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Data Breach Securities Class Actions: Record Settlements and Investor Claims on the Rise

Posted by David Malmstrom, Broadridge, on Wednesday, August 21, 2024

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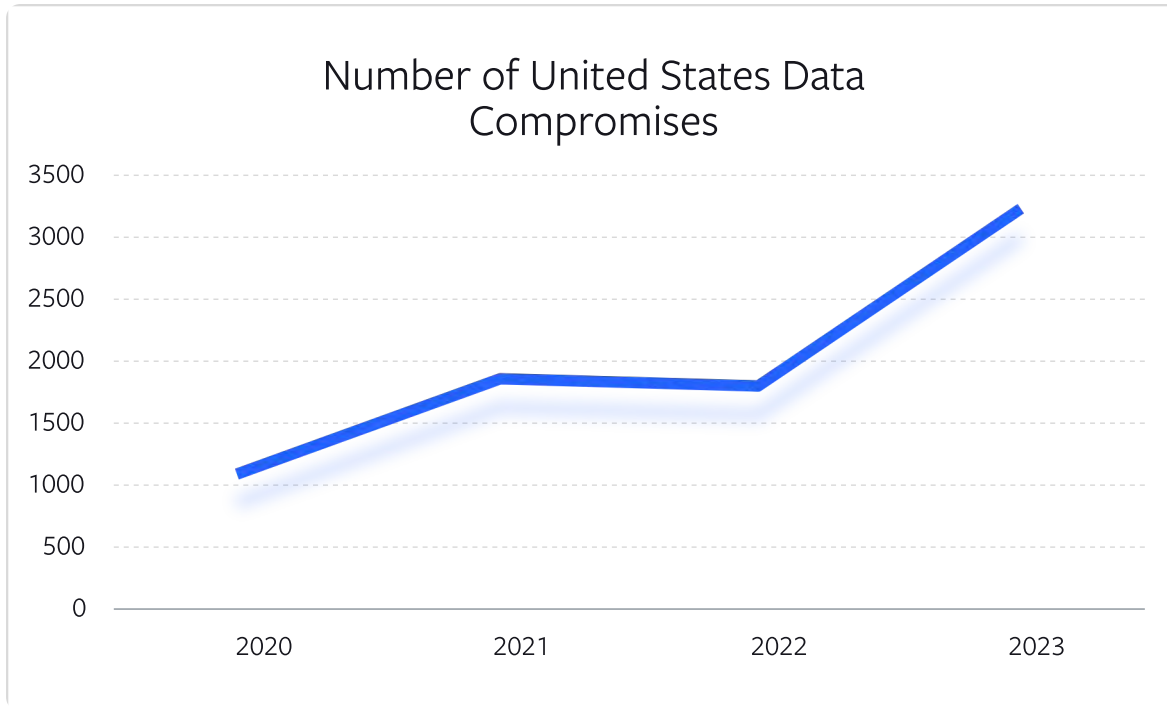
Editor's Note: David Malmstrom is a Manager at Broadridge. This post is based on his Broadridge memorandum.

Data Breach Securities Class Actions: Record Settlements and Investor Claims on the Rise

Data breach related securities class action filings are on the rise.^[1] These lawsuits are based on allegations that companies misrepresented or misled investors about cybersecurity events, such as data breaches or security vulnerabilities, causing stock prices to fall when the truth is revealed. Data breaches have increased steadily since 2020^[2] and this surge in breaches and cybersecurity incidents has led to more shareholders filing securities class action claims. This year we have witnessed significant settlements, including three of the top ten largest data breach related securities class action settlements, totaling \$560 million.

Increased Frequency of Data Breaches

In response to the rising number of data breaches, corporations are investing heavily in cybersecurity measures to protect their data. In 2023, organizations spent \$188 billion globally on implementing cybersecurity measures, a figure projected to rise to \$215 billion in 2024.^[3] Despite these investments, the number of data breaches in the United States have nearly tripled since 2020, with a record 3,205 data breaches in 2023.^[4] A 2023 survey of over 1,000 businesses worldwide found that 72.7% had fallen victim to ransomware attacks, coinciding with the record number of data breaches in the United States^[5] leading to over \$1 billion in ransoms being paid to cybercriminals last year.^[6]



[7]

Effects of Data Breaches on Shareholders

Data breaches have significant financial repercussions for shareholders, as their investments often decline in value. An analysis of 28 public companies that experienced data breaches revealed an average 7.27% share price drop following the breach, with financial and technology companies impacted the greatest.[8] Financial companies saw a 17% decrease in value against the NASDAQ within the first 16 trading days post-breach and continued underperforming the NASDAQ by 2% even six months later.[9]

On average, it takes 46 days for a company's stock price to rebound to pre-breach levels, and not all companies are able to fully recover.[10] However, even when stock prices do rebound on paper, one study found that when stocks showed a near 18% increase in the two years after a data breach, these stocks still underperformed the NASDAQ by 11.35% on average, resulting in a "loss" for investors. [11]

2024 Brings Large Securities Data Breach Settlements

The rise in data breaches and cybersecurity incidents has led to increased data breach related securities class action filings. These cases reflect a broader trend known as "event driven litigation," where a significant event or development, such as the disclosure of a data breach or security vulnerability, triggers a drop in a company's share price and forms the basis of the class action, rather than traditional accounting fraud or financial misrepresentations.

