is roughly speaking the family office of the Reimann family, heirs to the Benckiser chemical fortune. (Roughly but not quite: “JAB evolved into a company resembling less a family office — with an ultra-long-term vision and the mundane goal of wealth preservation — and more an ambitious investment firm,” and has money from some other wealthy families.) The thesis of the article is that JAB has not been all that lucrative for the Reimanns, but it has been exceptionally lucrative for its managers:

If the Reimanns, the reclusive family behind JAB, had instead invested in a low-cost fund tracking that index, they would be worth more than \$50 billion, richer than the dynasties behind Hyatt Hotels, Anheuser-Busch InBev and Ferrero chocolates, according to data compiled by Bloomberg. Instead, JAB's mixed track record means they're worth about half that.

But JAB's consumer gambits have proven highly lucrative for [Peter] Harf, 78, who has advised the family for 43 years, and [Olivier] Goudet, 59, who was chief executive officer of JAB until last year. They're each worth more than \$1 billion, partly thanks to payouts and stakes in scores of JAB investments they accumulated over the years, according to the Bloomberg Billionaires Index. It's a rare example of executives who've made 10-figure fortunes by managing another family's riches.

Yes, and they had fun along the way:

They paid a 78% premium for K-cup maker Keurig, now part of Keurig Dr Pepper Inc. They bought Starbucks muse Peet's Coffee and merged it with 271-year-old Dutch beverage group Jacobs Douwe Egberts. And they branched into coffee on-the-go with a series of fast-casual restaurants, buying Krispy Kreme, Panera Bread and Pret A Manger. ...

"I'm not afraid of taking risks," he said in an interview for a 2011 Harvard Business School profile, describing his investing approach. "I'm not afraid of losing. I'm not afraid of buying something." ...

In the span of 12 years, it bought enough companies to make it a major global player in the coffee industry. It also bought donut maker Krispy Kreme and, through Coty, dozens of beauty labels. It even delved into veterinary clinics and pet insurance, investing \$2.8 billion last year in its pet insurance division alone. Today, it has more than \$50 billion in managed capital. ...

JAB's buying spree attracted both praise and skepticism.

"I'm sure there's some towering strategic logic," then-PepsiCo Inc. CEO Indra Nooyi said in a 2018 earnings call commenting on the merger of Dr Pepper Snapple Group with Keurig Green Mountain, a JAB coffee company. "But we are still searching for it."

Six years on, JAB's investors are searching too. Not only has it failed to usurp Nestle but its proclaimed strength — consumer — has become its weak spot. Last year, the company returned 3% compared to 17% for the equal-weighted MSCI World Index, which it uses as its benchmark.

Also now it's getting into insurance. (I mean, further into insurance, beyond the pet insurance.)

Man, I don't know. You go to a party and people ask you what you do with your billions of dollars and you say "oh I own Krispy Kreme and am a major global player in the coffee industry, and our business is so good that it has made the guys who manage my money billionaires": That's cool. *Making those guys billionaires is itself impressive*. You say "oh I own diversified index funds and the guys who manage my money make one basis point": Ehh fine whatever.

At the highest levels, it is can be hard to distinguish investment from consumption. Owning a sports team, or a Leonardo, is clearly both. Having a family office that makes its employees billionaires and owns "dozens of beauty labels" is *less obviously* both, but it is also both. If I had \$25 billion and you offered me the choice of (1) index funds or (2) this whole thing, with the underperformance and the billionaire managers and the pet insurance and the coffee empire, I would *unhesitatingly* take this whole thing. This is a better story! If you have \$25 billion you don't *need* a few extra basis points of performance. You need to have some coherent, or entertainingly incoherent, story of what you're up to with your money.

I do not have \$25 billion, though. If you do and would like me to manage your family office for you, I cannot promise good financial results, but I think I can promise that (1) we'll have fun and (2) you'll pay me a billion dollars.

Starbucks

There are two ways to think about the management of a public company. One is: There is a board of directors, which is in charge of the company. The board hires a chief executive officer to run the company from day to day, and then monitors her performance. If the performance is unsatisfactory, the board fires the CEO and hires someone else.

The other is: There is a CEO, who is in charge of the company. There is also a board of directors to help and advise her, but it is stocked with the CEO's friends and very deferential to her wishes. If she wants to do an acquisition or sell the company or pay herself \$50 million, the board is like "sure, for you, anything." If she has a long run of underperformance, the board is like "well, it's not like anybody else could do any better, we still believe in you, here, have \$50 million."

The first model is in some technical sense *correct*; as a legal and theoretical matter, the board is responsible for the company and can hire and fire the CEO. The second model is often a more useful practical guide to how companies actually operate. Not always. The second model is most clearly true where the CEO is also the founder and biggest shareholder of the company: Nobody expects Tesla Inc.'s board to fire Elon Musk, whatever he gets up to, and Meta Platforms Inc.'s board basically *can't* fire Mark Zuckerberg.

More generally, the second model tends to be more useful where the CEO is in some sense a star, is in high demand, has her own source of power and connection to the company, and has had a lot of success. Jamie Dimon is not the founder or largest shareholder of JPMorgan Chase & Co., but, you know. The board meetings at JPMorgan do not start with the directors in executive session pondering the question of whether Dimon is still the right person for the job. It is not really an aspersion on the governance of JPMorgan to say that Jamie Dimon is in charge of the company. He's good at it!

A very crude way to analyze the difference is that, if the CEO is also the chair of the board, that suggests that she is in charge and that the board will be deferential to her. And if the CEO is *not* the board chair, that suggests that the board has power independent of her, that the board is in charge and will feel free to monitor or fire her. This is quite crude — the corporate formalities and titles don't necessarily map the social reality; Elon Musk is not the chairman of Tesla's board — but it's one useful indicator.

There is a normal process where companies mostly start in the first model — the first CEO is the founder and biggest shareholder, she picked the board herself, the directors are all there to support her vision — and then mature and transform into the second model: The founder-CEO steps back but stays on as board chair, the board picks a professional outside manager, the board becomes the center of power and the hired outside CEOs answer to the board. But companies can go the other way. You could have a string of hired outside managers who all work at the board's pleasure, and then you get a really good one, and she lasts a long time and has a lot of success, and on her fifth anniversary as CEO she says "you know what I'd really like is to be the chairman of the board too," and the board says "well we owe that to you, here you go," and by her 10th anniversary no one can imagine the company without her.

Here is a Wall Street Journal story about the succession at Starbucks Corp., which this week announced that its CEO, Laxman Narasimhan, will be leaving, to be replaced by Chipotle CEO Brian Niccol. One thing that is striking in the story is how coolly and independently the board evaluated, and turned on, Narasimhan:

The company's board, once firmly in Narasimhan's camp, quietly discussed finding a possible replacement while he remained in charge.

Starbucks board Chairwoman Mellody Hobson said in an interview that the board had been thinking about the company's trajectory for some time. The board didn't have a special connection to Niccol, but focused on him as the best candidate to potentially replace Narasimhan. The board set its sights on trying to directly woo him to Starbucks, rather than using a recruiter.

Starbucks's board managed the entire recruitment process itself, tapping just a few outside advisers to get it done, Hobson said. ...

"We had the opportunity to get Brian Niccol," Hobson said. "In the industry, he's probably the most successful CEO right now."

The board looked at the company and decided that it needed the best available CEO, and that that was not its current CEO. So it called the best available CEO and hired him, then got rid of the current guy. In some ways that is a model of good corporate governance.

On the other hand:

To lure Niccol away from Chipotle, where he had turned around the company's sales and was paid handsomely for it, Starbucks offered him both the CEO and board chair positions. Niccol has held both roles at Chipotle.

Well that makes sense too! They had a sort of replacement-level CEO, and he was not the board chair, and they weren't happy with him. They wanted the best CEO. But the best CEO is the *sort of* CEO who will be the center of power at the company, and he wants to be the board chair. And if you're sure he's the right guy, you should be willing to bet everything on him. And that means giving him more control over the company than the other guy had.

Now, one thing that is unusual about Starbucks is that it already has a founder-CEO type in Howard Schultz. My Bloomberg Opinion colleague Beth Kowitt writes:

Starbucks has a problem for any incoming CEO. And that problem is named Howard Schultz.

As Starbucks' longtime CEO who became synonymous with the company he all but founded, Schultz can't seem to let go. He's twice boomeranged back into the top job when the company hit turbulence. And since he departed from the board a year ago, he has become a meddler — criticizing his successor Laxman Narasimhan and the board in a LinkedIn post and on a podcast, even though he handpicked Narasimhan, trained him and set an aggressive growth plan on his way out the door. ...

Schultz seems to have orchestrated his latest official departure from company leadership to make it impossible for Starbucks to disentangle itself from his grasp. He is the company's largest individual shareholder and has negotiated to be chairman emeritus for life.

There are *three* potential centers of power at Starbucks: the board, the CEO, and Howard Schultz. So if Starbucks wants a new star CEO, it is all the more important to give him a lot of power, to counterbalance not just the board but the former star CEO.

BofA

We talked the other day about a dilemma facing some junior investment bankers at Bank of America Corp. The bank's official policy, communicated by the human resources department and endorsed by senior executives, is that there should be some limits on how many hours they work, and they should report their hours so that HR can enforce those limits. But the actual bankers assigning them work want the work done by tomorrow morning, so it looks like another all-nighter tonight. I wrote:

If you are a junior banker, whom do you listen to? The vice president sitting next to you and giving you assignments and demanding that they be done by morning, or the human resources officer sending you memos forbidding you from working all night? There is an obvious answer.