Thus far, 2024 has been a banner year, featuring the first, second, and sixth largest data breach related securities class action settlements of all time, totaling \$560 million. These cases involved alleged failures to disclose data breaches or material aspects relating to how customer data is secured.

	Alphabet Inc.	Zoom Video Communications, Inc.	Okta, Inc.
Data Breach and/or Privacy Related Allegations	Alphabet allegedly had the opportunity to disclose a bug which led to users' data being accessible by third party developers for over three years and failed to disclose the breach.	Zoom allegedly made false statements regarding the encryption level of video calls on the platform and the adequacy of its data privacy and security measures.	Okta allegedly downplayed and failed to adequately acknowledge a cyberattack which affected 366 clients. The Okta stock price fell 10% after the group who hacked them, Lapsus\$, disclosed the event on their blog.
Lead Plaintiff	Employees' Retirement System of Rhode Island	Adam Butt	Nebraska Investment Council
Lead Counsel	Robbins Geller Rudman & Dowd LLP	Robbins Geller Rudman & Dowd LLP	Labaton Sucharow LLP
Class Period	April 23, 2018, through April 30, 2019	April 18, 2019, through April 6, 2020	March 3, 2022, through August 31, 2022
Class Definition	All Persons that purchased or otherwise acquired Alphabet Class A and/or Class C stock during the period from April 23, 2018, through April 30, 2019.	All Persons that purchased or otherwise acquired Zoom common stock or call options on Zoom common stock or sold put options on Zoom common stock between April 18, 2019, and April 6, 2020.	All persons and entities who or which, during the period from March 3, 2022, through August 31, 2022, inclusive, purchased or otherwise acquired the publicly traded Class A common stock of Okta, Inc.
Settlement Amount	\$350,000,000	\$150,000,000	\$60,000,000
Claim Filing Deadline	July 25, 2024	Pending	Pending

Regulations Worldwide – More Class Actions to Come?

In July 2023, the SEC adopted new cybersecurity risk management rules which require public companies to disclose any cybersecurity incident which would be deemed material to investors on an 8-K form. These disclosures must be made within four days of when the company deems the breach (or series of related smaller breaches) to be material, and the disclosures must include both the quantitative and qualitative impacts of the incident.

At least two major disclosures under the new SEC 8-K requirements have already fallen short of compliance.^[12] UnitedHealth Group's February 22, 2024, disclosure of a suspected unauthorized nation-state intrusion and Microsoft's January 19, 2024, disclosure of an email hack both failed to list quantitative impacts, mentioning only qualitative ones.^[13] In fact, within the first 100 days of the new SEC regulations enactment, 73% of 8-K reports did not state whether the breach had a material impact, and only one that did included quantitative effects.^[14] As companies adjust to these new disclosure requirements, we expect filings if it is later revealed that certain quantitative impacts existed and were not reported.

Other countries have adopted similar disclosure requirements. Article 33 of the European Union's General Data Protection Regulation requires disclosure of the breach within 72 hours of learning of the breach and without undue delay. The disclosure must include the likely consequences of the breach, and the measures to be taken by the company to address the breach and mitigate any possible adverse effects. Australia's Privacy Act also has disclosure requirements, where an

eligible data breach^[15] must be reported to affected individuals. The breach must also be reported to the Australian Information Commissioner, and this notification must contain the contact information of the notifying entity, a description of the data breach, the kind of information concerned, and recommendations to individuals regarding the steps they should take to minimize the impact of the breach.

Due to the global scale of these regulations, we expect to see an increase in securities class action filings related to cybersecurity disclosures across multiple jurisdictions.

Final Thoughts

The rapid growth of event-driven data breach related securities class actions calls for increased vigilance regarding data breaches, claim filings, and compliance with new regulations. With the rising frequency of these class actions globally, investors must stay informed to maximize their recovery opportunities.

¹ In this article, we use the term “Data Breach” to refer broadly to all related incidents, including breaches, data privacy concerns, cybersecurity threats, security vulnerabilities, and other similar occurrences.

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² Ani Petrosyan, *Annual Number of Data Compromises and Individuals Impacted in the United States from 2005 to 2023*, Statista (Feb. 12, 2024), <https://www.statista.com/statistics/273550/data-breaches-recorded-in-the-united-states-by-number-of-breaches-and-records-exposed>.

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³ Stuart Madnick, *What’s Behind the Increase in Data Breaches?*, Wall St. J. (March 15, 2024), <https://www.wsj.com/tech/cybersecurity/why-are-cybersecurity-data-breaches-still-rising-2f08866c>.

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⁴ Petrosyan, *supra* note 2.

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⁵ Ani Petrosyan, *Annual Share of Organizations Affected by Ransomware Attacks Worldwide from 2018 to 2023*, Statista (Mar. 28, 2024), <https://www.statista.com/statistics/204457/businesses-ransomware-attack-rate/>.