The obvious answer is "the VP, because you sit next to her and she has much more influence over your life than HR does," but that answer is only obvious in the cultural context of investment banking. You could imagine a company where, if the VP tells you to work all night, you just report her to HR, HR unceremoniously fires her, and *you* get promoted to VP. Banks are not like that.

Still, if you are the CEO of a bank and you *actually want* your junior employees to work reasonable hours, you probably can make that happen. Send them all an email saying "hi, this is the CEO, it's really me, I am writing this email, if your VP tells you to work all night, or to fudge your hours so that HR doesn't know how much you're working, you email me and I will fire your VP myself." The question "who has the power, the midlevel line bankers or HR?" does not have an a priori answer; if you want the answer to change, you can make that happen.

The Wall Street Journal follows up:

Bank of America is urging young bankers to accurately report the hours they work after an investigation by The Wall Street Journal found bankers are often pressured to ignore rules meant to prevent dangerous overwork.

Several junior investment bankers were told by their managers Monday to alert superiors or the human-resources department if they are being pressured to misreport hours. They were also told that the mandate to do so comes from the highest levels of the company.

Managers, meanwhile, discussed the topic in a regularly scheduled meeting Monday that included global corporate and investment bank head Matthew Koder and representatives from human resources, people in the bank said. ...

A spokeswoman for the Bank of America said in a statement its practices are clear and all employees and managers are expected to follow them. "When we've become aware they aren't being followed disciplinary action has been taken," she said.

That might work! If you say "please report your hours accurately so you don't work too hard," people will likely ignore that, but if you add "we really mean this and the mandate comes from the highest levels of the company," they might not.

Forum shopping

The way the US legal system works is that, if you're looking to get a particular result in a lawsuit, the most important thing is to pick the right judge. Roughly speaking — not legal advice, not entirely accurate, but a good rough guide — the way it works is:

1. There is a lot of flexibility on *where* you can file a federal lawsuit, so if you're a big company or suing a big company, you can pretty much pick any district in America and bring your lawsuit there.
- 2. Some places, particularly in Texas, have very few judges, so if you sue in those places you pretty much know what judge you're going to get.
- 3. Some places — often in Texas — have one very *right-wing* judge, so if you're looking to get a right-wing result you go and pick that judge.

This is called “forum shopping,” or more generally I guess it is called “ legal realism.” Elon Musk does a certain amount of it; NPR's Bobby Allyn reported last week:

Billionaire Elon Musk seems to have found a new favorite federal judge: Reed O'Connor in Fort Worth, Texas.

Musk's social media company X has filed two major lawsuits against groups he sees as antagonists, and O'Connor is presiding over both of them, even though none of the parties is based in Texas.

So far, O'Connor has delivered stunningly pro-Musk decisions, which have gained widespread attention.

Right, I mean, in some sense this is unfair, but that's the system's fault, not Musk's. He gets to choose where to bring the lawsuits, and it would be somewhat silly of him to bring them in an *unfriendly* court. If you get to pick the judge, pick the one who is stunningly pro-you!

On the other hand, O'Connor is just *slightly* too pro-Musk. The Verge reports:

A Texas judge who was assigned two cases involving Elon Musk's X platform has recused himself from one of them, shortly after a report that he owns stock in Tesla.

US District Court Judge Reed O'Connor was assigned to X's recent antitrust lawsuit against advertisers over their boycott of the service, as well as a separate case against Media Matters, which the company sued for a report showing that X displayed ads from major brands next to pro-Nazi content. On Tuesday, O'Connor filed a notice to the court clerk recusing himself from the antitrust lawsuit. He still appears to be assigned to the Media Matters case as of Tuesday afternoon.

The recusal came just a few days after NPR reported on O'Connor's Tesla stock holdings, which, according to a financial disclosure, fall between \$15,001 and \$50,000. Musk, of course, is Tesla's CEO.

Ahahahaha oops. My Bloomberg Opinion colleague Noah Feldman writes:

The Code of Judicial Conduct says judges may not preside over cases that would affect a company in which they own shares. Because X and Tesla are legally separate entities, O'Connor perhaps initially believed that this rule did not apply here.

But there is another, broader rule in the same judicial ethics code. That rule says that a judge "shall disqualify himself" if his "impartiality might reasonably be questioned." The basic idea is that a judge should recuse himself if a reasonable person in possession of the relevant facts would believe that the judge has reason for bias. And there is good reason to think that this rule covers O'Connor.

What a bummer for Musk. The job is to choose a judge who (1) will be biased in your favor but (2) won't *seem* biased in your favor under judicial ethics rules.

NIL

Traditionally there were two main ways to monetize a career as a college athlete:

1. Be really, really good at a big-money sport (basketball, football, etc.), graduate, and play your sport professionally for millions of dollars a year; or
- 2. Play a sport at an Ivy League college, graduate, and work in investment banking and then private equity, industries that really like Ivy League athletes.

If you were a high school senior and really, really good at basketball, the financially savvy move was probably to go to a college with a big-time basketball program, to maximize your chances of making the NBA. If you were a high school senior and *pretty* good at basketball, the financially savvy move was probably to go to Harvard, to maximize your chances of making KKR. There was some blurring at the boundaries — you *can* make the NBA from Harvard, and Duke is good at both basketball and investment banking — but the point was that the Ivy League could provide some financial advantages that Kentucky couldn't, though Kentucky could provide some financial advantages that the Ivy League couldn't.

But then the rules changed to allow college athletes to profit from their "name, image and likeness," so now if you are at a big-time sports school you can get paid a lot of money *in college*, whether or not you graduate into professional sports. And so the calculation is not, like, "5% chance of the NBA and 50% chance of private equity at Harvard versus 20% chance of the NBA and 20% chance of private equity at UConn," but rather "5%/50% at Harvard versus 20%/20% *plus a million dollars upfront* at UConn." And so at the margin Harvard will be losing some recruits to better sports schools:

Basketball players at the University of Pennsylvania tend to spend their summers interning for top-tier finance firms, clerking for judges or working in medical research labs. But after his freshman season at Penn, Tyler Perkins chose somewhere very different.

He went to Villanova, sacrificing his chance to earn a coveted Ivy League degree in favor of transferring to a different school to continue his basketball career.

"To get an internship at Goldman Sachs and stuff like that, that's amazing," Perkins said. "But I'm a basketball player, so I just wanted to do what was best for me."

Perkins isn't alone. The Ivy League has shed a load of talent over the past few months, with at least five of the conference's best players leaving their esteemed schools to take advantage of loosened transfer rules, better facilities and potential endorsement deals at more decorated basketball programs. None of them went to another Ivy. ...

There's no doubt players are aware of the money that's out there. [Former Harvard, now Stanford player Chisom] Okpara said the possibilities of big paydays has become a topic of conversation among Ivy athletes.

"I will say, once I entered the [transfer] portal and heard the opportunities available for NIL," Okpara said, "I was like, 'Wow. This is a serious matter.'"

Princeton athletic director John Mack offers this:

"The lifetime value of a Princeton education will trump any NIL deal that student-athletes are going to be offered," Mack said. "We want our student-athletes to have those opportunities, but what we don't want is for them to turn down the opportunity to change their life in a long-term way just for the short-term benefit of getting paid to go somewhere else."

But I guess it depends on your discount rate? Anyway the article is mostly about basketball and I assume that the math for lacrosse is different.

Things happen

Mars to Purchase Snack Maker Kellanova in \$36 Billion Deal. JPMorgan reshuffle erodes power base of top deputy to Jamie Dimon. Elliott to Launch Proxy Fight at Southwest Airlines. U.S. Said to Consider a Breakup of Google to Address Search Monopoly. BOE Says Key Market Rate Is Working Fine After 70-Day Freeze. How hedge funds are fighting back against the SEC's 'aggressive' agenda. Elon Musk's xAI launches Grok-2 in race to catch ChatGPT. Why AI Risks Are Keeping Board Members Up at Night. The Dramatic Turnaround in Millennials' Finances. Companies Prepare to Fight Quantum Hackers. Disney wants NYU doctor allergy death suit tossed because of widower's Disney+ subscription.

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- 1. I mean, he had a hard time anyway.

- 2. "Important people like to deal with important people. Are you one?" If your employees are billionaires, you sure are!
- 3. Well, it can, but as the controlling shareholder he could fire them right back and put himself back in.
- 4. Because he's not allowed to be, lol.
- 5. Another thing about this situation is that there are two activists pushing for changes, Elliott Investment Management and Starboard Value, though by most accounts they did not have much to do with the CEO change.
- 6. I'm ignoring athletic scholarships, which broadly speaking big-time sports schools offer and the Ivy League does not, because Ivy League financial aid often makes this a closer question.

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Accountancy**BDO sinks to bottom of US audit quality league table**

PCAOB boss says deficiency rates remain 'unacceptable' across largest accounting firms



The PCAOB said 86 per cent of inspected audits at BDO were found to be deficient © Bloomberg

Stephen Foley in New York 4 HOURS AGO



There are still “unacceptable” numbers of flaws in the work carried out by the largest US audit firms, the industry’s regulator said on Thursday, after its inspections showed a surging rate of deficiencies at mid-tier firms BDO and Grant Thornton in particular.

Among the Big Four, the deficiency rate — which leapt higher after the pandemic — stabilised in 2023, the Public Company Accounting Oversight Board said.

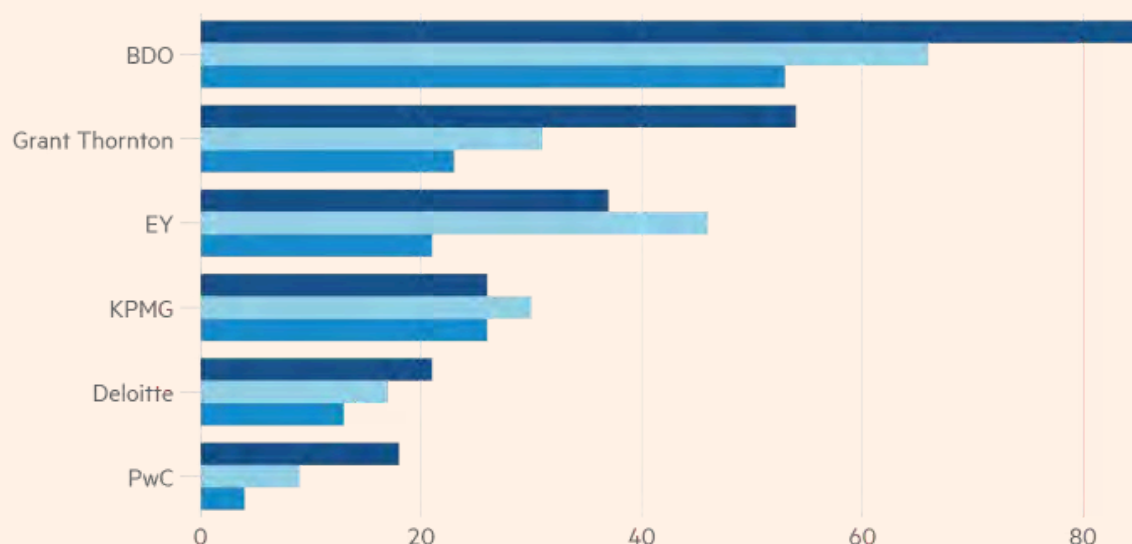
At BDO, 86 per cent of audits inspected by the PCAOB were found to be deficient, meaning that the firm had failed to collect enough evidence to support at least part of its audit conclusion. At Grant Thornton, a little over half of audits inspected contained flaws.

“These inspection results point to some small signs of movement in the right direction,” said PCAOB chair Erica Williams. “Still, overall deficiency rates are unacceptable, and firms must do better. Now is the time to double down on efforts to improve and deliver the audit quality investors deserve.”

Inspectors find more flaws in audits by BDO and Grant Thornton

Deficiency rate (%)

2023 2022 2021



Source: Public Company Accounting Oversight Board

EY, which had the highest deficiency rate among the Big Four for the second year in a row, last year said it would roll out new technology and restructure its audit business to [try to improve](#) its results.

BDO said last month that it would bring additional outsiders on to a board monitoring its own efforts to [improve quality](#).

“Over the past two years, we have made numerous investments to strengthen the quality of our audits,” BDO said on Thursday, adding that it had centralised control of audit standards and “reimagined” staff training.

Grant Thornton said it was committed to enhancing quality procedures.

The PCAOB has the power to inspect the audit of any company listed in the US and conducted checks of 287 audits carried out by the six largest US firms last year.

On Thursday, it also published reports on another eight smaller firms with more than 100 US-listed clients, and presented an overview of other inspections yet to be finalised. In all, it inspected audits by more than 200 accounting firms last year, finding deficiencies in 46 per cent of audits, up from 40 per cent in 2022.

In a report on its inspection findings, the PCAOB said: “While there is no single reason for the aggregate increase in deficiencies, it’s clear the Covid pandemic influenced audit quality. Broadly speaking, audit firms with strong quality control systems and centralised structures and processes in place before the start of the pandemic seem to have had a better chance of weathering the crisis and more quickly righting their ships.”

The agency said actions such as requiring staff to come to the office for part of the week and increasing training for younger staff have helped, “but more needs to be done”.

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Big Four Firms Hold Steady on Audit Quality as Second-Tier Lags

By Nicola M. White and Amanda Iacone 2024-08-15T13:45:49000-04:00

- Deloitte, PwC see slight drop in quality with EY, KPMG improving
- Regulator flags flaws in KPMG's bank industry audits

Top US accounting firms largely held steady on their regulatory compliance rates in 2023, snapping a two-year trend of rising audit rule violations, their latest inspection results show.

The rate of flawed audits improved at [Ernst & Young LLP](#) and [KPMG LLP](#) with slightly more problems reported among audits inspected at [Deloitte LLP](#) and [PwC LLP](#), according to reports the Public Company Accounting Oversight Board released on Thursday.

Second-tier firms did not fare as well. [BDO USA P.C.](#) continued to struggle with US audit standards compliance when vetting corporate accounting, trailing its competitors with 86% of its inspected audits missing the mark. At [Grant Thornton LLP](#), inspectors found problems with more than half the audits they analyzed.

Violations across the Big Four firms stayed the same [as year before](#), with 26% of inspected audits failing to meet standards. The rate of flawed audits across all six firms rose to 40% on average, with the audit watchdog noting that “[outlier](#)” [results](#) from BDO and Grant Thornton contributed to the increase in deficiencies.

Inspections are the board's primary tool to oversee the work of auditors—probing how they approach core work like testing revenues and assessing management's accounting judgments. The latest results reflect inspections conducted last year that largely scrutinized work on 2022 financial statement audits, a period of fast-rising interest rates that eventually led to a series of bank collapses.

A handful of banks failed without warning from their auditor beforehand. In response, the audit board pledged to scrutinize audits of regional banks as part of [2023 inspections](#) and for its reviews conducted [this year](#).

PCAOB Chair Erica Williams called the inspection results “small signs of movement in the right direction.”

“Still, overall deficiency rates are unacceptable, and firms must do better,” Williams said in a statement. “Now is the time to double down on efforts to improve and deliver the audit quality investors deserve.”

Appointed in 2021, Williams has pledged to hold auditors to a higher bar through the board’s more aggressive enforcement, an overhauled rulebook, and routine checks that press firms on maintaining core standards. The board received a 10% [funding boost](#) for 2024 to hire more inspectors.

Firm Details

While KPMG LLP’s overall deficiency rate of 23% improved compared to the year before, the audit regulator called out flaws specific to the firm’s banking clients.

KPMG issued clean audit opinions for [three banks](#)—Silicon Valley Bank, Signature Bank, and First Republic Bank—just weeks before they failed in 2023. The bank turmoil sparked investor lawsuits and [congressional scrutiny](#) of KPMG’s relationships with the lenders.

The PCAOB does not name the companies whose audits are inspected but breaks down the audits by industry. The regulator found problems in eight out of 12 of KPMG’s financial firm audits, including issues with testing the valuation of investment securities and credit losses. It also found deficiencies in one audit related to the disclosure of deposit liabilities and in another audit for evaluating the ability of a firm to stay afloat, also known as continuing as a going concern.

The firm didn’t immediately respond to a request for comment. In a letter to the PCAOB included in the firm’s report, KPMG Chair Paul Knopp said the inspections “provide valuable insights and are important inputs in our continuous improvement process.”

BDO Quality Woes Worsen

[BDO](#) continued its streak of lagging behind its competitors with a violation rate that increased compared to last year's report, which found flaws with two-thirds of audits the regulator inspected.

"We are dedicated to continuous improvement and fully support and are responsive to the PCAOB's inspection process and its mission to protect investors and further the public interest in the preparation of informative, accurate, and independent audit reports," BDO said in a statement.

The firm in June [forecast](#) its weaker inspection findings, cautioning that improvements already underway wouldn't quickly reverse its struggles.

More than half of the firm's audits inspected since 2020 have failed to meet standards. BDO trimmed its audit client list and launched other [reforms](#) meant to repair a track record that consistently lags its peers.

Almost 40% of EY's audits fell short of meeting basic standards but the firm's 37% deficiency rate marked an improvement compared to last year, when the PCAOB reported that almost half of all audits inspected contained flaws. The firm's 2023 results "reflects the initial actions we took to transform our audits and strengthen quality," EY said in a statement.

Grant Thornton posted a 54% deficiency rate, a fall from last year's results, when the regulator reported almost a third of its audits missed the mark. The firm is "dedicated to enhancing our quality-related initiatives. This includes consistent and meaningful investments in technology and innovation," it said in a statement. .

Inspectors found fault with [21% of Deloitte's](#) audits compared to 17% the year before. The firm has "a relentless focus on professional excellence and continuous improvement," it said in a statement.

PwC, also known as PricewaterhouseCoopers, again led its competitors with the strongest results of the six global network firms. Inspectors found violations in 18% of reviewed audits compared to 9% the year before. "While we are proud to lead our profession based on our record of audit quality over the past few years, we are continuously seeking to improve and take meaningful actions to further enhance our culture of quality, transparency, integrity and independence," the firm said.

Marcum LLP, which intends to [merge](#) its audit practice with the assurance arm of CBIZ Inc., failed to meet standards in 81% of inspected audits compared to 56% the year before, the PCAOB also said

ThursdayThe firm agreed to [\\$13 million](#) in combined penalties last year for botched audits of blank-check companies, known as special purpose acquisition companies or SPACs.

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Del. Justices Affirm \$266M Atty Fee Award In Dell Class Suit

By **Lauren Berg**

Law360 (August 14, 2024, 8:36 PM EDT) -- Delaware's Supreme Court on Wednesday backed a Chancery Court decision awarding an almost record-breaking \$266.7 million fee for stockholder attorneys who settled a class action against Dell Technologies Inc. for \$1 billion, saying the Chancery "did not exceed its discretion in setting the fee percentage."