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⁶ *Ransomware Costs Businesses Record-High \$1 Billion in 2023: Your 5-Step Plan to Prevent Attacks in 2024*, Fisher Phillips (Feb. 21, 2024), <https://www.fisherphillips.com/en/news-insights/ransomware-costs-businesses-record-high-1-billion-in-2023>.

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⁷ Petrosyan, *supra* note 2.

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⁸ *Cybersecurity Breaches and Their Impact on Corporate Stock Prices*, Cap. Tech. Univ.: Capitology Blog (May 18, 2020), <https://www.captechu.edu/blog/cybersecurity-breaches-and-their-impact-on-stock-prices>.

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⁹ *Id.*

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¹⁰ Keman Huang et al., *The Devastating Impacts of a Cyber Breach*, Harv. Bus. Rev. (May 4, 2023), <https://hbr.org/2023/05/the-devastating-business-impacts-of-a-cyber-breach>.

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¹¹ Chris Brook, *Data Breaches Have Lasting Effect on Stock Price*, Digit. Guardian (Aug. 22, 2022), <https://www.digitalguardian.com/blog/data-breaches-have-lasting-effect-stock-price>.

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¹² Bob Zukis, *Companies are Already Not Complying with the New SEC Cybersecurity Incident Disclosure Rules*, Forbes (Mar. 4, 2024), <https://www.forbes.com/sites/bobzukis/2024/03/04/companies-are-already-not-complying-with-the-new-sec-cybersecurity-incident-disclosure-rules/>

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¹³ *Id.*

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¹⁴ Charu A. Chandrasekhar et al., *100 Days of Cybersecurity Incident Reporting on Form 8-K: Lessons Learned*, Debevoise & Plimpton (Mar. 28, 2024), <https://www.debevoise.com/insights/publications/2024/03/100-days-of-cybersecurity-incident-reporting>.

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¹⁵ An eligible data breach is one that is likely to result in serious harm to any of the individuals to whom the information relates.

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This Week in Chancery Court: Santander Messages, Trump SPAC Case

By Jennifer Kay

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This Week in Chancery Court: Santander Messages, Trump SPAC Case

By Jennifer Kay 2024-08-26T05:00:01000-04:00

Banco Santander SA's practice of using an auto-deleting messaging platform will be discussed before the Delaware Chancery Court this week, shortly before a trial is set to start over a take-private buyout of the Spanish bank's US auto loan business.

Here's more from the court's calendar:

Monday: Morris v. Spectra Energy Partners (DE) GP LP, Del. Ch., No. 2019-0097, telephonic hearing 8/26/24.

At issue: Spectra Energy Partners LP's former general partner agreed to pay \$7.5 million to resolve investor litigation over the pipeline operator's \$3.3 billion "roll-up" buyout by Enbridge Inc. The parties now seek to redirect \$14,187 remaining in the settlement fund to Delaware's Combined Campaign for Justice, which raises funds to provide operating support for the state's three civil legal aid organizations. The settlement administrator determined the money isn't "sufficient to conduct an additional *pro rata* distribution to all eligible class members," according to a motion. It adds that the money largely consists of interest earned on the principal of the settlement fund, and simply reverting it to the state "would generate unnecessary complications for the court and the state."

Court action: Vice Chancellor Sam Glasscock III will hold a telephonic hearing.

Spectra-Enbridge \$3.3 Billion Buyout Lawsuit Ends in Settlement

Tuesday: United Atl. Ventures LLC v. Trump Media & Tech. Grp. Corp., Del. Ch., No. 2024-0184, telephonic hearing 8/27/2024.

At issue: Two former contestants on former President Donald Trump's reality show, The Apprentice, sued the former president over his plan to dilute their 8.6% stake in the business that runs the Truth Social online networking platform, which they co-founded. Their lawsuit challenges aspects of the merger with a shell entity that made Trump Media & Technology Group Corp., a publicly traded company. After Trump counter-sued in Florida, seeking to zero out their stake, they amended their Delaware complaint and sought an injunction blocking the parallel litigation. Motions for contempt regarding the Florida lawsuit will be discussed at a hearing before Vice Chancellor Morgan T. Zurn.

Court action: Zurn will conduct the hearing via teleconferencing.

Trump's Truth Social Allies Turned Foes Dealt Setback in Court

Tuesday: Schafermeyer v. Tingo Grp. Inc., Del. Ch., No. 2024-0251, oral arguments 8/27/24.

At issue: The founder of Tingo Group faces charges of securities fraud in New York, and the US Securities and Exchange Commission has separately sued the financial technology company for allegedly orchestrating a fraud of "staggering" scope. A Tingo shareholder also sued in Chancery Court, seeking internal books and records related to the alleged wrongdoing that led to the charges brought by the SEC and the US Justice Department. Magistrate in Chancery Selena Molina in May ordered Tingo to produce the requested files, but the shareholder says in a motion for contempt that Tingo hasn't complied or produced any documents.

Court action: Molina will hold a telephonic hearing to hear oral arguments on the motion for contempt.