The state's highest court, in a 38-page **opinion**, affirmed Vice Chancellor J. Travis Laster's decision in July 2023 to **award the fees** to Labaton Keller Sucharow LLP, Quinn Emanuel Urquhart & Sullivan LLP, Andrews & Springer LLC, Robbins Geller Rudman & Dowd LLP and Friedman Oster & Tejtell PLLC. The high court said the vice chancellor did not exceed his discretion in setting the fee percentage at just under 26.7% of the "extraordinary" \$1 billion settlement.

"In a thoughtful opinion, the Court of Chancery declined to apply a declining percentage to the fee award," the court said. "It also found that the \$1 billion settlement was a significant achievement, and no other factors warranted reducing the percentage of fees awarded from the recovery."

Class counsel initially sought \$285 million, or 28.5% of the deal, in fees and expenses, which would have been the second-largest fee ever awarded by the Chancery Court. But Vice Chancellor Laster trimmed it after nine investment funds objected.

Pentwater Capital Management LP then appealed the fee award as "excessive," saying it took too much away from the class. The hedge fund argued that the Chancery Court erred when it refused to apply a "declining percentage principle" that is frequently applied to mega-settlements in federal securities litigation.

The high court said Vice Chancellor Laster took the lead from the Delaware Supreme Court's landmark 2012 decision in **Americas Mining v. Theriault** . In that case, the high court upheld a \$304 million attorney fee and expense award in a case where the Chancery Court awarded \$2 billion in damages — a 15% slice of the total judgment.

The case set out that "when the benefit is quantifiable and the litigation settles in the late stage of the litigation but before trial, the resulting fee award is usually 25%-30% of the settlement," Wednesday's opinion said.

Pointing to **Americas Mining**, Vice Chancellor Laster determined that a downward adjustment to the percentage is not made based on the size of the settlement fund. Instead, the multifactor test developed in the Delaware Supreme Court case **Sugarland Industries v. Thomas**  should be used, the high court said.

Those factors include the results achieved, counsel's time and effort, the complexities of the litigation, any contingency factors and counsel's "standing and ability," it said.

"As the court held, the declining-percentage approach was a covert return to the lodestar method, which this court considered and rejected in **Sugarland**," the court said, adding that the vice chancellor had determined the other test factors did not warrant a reduction in the percentage award.

The justices agreed with the Chancery Court's decision to follow **Americas Mining** in refusing to "adopt rigid rules in fee award cases," saying the **Sugarland** factors control a megafund fee award.

Vice Chancellor Laster acknowledged that, under Americas Mining, he had the discretion to reduce the fee percentage, but he also said that none of the reasons for a megafund reduction apply in this case. He said the risk of no recovery was "significant" and only intensified as trial approached.

And the high court agreed with the vice chancellor's observations that it was a "highly contentious" suit that spanned more than two years and involved nearly 100 lawyers for the defense.

"The underlying transaction was complex, and counsel achieved an excellent settlement for the class on the eve of trial," the high court said. "The Court of Chancery supported the reasons for its fee award percentage, including the reasons for no downward adjustment to the fee percentage."

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

The \$1 billion deal approved in April 2023 headed off a trial on claims targeting Dell's effort to exchange Class V stock — created to finance much of Dell's \$67 billion acquisition of EMC Technologies in 2016 — for shares of Dell common stock. The Class V shares generally traded at only 60% or 65% of the price of VMware, a business in which EMC owned an 81.9% equity stake when Dell acquired EMC.

Public shareholders, the class has argued, were shortchanged by \$10.7 billion when, in December 2018, Dell paid \$14 billion in cash and issued more than 149 million shares of its Class C common stock for the Class V shares.

When the challenged conversion closed on Dec. 28, 2018, VMware stock closed at \$158.38 per share, and Class V stockholders received just \$104.27 per share, fueling objections that the Dell Class C stock to be received for Class V shares had been overvalued.

The class is represented by Ned Weinberger, Domenico Minerva, Joseph Cotilletta and Mark Richardson of Labaton Keller Sucharow LLP, David M. Cooper, William R. Sears, George T. Phillips and Dominic J. Pody of Quinn Emanuel Urquhart & Sullivan LLP, Peter B. Andrews, Craig J. Springer and David M. Sborz of Andrews & Springer LLC, Chad Johnson, Noam Mandel, Desiree Cummings, Robert Gerson and Jonathan Zweig of Robbins Geller Rudman & Dowd LLP and Jeremy S. Friedman, David F.E. Tejteltel, Christopher M. Windover and Lindsay La Marca of Friedman Oster & Tejteltel PLLC.

Pentwater is represented by Stephen B. Brauerman and Sarah T. Andrade of Bayard PA.

The case is In re: Dell Technologies Inc. Class V Stockholders Litigation, case number 349, 2023, in the Supreme Court of the State of Delaware.

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



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Computer Equipment Co. Hid Demand Decline, Investor Says

By **Sydney Price**

Law360 (August 14, 2024, 8:15 PM EDT) -- Cloud network equipment company Extreme Networks Inc. misled investors about its financial prospects and declining client demand as its customers' buying habits changed during the COVID-19 pandemic, according to a proposed class action filed in California federal court.

According to the complaint filed on Tuesday by Steamfitters Local 449 Pension & Retirement Security Funds, Extreme Networks' "backlog" metric — which indicates client demand and anticipated revenue — became increasingly important to the company during the pandemic, which resulted in global supply chain disruptions.

However, Extreme Networks failed to disclose to investors that its clients had ordered more product from Extreme than needed to avoid shortages and because they lacked alternative sourcing options, the complaint claims. Extreme Networks attempted to conceal the loss of organic demand by fulfilling back orders, the suit alleges.

"To hide the fact that Extreme's backlog was actually decreasing and 'normalizing' faster than defendants had stated (thereby masking declining organic demand and revenue growth), defendants made materially false and misleading statements regarding the Company's organic demand trends," the suit states.

In addition to Extreme Networks, the suit's individual defendants include its CEO Edward B. Meyercord III, former Chief Financial Officer Rémi Thomas, interim CFO Cristina Tate and current CFO Kevin Rhodes.

The suit alleges Extreme Networks and its executives repeatedly updated the backlog fulfillment timeline through a series of "piecemeal disclosures" while touting strong organic demand.

The class period begins on June 30, 2022, the day the defendants told investors that Extreme Networks was experiencing "unabated" market demand and a "record" backlog, the suit states. The defendants also said Extreme Networks' backlog would continue growing for "the next several quarters" and only "begin to shrink" in the fourth quarter of 2023, according to the suit.

Extreme Networks' first negative disclosure regarding its backlog occurred on Jan. 25, 2023, the suit alleges. On that day, executives told investors on an earnings call that its backlog had fallen to \$542 million from \$555 million in the previous quarter. Its product book to bill ratio and service book to bill ratio had also fallen during the quarter, according to the suit. That same day, Extreme Networks' then-CFO Thomas announced his resignation, effective Feb. 16, 2023.

On this news, shares of Extreme Network declined \$2.81 each, or about 15%, to close at \$16.50 on Jan. 24, 2023, according to the suit.

The last and largest share decline alleged in the suit occurred earlier this year. On Jan. 31, 2024, Extreme Networks reported a 37% year-over-year product revenue decline, and an overall revenue decline of 7%.

Extreme Networks also revealed that it would likely experience lower revenues in fiscal year 2024, with annual revenues for its baseline business projected to be lower than previously expected.

On this news, shares of Extreme Network declined \$4.05 each, or about 24%, to close at \$12.59 on Feb. 2, according to the suit.

Extreme has continued to report a deterioration in its business, the suit alleges. Meyercord stated in May that "channel inventory was significantly reduced" and that the customers were still "working through their prior purchases."

The plaintiff said Extreme Networks and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act. It claims the defendants' statements are not covered by the safe harbor provisions of securities laws and seeks damages on behalf of the proposed class.

Counsel for the Steamfitters Local 449 Pension & Retirement Security Funds and a representative of Extreme Networks did not immediately respond to requests for comment on Wednesday.

Steamfitters Local 449 Pension & Retirement Security Funds is represented by Shawn A. Williams, Brian E. Cochran and Richard W. Gonnello of Robbins Geller Rudman & Dowd LLP.

Counsel information for Extreme Networks and the individual defendants was not immediately available on Wednesday.

The case is Steamfitters Local 449 Pension & Retirement Security Funds v. Extreme Networks Inc. et al., case number 5:24-cv-05102, in the U.S. District Court for the Northern District of California.

--Editing by Vaqas Asghar.

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Supply Chain Automation Co. Symbiotic Faces Investor Suit

By **Emilie Ruscoe**

Law360 (August 14, 2024, 8:57 PM EDT) -- Symbiotic Inc., a supply chain automation technology company, was hit with a proposed class action Wednesday alleging it misled investors about its growth prospects after announcing a roughly \$13 million earnings miss amid unanticipated costs and construction delays for certain projects.

In a complaint filed in Massachusetts federal court, Symbiotic investor Virginia L. Fox claims that in May, the company shared "overwhelmingly positive" projections for its upcoming fiscal quarter but then announced at the end of the quarter that earnings were about 46% lower than expected.

In pertinent part, the investor says, the company made its earnings prediction expressing confidence it would be able to speed up deployment timelines at some of its project sites. But "the company was not truly equipped to timely deploy their systems or otherwise appropriately manage expenses through project delays," and its claims to the contrary were misleading and caused Symbiotic shares to trade at artificially high prices, Fox's suit says.

Fox claims that after the July 29 earnings report, investors were hurt when trading prices for Symbiotic shares slid nearly 24%, from approximately \$36 to just over \$27.

The latest quarter saw the company post \$15 million in earnings before interest, taxes, depreciation and amortization when three months earlier, the company had told investors it expected that earnings number to be somewhere between \$27 million and \$29 million, according to the suit.

The earnings miss also came after the company told investors its previous quarter's accomplishments included "accelerating deployment" of its systems, the suit says.

Fox's suit describes Symbiotic as a company that "develops, implements and operates end-to-end supply chain automation in the U.S. and Canada." Specifically, the company's technology automates pallet and case processes in warehouses and distribution centers and aims to expand to Europe.

The company said in July that its "gross margin reflects elongated construction schedules and implementation costs associated" with its own rapid innovation in the previous quarter.

"What we're seeing now is some of those complex systems [we're building are] just taking longer. Longer system deployment creates higher costs," a company representative said on an earnings call in July, with another representative describing the certain delays as "just not acceptable."

The proposed class would include those who bought Symbiotic shares between May 6, 2024, and July 29, 2024.

Representatives for the parties didn't immediately respond to requests for comment Wednesday.

Fox is represented by Shannon L. Hopkins and Adam M. Apton of Levi & Korsinsky LLP.

Counsel information for the defendants wasn't immediately available Wednesday.

The case is Fox v. Symbiotic Inc. et al., case number 1:24-cv-12090, in the U.S. District Court for the District of Massachusetts.



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Temu Parent Sued By Investor Over Security, Labor Violations

By **Sydney Price**

Law360 (August 14, 2024, 10:21 PM EDT) -- Chinese retail company PDD Holdings Inc., the owner of online merchandiser Temu, was hit with a proposed securities class action in New York federal court alleging it concealed from investors that it actively sought to put malware on its users' phones and sold goods that were likely made by forced labor.

According to the suit filed by shareholder Blake Baxter on Tuesday, PDD sought to improperly obtain data from customers' smartphones with malware installations. Additionally, Baxter alleges the labor used to create goods sold on the company's platforms infringed on U.S. laws. Both violations made the company susceptible to heightened regulatory scrutiny, which has resulted in a congressional investigation and a lawsuit from Arkansas' attorney general, the suit alleges.

Several media reports published this year have "revealed" the extent of violations made by Pinduoduo and Temu, shopping platforms owned by PDD, according to the suit.

In addition to PDD, the suit's individual defendants include its chairman and former CEO Lei Chen, Vice President of Finance Jun Liu and former Vice President of Finance Jing Ma.

The suit's class period begins April 30, 2021, the day PDD filed its 2020 annual report with the U.S. Securities and Exchange Commission. In the report, the company affirmed its commitment to internet and data security, according to the suit.

However, beginning in March 2023, news publications published a series of articles regarding PDD's security issues, leading to share declines, the complaint claims. For example, CNN reported on April 2, 2023, that Pinduoduo had the ability to "spy" on its users and can "bypass users' cell phone security to monitor activities on other apps, check notifications, read private messages and change settings," the suit states.

On this news, shares of PDD declined \$1.06 each, or about 1%, to close at \$74.84 on April 3, 2023, according to the suit.

The complaint alleges that a few months later, news began to emerge regarding PDD's labor practices. For example, the suit states that on June 22, 2023, the New York Times reported on findings by the U.S. House of Representatives Select Committee on the Chinese Communist Party.

According to the complaint, the article noted that in 2022, "The U.S. imposed a ban on products from Xinjiang, citing the region's use of forced labor in factories and mines." It quoted former Republican representative Mike Gallagher of Wisconsin as saying that "Temu is doing next to nothing to keep its supply chains free from slave labor," according to the suit.

Then, on Feb. 12, 2024, after the market closed, Fox Business published an article stating that Temu's Super Bowl ads "sparked backlash" over forced labor allegations and illustrated the increased attention from American lawmakers on Temu, the suit states.

On this news, PDD's shares declined \$2.53 each, or about 2%, to close at \$129.04 on Feb. 13, according to the suit.

Several months later, on June 25, Attorney General of Arkansas Tim Griffin announced he would sue

Temu for violations of the Arkansas Deceptive Trade Practices Act and the Arkansas Personal Information Protection Act, calling it a "data-theft business that sells goods online as a means to an end." The complaint was filed the same day in the Circuit Court of Cleburne County, Arkansas.

On this news, PDD's shares fell by 1% on June 26, 2024, and nearly 5% on June 27, 2024, according to the suit.

Baxter accuses the defendants of acting with scienter, or actual knowledge of wrongdoing or reckless disregard, and violating the Exchange Act. He seeks damages on behalf of the proposed class.

Counsel for Baxter and a representative of PDD did not immediately respond to requests for comment on Wednesday.

Baxter is represented by Phillip Kim and Laurence M. Rosen of The Rosen Law Firm PA.

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

The case is Baxter v. PDD Holdings Inc. f/k/a Pinduoduo Inc. et al., case number 1:24-cv-05653, in the U.S. District Court for the Eastern District of New York.

--Editing by Vaqas Asghar.

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Exxon Can't Beat Investor Suit Over Permian Basin Claims

By **Spencer Brewer**

Law360 (August 14, 2024, 9:58 PM EDT) -- A Texas federal judge kept a proposed investor class action against Exxon Mobil intact, saying in an opinion that the investors' allegations claiming Exxon overvalued its Permian Basin holdings by billions of dollars and fudged its public statements were strong enough for the case to move forward.

Chief U.S. District Judge David C. Godbey found that the plaintiffs adequately alleged that an executive made deceptions that the company passed on to investors, causing them to buy overvalued Exxon securities. Exxon investor Mendi Yoshikawa **sued the oil giant** in 2021, accusing it of overvaluing its Permian Basin holdings by billions of dollars, causing Exxon's stock price to drop after reports circulated that federal securities regulators were looking into the valuation.

Investors accused Exxon of misleading them about the value of one of its most promising oil and gas assets — its properties located in the top-producing domestic oil reserve, the Permian Basin in northwest Texas.

After The Wall Street Journal reported that the U.S. Securities and Exchange Commission launched an investigation into a whistleblower's claim that workers were coerced into overestimating the speed at which wells could be drilled in the area to make the properties seem more valuable, Exxon share prices fell by close to 5%, the investors said.

The investors alleged that Exxon's actions leading up to the price drop **violated federal securities laws** and injured potentially thousands of investors. The State of Rhode Island, Office of the General Treasurer, on behalf of the Employees' Retirement System of Rhode Island and Amalgamated Bank, are co-lead plaintiffs.

Last year, Exxon **largely evaded** the brunt of the proposed class action after the judge ruled that the investors did not establish a strong inference of scienter. However, Judge Godbey allowed their scheme liability claims against Exxon and a former senior manager to proceed.

Melissa Bond, then senior manager of Delaware Basin development, manipulated learning curve assumptions included in Exxon's 2019 development plan, which increased proved reserves by increasing the number of wells Exxon expected to drill, the investors alleged. Exxon contended that Bond's statements stayed within the company.

"Here, the Court finds that Plaintiffs adequately alleged facts that Bond's deceptive acts were communicated to the public," Judge Godbey said.

Exxon maintains that Bond's alleged exaggerations did not make it into public statements, but Judge Godbey said that factual disputes for the calculation of reserves cannot be resolved at the pleading stage. The investors adequately alleged sufficient facts to keep the case intact, he said in the opinion.

Additionally, the investors adequately pled that Exxon knew that what it was doing was wrong, according to the opinion. Bond allegedly boosted the learning curves while knowing it was fraudulent, and Exxon bears responsibility for her misconduct.

"Bond allegedly orchestrated and participated in the fraud of artificially inflating the learning curves, which furnished information to inflate publicly reported proved reserves and resource base;

therefore, Bond's scienter can be imputed onto Exxon Mobil," Judge Godbey said.

Representatives for the parties did not immediately respond to a request for comment.

The investors are represented by John Rizio-Hamilton, Rebecca E. Boon, John J. Esmay, Thomas Z. Sperber and Stephen Boscolo of Bernstein Litowitz Berger & Grossmann LLP and Daniel L. Berger, Barbara J. Hart, Caitlin M. Moyna and Lauren J. Salamon of Grant & Eisenhofer PA.

Exxon and the other defendants are represented by Noelle M. Reed State, Abigail E. Davis, Wallis M. Hampton, Michelle L. Davis, Michael W. Restey Jr. of Skadden Arps Slate Meagher & Flom LLP.

The case is *Yoshikawa v. Exxon Mobil Corp. et al.*, case number 3:21-cv-00194, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Gina Kim. Editing by Vaqas Asghar.

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NC Judge OKs \$15.2M Deal For Medical Device Investors

By **Katryna Perera**

Law360 (August 14, 2024, 8:47 PM EDT) -- A North Carolina federal judge has given the first green light to a \$15.25 million settlement that will resolve a securities class action claiming that Bioventus Inc. misled investors about its internal controls and financial health and its readiness to implement new Medicare regulations, leading to inflated stock prices.

U.S. District Judge Catherine C. Eagles issued an **order** Tuesday finding that the proposed settlement should be approved since, among other things, it resulted from informed, extensive and noncollusive negotiations, it eliminates the risks of continued litigation and the amount is reasonable.

The judge also certified a settlement class of individuals and entities that purchased or acquired Bioventus Class A common stock between Feb. 11, 2021, and Nov. 21, 2022.

The investors, led by Wayne County Employees' Retirement System, filed a **motion** for preliminary approval last month, arguing that the settlement is an outstanding result for the class given Bioventus' "financial constraints, the maximum theoretical damages, and the risks and delay of continued litigation."

According to the motion, Bioventus had argued that the investors' amended complaint failed to state a claim and that the suit's challenged statements were made in good faith. Had litigation continued, the investors said Bioventus would have continued to press these issues, and any recovery would have been drastically reduced or eliminated.