Tingo Group Founder Hit by Hindenburg Now Charged Criminally (1)

Thursday: In re Santander Consumer USA Holdings, Del. Ch., No. 2022-0689, hearing 8/29/24.

At issue: A five-day trial is scheduled to start in Sept. 16 in Elliott Investment Management's long-running lawsuit against Santander Consumer USA Holdings Inc. During pre-trial information exchanges, Elliott says it uncovered "significant destruction of relevant evidence" relating to Signal messages sent around the time of Santander's \$12.7 billion take-private buyout of the auto loan business. Elliott alleges the deal was rigged so that potentially billions of dollars worth of pandemic-related profits remained in the bank's hands. Santander argues in a brief that Elliott hasn't been deprived of discovery in the litigation.

Court action: Vice Chancellor Lori Will holds a hearing on the matter in Wilmington, Del.

Elliott Says Santander's Use of Signal Message App Hampers Claim

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NY Sues Illumina Board Over 'Disastrous' \$8 Billion Grail Deal

By Mike Leonard 2024-08-26T10:47:33000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0864](#)

New York's public pensions have joined widening shareholder litigation over the costly consequences of Illumina Inc.'s failed \$8 billion bid to buy cancer-detection startup [Grail Inc.](#), which was rejected by regulators.

State Comptroller [Thomas DiNapoli](#) is suing Illumina board members on behalf of two retirement funds, saying they recklessly rushed into the doomed deal with full knowledge they were violating a European regulation requiring companies to pause mergers while they're reviewed on antitrust grounds.

The move "ignited legal chaos," the lawsuit says, pointing to hundreds of millions in fines, billions in lost value, the June 2023 resignation of Illumina CEO Francis DeSouza, a board battle that ousted its chairman, and an investigation by the Securities and Exchange Commission. "The damage to Illumina from this disastrous acquisition cannot be overstated," according to the court complaint.

Illumina [completed its divestiture](#) of Grail in June, about six months after the deal was dealt its final legal blow when [a US appeals court blocked it](#) on antitrust grounds in December. European regulators previously shot down the acquisition and [fined Illumina \\$476 million](#) under the standstill regulation, which authorizes penalties up to 10% of a company's annual revenue.

The new suit, made public Aug. 23, is the fifth filed over the transaction this year in Delaware's Chancery Court. The other cases included challenges brought by [a union pension fund](#) and [billionaire activist investor Carl Icahn](#), who placed an affiliate on Illumina's board after leading a 2023 proxy fight over the planned acquisition. Icahn declined to seek additional directorships this year.

The San Diego-based biotechnology research company didn't immediately respond to a request for comment Monday.

'Self-Interested Move'

DiNapoli's complaint, originally filed Aug. 16, comes three months after Vice Chancellor [Paul A. Fioravanti Jr. ordered the unsealing](#) of redacted court filings related to the alleged decision by Illumina's corporate leaders to boost their liability insurance before attempting the Grail transaction.

That information found its way into the new lawsuit, which says the policy increase covered only management and the board, leaving the company and its shareholders exposed. "The directors and officers abandoned their fiduciary duty of loyalty to Illumina in a self-interested move to protect themselves," the suit says.

Then, after they closed the deal at risk, they wasted 28 months and hundreds of millions of dollars fighting antitrust regulators on two continents, according to the complaint. "Meanwhile, Illumina's performance, value and stock price declined precipitously," the lawsuit says.



Confidentiality has become a major point of contention in the litigation, which is still in its earliest stages. Icahn was [forced to withdraw](#) the original version of his lawsuit in January after Fioravanti ruled that he'd improperly included information gleaned from his representative to Illumina's board.

The judge also ordered the company in July to [release some of its legal advice](#) about the transaction to a different union fund that sued for access to internal corporate documents.

The New York state funds are represented by Prickett, Jones & Elliott PA and Barrack, Rodos & Bacine. Illumina, which hasn't yet made a court appearance, is represented in the parallel litigation by Potter Anderson & Corroon LLP and Cravath Swaine & Moore LLP. Its board members are represented in those cases by Abrams & Bayliss LLP and Wachtell, Lipton, Rosen & Katz.

The new case is [DiNapoli v. Thompson](#) , Del. Ch., No. 2024-0864, complaint unsealed 8/23/24 .

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Aug. 26, 2024, 2:00 AM PDT

Judge Leaves Top Business Court Legacy of 'Glasscockian Prose'

By Jennifer Kay

Eye on the Bench

- Glasscock plans to step down from the bench in January
- Judge known for down-to-earth demeanor, narrow opinions

Bloomberg Law News 2024-08-26T10:03:5741766643-04:00**Judge Leaves Top Business Court Legacy of 'Glasscockian Prose'****By Jennifer Kay 2024-08-26T05:00:01000-04:00**

- Glasscock plans to step down from the bench in January
- Judge known for down-to-earth demeanor, narrow opinions

Some Delaware Chancery Court opinions will be remembered for shaping corporate law. Others for boldly rejecting a billionaire's business plans. Then there's the octopus one.

"Scientists have found that the octopus is bizarrely adept at navigating mazes," Vice Chancellor Sam Glasscock III mused in a contract dispute over house construction. He thought less highly of the complaint, writing, "the octopus has nothing on the contortions exhibited in Plaintiffs' attempt to establish jurisdiction here."

The August 2023 opinion is a classic of what the court's chief judge calls "Glasscockian prose," a perspective she will miss when Glasscock retires in January. Nationally recognized for his corporate law decisions, Glasscock also is well-regarded "for the effortless way in which he makes complicated issues accessible to the uninformed reader, and the obvious delight he finds in the craft of decision writing," Chancellor Kathaleen St. Jude McCormick told Bloomberg Law.

McCormick often drops pop culture and Shakespeare references into opinions, and Vice Chancellor J. Travis Laster is fond of the classics, but Glasscock's allusions vary wildly. His opinions contemplate rodeo bull-riding, World War I, mythology, whaling, and the task of taming "legal shrubbery" in the "limited garden of equity."

Yes, it's a little self-indulgent, but "they don't pay me enough not to have fun writing my opinions," Glasscock, 66, said during an Aug. 13 interview at his chambers in Georgetown, Del. Atop his desk: a large silver octopus, gifted by his law clerks.

"I just enjoy the unexpected parallels and relationships of different things," he said.

But Glasscock's penchant for wordplay shouldn't distract from his contributions from the bench of America's premier business court, said Charles Elson, founding director of the Weinberg Center for Corporate Governance at the University of Delaware.

Elson points to a 2020 decision allowing investors to proceed with claims that AmerisourceBergen Corp. directors knowingly ignored a subsidiary's scheme to sell unsterile cancer drugs pooled from an overflow of pre-filled syringes as an example of Glasscock's careful, balanced opinions.

"He doesn't push the law to its extreme," Elson said. "He takes the law and he applies it in a smart and fair way, with a deep understanding of the point of the law."



Delaware Court of Chancery Judge Sam Glasscock III in his chambers in Georgetown, Del. on Aug. 13, 2024.

Photographer: Jennifer Kay/Bloomberg

Conflict Evolution

Glasscock, first appointed to the court in 2011, is the second-longest serving judge on the court, which hears cases without juries. Previously, he was a Master in Chancery, now called a Magistrate in Chancery, for about 12 years; these judges oversee adult guardianships, books-and-records lawsuits, property and trust disputes, and other corporate claims. He received a bachelor's degree in history and master's degree in marine policy from the University of Delaware, and a law degree from Duke University.

The marine policy degree was a "detour" but it's proven useful in real estate complaints as rising sea levels alter Delaware's coast and shift property lines, Glasscock said.

Corporate cases have shifted over time, too, with the court increasingly considering how contractual obligations collide with traditional questions of equity, he said. Questions about director independence also have evolved as some industries, such as the tech sector, become dominated by smaller groups of leaders, he said.

Many tech leaders know each other socially, but it's their interlaced business dealings that raise concern, he said.

"If you draw the line and say, 'Well, because you've been in the tech field, you can't be an independent board member,' that's going to prevent a lot of good people from being board members, or it's going to cause transactions to be too heavily scrutinized. That causes a loss of value," he said. "On the other hand, you can't say it doesn't matter, whatever degree of friendship there is, because that could lead to really conflicted transactions not being reviewed, and that could result in a loss of value."

His down-to-earth approach ensures every litigant receives the same treatment, said a former clerk, Jerrod Lukacs, general counsel at Yancey Bros. Co.

"Whether it's a property owner in Sussex County or JPMorgan, he treats everybody with just that same level of courtesy and respect, and applies that same level of diligence to everything," Lukacs said.

One thing that hasn't changed over his time on the bench: what he jokingly calls his "judicial laziness principle" of deciding a case "as narrowly and simply as I can," an approach he says helps avoid unintended legal consequences.

Don't mistake that for actual laziness. McCormick praised Glasscock's work ethic, saying, "He always insists on taking on more than his fair share of case work. And he always manages to lighten the mood while still making clear that he takes the job quite seriously."

Greatest Hits

Explaining how Chancery Court works to Widener University Delaware Law School students earlier this year, Glasscock encouraged them to read "Bleak House," Charles Dickens' sharp critique of England's Court of Chancery. The novel revolves around an interminable lawsuit, and Glasscock oversaw his own version—an environmental cleanup case that took 26 years to resolve, before he approved a stipulation of dismissal in 2015.

That same year, dismissing claims that Walt Disney Co. was "holding back the flying car," Glasscock included a color image of the cover of a children's book version of "The Absent-Minded Professor." McCormick's personal favorite is a 2014 opinion in which Glasscock interspersed his analysis of a sewer line dispute with lyrics from the song "Danny Boy"—"the pipes, the pipes are calling."

"Consider the persimmon," Glasscock wrote in a 2014 order finding a trust dispute wasn't yet ripe for adjudication. "As with fruit, so with litigation."

Magistrate Bonnie David, who clerked for Glasscock, said it's obvious when one of his opinions delights the close-knit Chancery community. "People knew I was clerking for him, and my phone would just blow up," she said.