Additionally, Bioventus' limited cash availability heightened the risk that investors would recover nothing at all as the company would not be able to fund a larger resolution or satisfy any potential judgment the investors might obtain from the court, the motion stated.

The settlement is an excellent immediate recovery for the class, the investors said, as it represents over 10.8% of the maximum estimated damages. The motion also said lead counsel from Bleichmar Fonti & Auld LLP intends to seek attorney fees worth a third of the settlement fund, along with no more than \$800,000 in litigation costs and a \$15,000 service award for the lead plaintiff.

Investors initially filed suit in January 2023. The operative complaint alleges that Bioventus misled investors about the impact of the rebates it was required to pay to third-party insurers, which resulted in \$12.4 million in inflated revenue that did not exist.

The complaint also alleges that the medical device company misled investors about the effectiveness of its internal controls concerning rebates and falsely assured investors that it was "fully prepared for the implementation of new Medicare regulations in 2022 that reduced pricing and reimbursement on Bioventus's key products," according to the motion.

The retirement system said it suffered more than \$600,000 in losses on its investments in the company during the class period.

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

The investors are represented by Joseph A. Fonti, George N. Bauer and Nancy A. Kulesa of Bleichmar Fonti & Auld LLP and by Gagan Gupta of Tin Fulton Walker & Owen PLLC.

Bioventus is represented by Colleen C. Smith, David F. Kowalski, Michele D. Johnson and Kristin N. Murphy of Latham & Watkins LLP and by Donald H. Tucker Jr. of Smith Anderson Blount Dorsett Mitchell & Jernigan LLP.

The case is Ciarciello v. Bioventus Inc. et al., case number 1:23-cv-00032, in the U.S. District Court for the Middle District of North Carolina.

--Editing by Rich Mills.

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2nd Circ. Ruling Reaffirms Short-Swing Claims Have Standing

By **Stephen Blake, Craig Waldman and Jonathan Youngwood** (August 14, 2024, 4:22 PM EDT)

The U.S. Court of Appeals for the Second Circuit on June 24 issued a **decision** in *Packer v. Raging Capital Management LLC*, reversing the U.S. District Court for the Eastern District of New York's dismissal of a shareholder's Section 16(b) derivative suit seeking to recover so-called short-swing profits for a lack of constitutional standing.

The district court based its dismissal on its determination that the U.S. Supreme Court's 2021 decision in *TransUnion LLC v. Ramirez* had abrogated the Second Circuit's 2012 ruling in *Donoghue v. Bulldog Investors General Partnership*, which "categorically held that 'short-swing trading in an issuer's stock by a 10% beneficial owner in violation of Section 16(b) of the Securities Exchange Act causes injury to the issuer sufficient for constitutional standing.'"

In *TransUnion*, the Supreme Court stated that to determine whether an intangible injury is sufficiently concrete to confer constitutional standing, courts are to identify a "close historical or common-law analogue for the[] asserted injury." In *Packer*, the Second Circuit held that "nothing in *TransUnion* undermines *Donoghue*["]

The Second Circuit's decision in *Packer* settles the uncertainty concerning constitutional standing raised by the district court's dismissal.

Background and Procedural History

The litigation in *Packer* arose when a shareholder of 1-800-Flowers.com Inc. filed a derivative suit against investment firm Raging Capital Master Fund Ltd., its founder William C. Martin and the firm's investment manager, Raging Capital Management LLC, alleging that they violated Section 16(b) by buying and selling 1-800-Flowers' stock while they were 10% beneficial owners during a six-month period in 2014 and 2015.

Under Section 16(b), owners of more than 10% of a company's stock are required to disgorge short-swing profits made by buying and selling that company's stock within a six-month window.

The district court dismissed the case, concluding that the shareholder, Brad Packer, lacked constitutional standing to bring a suit under Section 16(b) because he did not allege a concrete injury. The district court found that the Supreme Court's decision in *TransUnion* abrogated *Donoghue*, which held that a violation of Section 16(b) inflicts an injury that confers constitutional standing.

Finding that Section 16(b) merely protected against "speculative harm," the district court determined that the alleged violation did not confer standing "in light of *TransUnion*'s holding that 'risk of harm' alone does not qualify as 'concrete' harm."

The Second Circuit Reconciles *TransUnion* and *Donoghue*



Stephen Blake



Craig Waldman



Jonathan Youngwood

The Second Circuit concluded in *Packer* that TransUnion did not abrogate or undermine *Donoghue*, and that the district court erred in dismissing the case.

Under TransUnion, a plaintiff must show, among other things, "that he suffered an injury in fact that is concrete, particularized, and actual or imminent." Those injuries may be tangible harms — i.e., physical harms and monetary harms — or intangible harms, i.e., reputational harms and disclosure of private information.

Turning to *Donoghue*, the Second Circuit noted that, there, it rejected a near-identical challenge to a Section 16(b) action. The Second Circuit explained in *Donoghue* that Section 16(b) imposed a form of strict liability by effectively prohibiting an entire class of transactions because the possibility of abuse of inside information was intolerably great. Therefore, the court in *Donoghue* concluded that Section 16(b) imposed a fiduciary duty on 10% beneficial owners and conferred an enforceable right to expect the fiduciary to refrain from short-swing trading, as well as that the deprivation of this right established constitutional standing.

In *Packer*, the Second Circuit stated, "[a]s *Donoghue* made clear, because Section 16(b) makes 10% beneficial owners into statutory fiduciaries, a close historical or common-law analogue to short-swing trading by a 10% beneficial owner is breach of fiduciary duty." Analogizing between a common law fiduciary who must account to the beneficiary for any personal profit arising from their breach and a statutory fiduciary who owes short-swing profits to the corporation, the Second Circuit concluded in *Packer* that the "deprivation of [short-swing] profits inflicts an injury sufficiently concrete to confer constitutional standing."

The Second Circuit stated that the district court "was mistaken in determining that Section 16(b) protects against the risk of harm alone." It also explained that the plaintiff did not base his standing argument on a risk of harm, and that the concrete injury that conferred standing was "the breach by a statutory insider of a fiduciary duty owed to the issuer not to engage in and profit from any short-swing trading of its stock."

Key Takeaways

The Second Circuit's ruling in *Packer* should provide reassurance to those unsettled by the district court's decision, which, if it had been upheld, could have undercut Congress' "prophylactic" purpose in crafting Section 16(b).

Notably, the U.S. Securities and Exchange Commission does not have enforcement authority pursuant to Section 16(b). Instead, relief under Section 16(b) may only be pursued by (1) the issuer of the security that was traded; and (2) an owner of any security of the issuer, but only if the issuer fails or refuses to bring such suit within 60 days after request.^[1]

If the Second Circuit had concluded that stockholders lack standing to recover short-swing profits, as urged by the district court, it would likely have made it more challenging to bring such claims in general, as conflicts could prevent companies from bringing claims against their own insiders.

With the Second Circuit **denying** a petition to reconsider its decision on Aug. 8, absent a contrary U.S. Supreme Court decision, the Second Circuit has made clear that plaintiffs seeking relief for being deprived of short-swing profits under Section 16(b) have suffered an injury sufficiently concrete to confer constitutional standing.

Stephen Blake is a partner at Simpson Thacher & Bartlett LLP.

Craig Waldman is a partner at the firm.

Jonathan Youngwood is a partner, global co-chair of the litigation department and leader of the civil securities litigation practice at the firm.

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for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 15 U.S.C. § 78p(b).

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Class Split Disrupts Hearing On \$8.7M Sears Suit Settlement

By **Jeff Montgomery**

Law360 (August 14, 2024, 9:22 PM EDT) -- A Sears Hometown and Outlet Stores stockholder that saw its share appraisal case tanked by the company's bankruptcy in late 2022 won Court of Chancery clearance Wednesday to intervene with a novel, alternative claim for recovery through a separate, ongoing SHOS class damages suit.

Vice Chancellor J. Travis Laster allowed Cannon Square LLC to intervene over opposition from counsel now in the final leg of a suit seeking damages from former Sears CEO Edward S. Lampert and his co-defendants, while acknowledging that the appraisal claim could "swamp" the proposed settlement.

"It seems to me what we've got here is a situation that surprisingly hasn't come up in the combined breach of fiduciary duty/appraisal cases," the vice chancellor said.

The separate class suit had already produced a first-of-its-kind ruling in January that controllers of a company can owe duties of good faith and care to the business and its minority stockholders.

In the class case, filed in 2019, stockholders not pursuing appraisal asserted breach of fiduciary duty and unjust enrichment claims against Lampert, his hedge fund ESL Investments Inc., and several related companies he set up to buy most of Sears Holdings Corp.'s assets out of bankruptcy — a move that cost \$5.2 billion in 2019, while also acquiring the freestanding SHOS enterprise for \$2.25 per share the same year.

Vice Chancellor Laster already pruned the class damages award from \$18.3 million to \$8.7 million in January, after Lampert's interests successfully challenged the court's calculations. Prior to the decision, the stockholders had received \$3.21 per share.

On Wednesday, however, Marcus E. Montejo of Prickett Jones & Elliott PA argued that Cannon Square, foiled by SHOS' bankruptcy from securing a better appraisal ruling for its shares, should have an opportunity to pursue its claim for more than 257,000 shares through the class damages case.

"This settlement has just come up. What we've been arguing about since trial, post-trial briefing, throughout, is really a question of law on damages," Montejo said.

Given that the court crafted a remedy in a breach of fiduciary duty case while a separate appraisal case was ongoing, "What does that mean under Delaware law?" Montejo asked. "Is a faithless fiduciary liable for the entire amount" — share price plus damages — or only the amount paid on top of what the shareholders seeking damages but not appraisal received.

"Why does the fact that the pool of money is now in the form of a settlement different from that fact that the pool of money was originally based on my incremental calculation of damages over and above the merger consideration," the vice chancellor asked. "It didn't cross my mind that the damages were including the value of the shares at the price of the merger. I was only thinking of the increase."

Also complicating the picture, the vice chancellor observed, is the fact that "depending on the size of the dissenters' stake, if there's no additional damages, then you guys will potentially step in and with the need to get your base share price as well, you potentially swamp everyone else in the class, simply because you guys exercised appraisal rights."

The vice chancellor said he would not use delay as a reason to deny intervention, but added: "I'm doing this on the basis of Mr. Montejo's representation that he's only seeking this as a matter of law, effectively. He's not going to suddenly put in something that makes additional factual arguments or asserts some additional or new claim."

Michael A. Pittenger of Potter Anderson & Corroon LLP, counsel to Lampert, ESL Investments Inc. and affiliates, opposed the intervention by Montejo's clients.

"Our position is that you're not entitled to damages in the form of merger consideration in a fiduciary action like this. It was a voluntary decision" by Cannon Square "to seek appraisal. To go back in, they should get [only] damages, like everybody else."

Cannon Square LLC is represented by Marcus E. Montejo of Prickett Jones & Elliott PA.

The co-lead plaintiffs are represented by Ned Weinberger, Mark Richardson, Michael C. Wagner, Jiahui (Rose) Wang and John Vielandi of Labaton Keller Sucharow LLP, Peter B. Andrews, Craig J. Springer and David M. Sborz of Andrews & Springer LLC, Samuel L. Closic of Prickett Jones & Elliott PA, and Donald J. Enright and Elizabeth K. Tripodi of Levi & Korsinsky LLP. The co-lead plaintiffs' executive committee is represented by Carl L. Stine and Adam J. Blander of Wolf Popper LLP.

Edward S. Lampert, ESL Investments Inc., ESL Partners LP, RBS Partners LP, Transform Holdco LLC and Hometown Midco LLC are represented by Michael A. Pittenger, Matthew E. Fischer, Jacqueline A. Rogers, Nicholas D. Mozal and Charles P. Wood of Potter Anderson & Corroon LLP.

The case is *In re Sears Hometown and Outlet Stores Inc. Stockholders Litigation.*, case number 2019-0798, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas and Rose Krebs. Editing by Michael Watanabe.

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\$24M Hidden Fee Deal With AIG Opposed By Class Member

By Hope Patti

Law360 (August 14, 2024, 5:00 PM EDT) -- A member of a class of travel insurance buyers who accused AIG insurers of stacking hidden fees on top of insurance travel premiums urged a California federal court to reject a nearly \$24 million proposed settlement, saying it inappropriately combines distinct California and Washington claims.

In an **objection filed Tuesday**, attorney and class member Eric Alan Isaacson further contended that the sealing and redaction of information has deprived class members of adequate representation and due process of law, and also violates the First Amendment and common law rights of access to judicial documents.

"In light of the redactions of critical information, failure to provide separate representation of subclasses, and provision for cy pres distribution of funds that could be distributed to the class, the proposed settlement cannot be approved as reasonable, fair, and adequate," Isaacson said.

"Class counsel plainly are more interested in maximizing their attorney's fee award than they are in obtaining the best outcome for the class," he added. "And named plaintiffs, for their part, seek incentive awards of \$5,000 apiece that far outstrip any recovery obtained for ordinary class members."

U.S. District Judge Trina L. Thompson **granted preliminary approval** of the class's settlement with Travel Guard Group Inc., AIG Travel Inc. and National Union Fire Insurance Co. of Pittsburgh, Pa. in April.

Under the terms of the settlement, which was **announced in December**, the companies will pay more than \$23.9 million into a common settlement fund, without admitting liability, to settle the current action as well as a similar case in Washington federal court. Of that amount, approximately \$16 million will be distributed among participating class members after deductions for attorney fees, litigation and settlement administration costs, and service incentive awards.

The companies also agreed to clearly inform all purchasers of Travel Guard plans that the price for a plan includes the travel insurance premium and an additional fee for noninsurance travel assistance services.

Isaacson asserted in Tuesday's filing that the disclosures are toothless, saying "the injunctive relief would ratify defendants' assertedly unlawful practices" by permitting the companies to continue bundling non-insurance services at an unknown price, so long as they disclose all charges and fees.

He also contended that plaintiff Stephanie Allen, who filed the Washington suit, lacks standing to pursue injunctive relief on behalf of Washington residents because she does not face an imminent risk of harm.

The present action, which was filed in December 2021, was amended earlier this year to add the Washington plaintiffs' claims for settlement purposes only, according to court filings. The April ruling conditionally certified a class of people, from both the California and Washington actions, who purchased at least one qualifying Travel Guard plan between Dec. 17, 2017, and Jan. 18, 2024.

The California claimants and Washington claimants are entitled to separate legal representation and

should not be included in a single settlement, Isaacson said.

"It is apparent from the amended complaint here, that Washington and California residents seek relief under two different statutory regimes, with different elements," he said. "Defenses under the two legal regimes are likely to be different — although any comparison is made difficult by the fact that the defendants have yet to file an answer in the stalled Washington proceeding. Recoverable damages undoubtedly are different too."

A final approval hearing is set for Oct. 1, according to court filings.

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

The objector, Eric Alan Isaacson, is represented by John W. Davis of the Law Office of John W. Davis and C. Benjamin Nutley.

The class is represented by Seth A. Safier, Rajiv V. Thairani and Stephen M. Raab of Gutride Safier LLP.

Travel Guard Group Inc., AIG Travel Inc. and National Union Fire Insurance Co. of Pittsburgh, Pa. are represented by Matthew D. Powers and Eric A. Ormsby of O'Melveny & Myers LLP.

The case is Miller et al. v. Travel Guard Group Inc. et al., case number, 3:21-cv-09751, in the U.S. District Court for the Northern District of California.

--Editing by Abbie Sarfo.

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Florida AG Can't Nix Hospitals', School Boards' Opioid Claims

By **Mike Curley**

Law360 (August 14, 2024, 8:02 PM EDT) -- A Florida state appeals court on Wednesday reversed a trial court's order allowing the state's attorney general to wipe out a group of suits by hospitals and school boards in opioid litigation, holding that she doesn't have the authority to release their claims without their consent.

In the **opinion**, the three-judge panel sided with Halifax Hospital Medical Center, North Broward Hospital District, South Broward Hospital District, Sarasota County Public Hospital District, Lee Memorial Health System, and the Miami-Dade and Putnam County school boards, saying Attorney General Ashley Moody cannot disavow representing the entities in their suits and then release their claims in a settlement they had no part in and which offered them no compensation.

According to the opinion, Moody's office filed suit on behalf of the state against opioid makers, distributors and prescribers in 2018, while the hospitals and school boards began filing similar suits with distinct and specific claims against the same defendants.

The state, and others, entered into a global settlement, which required Moody to seek to dismiss or otherwise extinguish the hospitals' and school boards' claims, and she filed complaints against each of them, resulting in a summary judgment declaration, which the entities appealed.

"The attorney general cannot disavow the substantive vested rights of appellants, including the two school boards created under the constitution, all of which have the power to sue to protect those vested rights and the hospital districts," the panel's ruling Wednesday states.

According to the opinion, even if the attorney general had common-law authority to do so, the Legislature removed that authority when it passed statutes creating the entities and assigned them, not the attorney general, the right to legally represent their claims.

As the state's chief legal officer, the attorney general has the authority to litigate claims for the good of the state and its residents, but does not have the authority to control claims of entities that assert unique and individual actual damages, according to the opinion.

And because the attorney general did not intervene in the hospitals' or school boards' suits, she cannot now get around the legislative decision to grant those entities their own rights to protect their legal interests by seeking a declaratory action here, the panel wrote.

"Nowhere does the organic law authorize the attorney general to represent without consent, or decline to represent and then attempt to disavow the damages of appellants," the panel wrote.

The panel rejected the attorney general's argument that she could use the dismissal of the hospitals' and school boards' claims as a "bargaining chip" to secure the settlement, particularly given that no part of the settlement is slated to go toward the hospitals, and she denied any interest in representing them.

"While it may be in the interest of the opioid defendants to see appellants' claims extinguished, it is not in the public interest of the children and parents of a certain district," the panel wrote, quoting the School Board of Miami-Dade's brief to add, "Through a settlement term, the attorney general has allowed the opioid defendants to usurp her authority, which is designed as a shield for the citizens of

Florida, and use it as a sword to defeat certain local entities' claims."

Morgan R. Bentley of Bentley Goodrich Kison PA, representing Sarasota County Public Hospital District and Lee Memorial Health System, said they're pleased with the decision.

"The attorney general had tried out a unique and unusual theory that could have had some unfortunate side effects had it been adopted," Bentley said Wednesday. "It would have also greatly expanded the power of the attorney general at the expense of the governor and the Legislature. Fortunately the court relied on the existing law to come to what we believe is the right decision."

Barry Richard of Barry Richard Law Firm, representing Halifax Hospital Medical Center, said Wednesday that the case is an example of checks and balances at work.

"The attorney general negotiated a major settlement for the state of Florida, but she should not have attempted to sacrifice the rights of Florida hospitals and school boards as a price of that settlement," Richard said. "The court performed its constitutional function and declared that the attorney general exceeded her authority."

A spokesperson for the attorney general said she is evaluating the decision.