"I think everyone understands that it's like he's saying, 'We're all in this together, let's go on this adventure together,'" said Lukacs, who has taught a short course on corporate law with Glasscock at the University of Georgia for the past eight years.

Glasscock's own favorite case involved a property dispute he decided in 2017 for the state against a developer. The crucial evidence: daffodils blooming on the site of a long-forgotten homestead. "If you like real property, and you like history, like I do, that was a great case," he said.

He doesn't have any firm retirement plans come next year, aside from teaching and dabbling in his wide-ranging interests. A current fixation: the Buddhist concept of "bardo," a transitional state.

"You're in one plane of existence and you're going to another, and I'm entering that," he said. "It's going to be kind of exciting to see how that plays out."

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Judge grants preliminary approval for \$13.9 million settlement in California gas price-fixing scheme

 [courthousenews.com/judge-grants-preliminary-approval-for-13-9-million-settlement-in-california-gas-price-fixing-scheme/](https://www.courthousenews.com/judge-grants-preliminary-approval-for-13-9-million-settlement-in-california-gas-price-fixing-scheme/)

Michael Gennaro

After an explosion at a Southern California oil refinery in 2015 decreased the state's gas supply, gas firms Vitol and SK Energy Americas were accused of colluding to drive up prices at the pump.

SAN FRANCISCO (CN) — A settlement resolving claims that two gas firms engaged in a scheme to artificially inflate the prices of gasoline in California is now one step closer to official approval.

On Friday afternoon, U.S. District Judge Jacqueline Scott Corley, a Joe Biden appointee, gave her preliminary approval to a \$13.9 million settlement to compensate the class of businesses and non-California customers who were cheated in the scheme by gasoline firms SK Energy Americas and Vitol to manipulate gas prices at the pump via a convoluted series of concealed trades on futures markets following an oil refinery explosion.

Former California Attorney General Xavier Becerra accused Vitol and SK of executing a series of trades, some of which they hid from the Oil Price Information Service in order to drive up the price of gasoline and enrich their respective bottom lines at a significant cost to California consumers.

Some estimates indicate the scheme could have cost state residents as much as \$150 million in 2015 alone, with the scheme likely persisting into late 2016.

The settlement class is composed of people who, at the time of purchase, were not residents of the state of California, and all persons that are not natural persons, wherever located, that: (i) purchased gasoline from a retailer for their own use and not for resale in California from February 18, 2015, through May 31, 2017.

The settlement agreement approved Friday requires the pair of firms to establish a non-reversionary gross settlement fund of \$13.9 million in an escrow account maintained by Huntington National Bank.

Becerra first sued the two companies in 2020, accusing them of taking advantage of the 2015 explosion at an oil refinery in Torrance in Southern California.

The refinery explosion caused significant disruption in the gasoline market in California. The refinery in question was responsible for roughly 10% of the state's gasoline supply, which decreased dramatically, driving up prices at the pump.

The companies used traders who were friends with each other to collude in driving up the price by making certain transactions appear materially different to confuse others about the true nature of supply in demand in the market at a given time.

The plan of allocation for class members recognizes two different pools of settlement class members: businesses, and non-California consumers. The Net Settlement Fund will be distributed in pro rata shares among these two pools based on the relative strength of the claims depending on whether the gas was purchased in Northern California or Southern California.

“85% of the settlement fund will be allocated to compensate businesses that allegedly paid supracompetitive prices for gasoline due to defendants’ conduct, and the remaining 15% of the settlement fund will be allocated to non-California natural persons (unless that leads to compensation of either group beyond their collective single damages),” Corley wrote in her order.

“Gasoline purchases made in Southern California will be compensated at twice the rate compared to those in Northern California (purchases in Southern California will carry weight of 1 and purchases in Northern California will carry a weight of 0.5),” she added.

Corley said the settlement was equitable, noting that the class faced significant hurdles if the litigation continued.

“Plaintiffs faced significant class certification challenges including ‘the possibility that the majority of their class’s claims would be precluded due to the settlement in the People’s Action,’ and even if not precluded, plaintiffs would need to prevail on class certification and ‘survive a possible interlocutory appeal of a class certification order, maintain class certification through entry of a final judgment, overcome numerous substantive defenses at trial, and succeed on a possible post-trial appeal,’” Corley wrote.

In their motion for preliminary approval, the plaintiffs said they will seek an award of up to 30% of the gross settlement fund, plus 30% accrued interest, and expenses of up to \$7 million, plus an additional \$1 million for notice and claims administration costs.

A separate, \$50 million settlement announced in July by California Attorney General Rob Bonta resolved claims for California consumers.

Lawyers for the plaintiffs did not respond to requests for comment. Lawyers representing SK and Vitol did not respond to messages seeking comment before deadline.

Categories / Consumers, Energy, Regional

J&J in talks with holdouts to \$6.5 billion talc settlement

 [reuters.com/business/healthcare-pharmaceuticals/jj-talks-with-holdouts-65-billion-talc-settlement-2024-08-23](https://www.reuters.com/business/healthcare-pharmaceuticals/jj-talks-with-holdouts-65-billion-talc-settlement-2024-08-23)

Dietrich Knauth, Mike Spector

A bottle of Johnson and Johnson Baby Powder is seen in a photo illustration taken in New York, February 24, 2016. REUTERS/Shannon Stapleton/Illustration/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, Aug 23 (Reuters) - Johnson & Johnson (JNJ.N) , opens new tab said on Friday it is negotiating with plaintiffs' lawyers who have opposed the company's proposed settlement of lawsuits alleging its baby powder and other talc products caused cancer, seeking to eliminate holdouts to the deal.

J&J has announced plans to finalize a \$6.48 billion global settlement through the bankruptcy of a subsidiary company, after earlier efforts were rebuffed twice by federal courts.

J&J says the majority of claimants support its settlement offer. But it has paused a vote count for a short time so that it can gather additional votes from plaintiffs who have until recently opposed the deal.

"We have agreed to a short extension of the certification timeline," said Erik Haas, J&J's worldwide vice president of litigation, in a statement. "This will allow these plaintiffs' attorneys time to speak to their claimants to now consider supporting the plan."

Andy Birchfield, a lawyer who has led opposition to J&J's proposed bankruptcy settlement, said he welcomed negotiations with claimants but is prepared to resist another Chapter 11 filing.

"Our ultimate objective is fair compensation in a timely manner for ovarian cancer victims. If J&J is becoming more reasonable by negotiating with some claimants, we applaud that," Birchfield said in a statement.

"For now, we are continuing to fight for our clients and if J&J chooses the bankruptcy route for the third time, we will oppose it and we believe the company will fail."

J&J plans to place a subsidiary into bankruptcy if it gets at least 75% of the talc claimants to vote for its settlement proposal.

The bankruptcy settlement would end all talc lawsuits alleging that J&J products cause ovarian cancer, and it would prevent similar cases from being filed in the future.

J&J faces lawsuits from more than 62,000 plaintiffs alleging that its baby powder and other talc products were contaminated with asbestos and caused ovarian and other cancers. J&J denies the allegations and has said that its products are safe, do not contain asbestos and do not cause cancer.

The current proposed bankruptcy settlement focuses on claims involving ovarian and other gynecological cancers, building on the company's previous settlement outside of Chapter 11 proceedings of most lawsuits alleging that its talc caused mesothelioma, a deadly cancer linked to asbestos exposure.

By using a subsidiary's bankruptcy to file for bankruptcy, J&J seeks to force all plaintiffs into one settlement – without requiring J&J itself to file bankruptcy.

Bankruptcy judges can enforce global settlements that permanently halt all related lawsuits and forbid new ones.

Outside of bankruptcy, any settlement J&J reached with some clients would still leave holdouts or future plaintiffs with the right to sue – and leave the company exposed to potential multibillion-dollar verdicts that encouraged it to pursue a bankruptcy settlement in the first place.

J&J has prevailed in many of the ovarian cases tried to date, but the litigation has also resulted in some large verdicts for plaintiffs, including a \$2.12 billion award in favor of 22 women who blamed their ovarian cancer on asbestos in J&J talc.

Keep up with the latest medical breakthroughs and healthcare trends with the Reuters Health Rounds newsletter. [Sign up here.](#)

Reporting by Dietrich Knauth, Editing by Alexia Garamfalvi and Marguerita Choy

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Mike Spector
Thomson Reuters

Mike Spector is an Investigative Reporter for Reuters' legal team. He strives to pursue special reports and other enterprising and exclusive stories that expose wrongdoing, highlight threats to consumers and illuminate how ordinary people are affected by the decisions of judges and lawyers across the United States. His stories often involve corporate crises linked to bankruptcy proceedings, mass tort litigation and government investigations. He was the first journalist to expose Johnson and Johnson's plan to offload into bankruptcy lawsuits alleging its iconic Baby Powder and other cosmetic talc products caused cancer. A series he led explaining how companies and nonprofits use the bankruptcy system to evade lawsuits over sexual abuse and deadly products received the Deadline Club's Daniel Pearl Award for Investigative Reporting. He has also investigated pervasive secrecy in American courts that covers up evidence of deadly products and allegations from Black women that chemical hair relaxers sold by large cosmetics companies caused cancer. He previously worked at The Wall Street Journal covering bankruptcy, private equity, mergers and acquisitions and the automotive industry.

Goldman, BASF, others in \$20 million platinum, palladium price-fixing settlement

 [reuters.com/legal/goldman-basf-others-20-million-platinum-palladium-price-fixing-settlement-2024-08-26](https://www.reuters.com/legal/goldman-basf-others-20-million-platinum-palladium-price-fixing-settlement-2024-08-26)

Jonathan Stempel

An employee works on an ingot of 99.97 percent pure palladium at the Krastsvetmet nonferrous metal plant in Krasnoyarsk, Siberia, September 30, 2014. REUTERS/Ilya Naymushin/File Photo Purchase Licensing Rights [↗](#), opens new tab

NEW YORK, Aug 26 (Reuters) - Goldman Sachs (GS.N) [↗](#), opens new tab, German industrial company BASF (BASF.DE) [↗](#), opens new tab and two other banks agreed to pay \$20 million to settle a nearly decade-old antitrust lawsuit accusing them of conspiring to suppress platinum and palladium prices.