Representatives for the other parties could not immediately be reached for comment Wednesday.

Judges Bradford L. Thomas, Ross L. Bilbrey and Thomas D. Winokur served on the panel.

Halifax Hospital Medical Center is represented by Barry Richard of Barry Richard Law Firm.

North Broward Hospital District is represented by George T. Levesque, Jason L. Unger and Stephen K. Varnell of GrayRobinson PA.

South Broward Hospital District is represented in-house by Frank P. Rainer.

School Board of Miami-Dade County is represented by Joseph W. Jacquot and Derek K. Mountford of Gunster Yoakley & Stewart PA.

Sarasota County Public Hospital District and Lee Memorial Health System are represented by Steven W. Teppler of Mandelbaum Barrett PC, Timothy M. Hartley of Hartley Law Offices PLC and David A. Wallace, Morgan R. Bentley and Corinna S. Coser of Bentley Goodrich Kison PA.

Putnam County School Board is represented by John Wayne Hogan of Terrell Hogan Yegelwel PA.

The attorney general is represented by Ashley Moody, John Guard and Gregory S. Slemp of the Attorney General's Office and Henry C. Whitaker, Daniel W. Bell and David M. Costello of the Florida Solicitor General's Office.

The cases are Halifax Hospital Medical Center v. Office of the Attorney General et al., case number 1D2023-1327; North Broward Hospital District v. Office of the Attorney General et al., case number 1D2023--1394; South Broward Hospital District v. Office of the Attorney General et al., case number 1D2023-1481; School Board of Miami-Dade County et al. v. Office of the Attorney General et al., case number 1D2023-1484; Sarasota County Public Hospital District v. Office of the Attorney General et al., case number 1D2023-1500; Putnam County School Board v. Office of the Attorney General et al., case number 1D2023-1529; and Lee Memorial Health System v. Office of the Attorney General et al., case number 1D2023-1570; all in First District Court of Appeal of the State of Florida.

--Editing by Amy French.



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Tuna Price-Fixing Deal Comes With A Catch: \$26M In Fish

By **Katryna Perera**

Law360 (August 14, 2024, 10:17 PM EDT) -- Two groups of buyers accusing major canned tuna producers of price-fixing have asked a California federal judge to give the first seal of approval to settlements totaling more than \$168 million in cash, plus \$26 million in packaged tuna products.

The groups, consisting of end payor or consumer plaintiffs and direct purchaser plaintiffs, filed **separate motions** for preliminary approval of their respective deals on Tuesday. They told the court in June that they **reached the deals** just before trial.

The settlements are with StarKist, its parent company Dongwon Industries Co. Ltd., and British private equity firm Lion Capital, which put money into Bumble Bee Foods, according to the motions.

The defendants' deal with the consumers has a combined cash value of \$136 million, according to their motion, and it was "vigorously and extensively negotiated at arm's-length by counsel experienced in antitrust class actions," achieved "literally on the steps of the courthouse and the eve of trial."

The end payors said the deal is fair, reasonable and adequate, and will provide relief to a proposed class of individuals and entities in several states who "indirectly purchased packaged tuna in cans or pouches smaller than forty ounces for end consumption and not for resale, produced by any defendant or any current or former subsidiary or affiliate thereof, or any coconspirator during the period from June 1, 2011 to July 1, 2015."

They want the court to certify the class since it is the same class that was certified for another settlement reached in the suit with defendants Chicken of the Sea and its parent company Thai Union Group.

Mark Rifkin of Wolf Haldenstein Adler Freeman & Herz LLP, counsel for the consumer plaintiffs, told Law360 on Wednesday that the total value of the consumer settlement benefit with all the defendants, including Chicken of the Sea and its parent company, is \$152 million.

"We are very pleased to begin the process of obtaining court approval of this \$152 million consumer antitrust settlement. This settlement will get meaningful cash benefits to consumers across the country. We encourage consumer class members to submit claims for settlement benefits," he said.

According to the motion, Wolf Haldenstein intends to seek an award of attorney fees worth one-third of the settlement plus about \$1.6 million in litigation costs.

Additionally, the motion states that service awards will be sought for the individual plaintiffs who played a "vital role" in the litigation of \$3,000, \$6,000, and \$9,000, based on the extent to which each one participated in discovery, depositions and other parts of the suit.

The end payors argue that the settlement should be granted preliminary approval given the risks of continued litigation, which would have included the consumers needing to prove their damages at trial and the defendants' liability.

"Even if successful at trial, with potential treble damages of over \$600 million, the settling defendants may not have been able to sustain a verdict of that size. Bumble Bee had already

declared bankruptcy, leaving a shell from which no recovery could be achieved. All of these facts weigh in favor of preliminary approval," the motion said.

The second group of plaintiffs, the direct purchasers, told the court Tuesday that the settlement they reached with StarKist and Dongwon totals \$58.7 million, made up of \$32.6 million in cash and \$26.1 million worth of packaged tuna products. Lion Capital has agreed to contribute an additional \$6 million.

According to the motion, the settlement class will be entitled to a pro rata share of packaged tuna products that may be redeemed for three years following final court approval of the deal, or for 90 days after the settlement administrator provides StarKist with the pro rata allocation of the product component of the settlement, whichever is later.

"Settlement class members will be able to place an order for any StarKist-branded products on StarKist's national price list in effect on the date that they place their order to redeem their pro rata share of StarKist products," the motion said.

"StarKist products will be delivered [free on board] destination point to each settlement class member who makes a claim and places an order, freight pre-paid to a single agreed shipping address within the continental United States for that claimant, provided that the claimant shall pay the standard shipping costs for any shipments that are made in less than full truckloads if more than one order for StarKist products is placed for its allocated share of the product component," the motion said.

The direct purchaser plaintiffs said the settlement is an excellent recovery because while class counsel from Hausfeld LLP were confident in their position, "trials are risky, and there is no certainty as to what a jury would decide."

The proposed settlement class includes all individuals and entities that directly purchased packaged tuna products within the U.S. or its territories from any of the defendants between June 1, 2011, and July 31, 2015.

The motion said that class counsel will seek attorney fees of no more than a third of the settlement fund as well as \$12,500 service awards for each class representative.

In a statement to Law360 on Wednesday, StarKist general counsel Robert Scott Meece said the company is glad to resolve the matters and move forward with a "new and positive chapter."

"StarKist is committed to complying with competition laws and engaging in socially responsible and ethical commerce. We will continue to conduct our business with the utmost integrity, focusing on providing our customers and consumers with top-quality products at competitive prices," he said.

Counsel for the direct purchaser plaintiffs and the other defendants did not immediately respond to requests for comment on Wednesday.

The buyers, whose cases were set to go to trial on July 15, revealed in May in pretrial briefs that the damages they were after **could top \$1 billion** if the court were to treble them as requested.

The direct purchasers of the allegedly price-inflated fish were asking for about \$90 million in damages, and the consumer plaintiffs sought \$224.4 million in damages, which they wanted to see trebled. According to their brief, neither amount factored in interest or attorney fees and costs.

The buyers said there were only three matters left to be tried: the scope of the conspiracy and who participated in it; damages; and whether StarKist, Dongwon and Lion Capital are liable.

However, StarKist said in its own pretrial brief that the only reason the matter was heading for trial and hadn't been settled was because "plaintiffs are overreaching."

The tuna giant has settled more than 100 other actions and would have settled this one too, it said, except that the tuna buyers asked it to pay for unaffected products and alleged price-fixing that happened a year and a half after the period StarKist has admitted liability for.

It also said the buyers were asking for too much money and unfairly wanted the shareholders to be found liable.

"These four factual issues should be the primary focus of the upcoming trial because they define the scope of the conspiracy and the damages flowing from it," Starkist said, adding that the plaintiffs wanted to use the company's earlier guilty pleas "to make the jury decide the case based on guilt-by-association (for the shareholders) or to inflame the jury into punishing Starkist for a period and for products far beyond those referred to in the guilty pleas."

That's why the tuna company said it had asked the court to **prevent the buyers** from mentioning Starkist's guilty plea to the jury.

Starkist **pled guilty** to participating in a scheme to inflate the price of packaged seafood in 2018, the result of a U.S. Department of Justice deep dive into the industry that also netted a **guilty plea** from Bumble Bee.

Civil suits began piling up in 2015 after news spread that the Justice Department was probing the seafood industry. Around the same time, Thai Union Group scrapped a plan to buy Bumble Bee after the deal came under antitrust scrutiny.

All three tuna behemoths ended up battling scores of suits in multidistrict litigation that was **consolidated** in California federal court and have cut millions of dollars in deals to escape some of those suits.

The consumer plaintiffs are represented by Betsy C. Manifold, Rachele R. Byrd, Alex J. Tramontano, Mark C. Rifkin, Thomas H. Burt and Carl Malmstrom of Wolf Haldenstein Adler Freeman & Herz LLP.

The direct purchaser plaintiffs are represented by Erika A. Inwald, Michael P. Lehmann, Christopher L. Lebsock and Michael D. Hausfeld of Hausfeld LLP.

Starkist and Dongwon are represented by Alfred C. Pfeiffer, Christopher S. Yates, Belinda S. Lee, Ashley M. Bauer and Jason M. Ohta of Latham & Watkins LLP.

Lion Capital is represented by Adam S. Paris, Brandon T. Wallace and Paul Lazarow of Sullivan & Cromwell LLP.

The case is In re: Packaged Seafood Products Antitrust Litigation, case number 3:15-md-02670, in the U.S. District Court for the Southern District of California.

--Additional reporting by Lauren Berg. Editing by Adam LoBelia.