A preliminary settlement of the proposed class action was filed on Friday night and approved by U.S. District Judge Gregory Woods in Manhattan, court records on Monday show.

The defendants also include HSBC (HSBA.L) [↗](#), opens new tab and London-based ICBC Standard Bank (601398.SS) [↗](#), opens new tab. All four defendants denied wrongdoing in agreeing to settle.

Platinum and palladium are used in catalytic converters to curb vehicle emissions, and also in dentistry and jewelry.

Purchasers of platinum, palladium and futures contracts for the metals accused the defendants of conspiring from Jan. 1, 2008 to Nov. 30, 2014 to rig the twice-daily platinum and palladium "fixings" by sharing customer data, front-running expected price moves, and placing bogus "spoof" orders.

The purchasers said lower metals prices reduced the cost that banks and their clients paid for platinum and palladium, and enabled banks to avoid losses on "short" positions they maintained in futures markets.

Lawyers for the purchasers called the settlement an "excellent" result that was fair, reasonable and adequate.

They plan to seek up to one-third of the settlement, or \$6.67 million, in legal fees, plus up to \$600,000 for expenses.

Final settlement approval is possible in January.

The lawsuit is one of several in the Manhattan court accusing big banks of colluding in various markets including interest rate benchmarks, U.S. Treasuries, currencies and commodities.

The case is In re: Platinum and Palladium Antitrust Litigation, U.S. District Court, Southern District of New York, No. 14-09391.

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Reporting by Jonathan Stempel in New York; Editing by Kirsten Donovan and Mark Potter

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AI-Powered Software Company Invoca Hit With Digital Privacy Class Action

The complaint, filed in the U.S. District Court for the Northern District of California, contends that Invoca covertly intercepts and eavesdrops on these phone conversations, thereby violating California's "wiretapping" laws.

August 23, 2024 at 10:47 AM

Artificial Intelligence



Kat Black



What You Need to Know

- AI-fueled customer service software company Invoca was hit with a digital privacy class action.
- The complaint alleges that Invoca, which partners with businesses such as DirecTV and DISH, intercepts and eavesdrops on third-party customer service calls from these companies for its own use.
- Plaintiffs contend that this practice violates the California Invasion of Privacy Act.

Artificial intelligence-fueled customer service software company Invoca was slapped with a digital privacy class action for allegedly collecting recorded customer service calls between third-party businesses and their customers without their consent.

Invoca, a self-described “conversation intelligence leader” based in Santa Barbara, provides call tracking and analytics services to clients such as DISH and DirecTV. The companies employ its conversation intelligence software-as-a-service to record, transcribe and extract AI-driven data analysis of its customer service calls using “natural language processing” (noted as “NLP” in the court document), a machine-learning technology.

The [complaint](#), filed in the U.S. District Court for the Northern District of California, contends that Invoca covertly intercepts and eavesdrops on these phone conversations, thereby violating California’s “wiretapping” laws (California Invasion of Privacy Act §§631, 632 and 637.5).

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

“The result is that every DISH and DirecTV consumer’s telephone conversation is surreptitiously transmitted to Invoca’s servers, where it is processed and analyzed using Invoca’s AI and NLP, and thereafter presented to Invoca’s clients in dashboards, searchable transcripts, and reports,” wrote the plaintiff’s attorneys at Bursor & Fisher and Gucovschi Rozenshteyn. The firms did not immediately respond to requests for comment. Counsel has yet to appear for the defendant.

According to the claim, though both DISH and DirecTV consumers are informed that their customer service calls will be monitored and recorded, the companies do not disclose that the conversations will be distributed to Invoca’s servers for training or purposes “other than quality assurance.”

The plaintiff’s attorneys allege that Invoca flouts California’s wiretapping laws “because it has the capability to use the contents of conversations it collects through the Services for its own purposes, other than simply furnishing the recording to its clients, such as DISH and DirecTV.” Sections 631 and 632 of the California Invasion of Privacy Act grant individuals a private right of action against CIPA transgressors for \$5,000 per violation, which the plaintiff suing Invoca is also seeking.

“We are confident that we comply with applicable law, and can share more information as it becomes available,” an Invoca spokesperson said.

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 among the first to act on opportunities in your region, practice area or client sector.

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Baltimore sues shale producers in price-fixing class action in US court

 [reuters.com/legal/government/baltimore-sues-shale-producers-price-fixing-class-action-us-court-2024-08-26](https://www.reuters.com/legal/government/baltimore-sues-shale-producers-price-fixing-class-action-us-court-2024-08-26)

Mike Scarcella

The cupola of Baltimore City Hall is seen amid the skyline in Baltimore, Maryland, U.S. May 12, 2019. REUTERS/Stephanie Keith Purchase Licensing Rights  , opens new tab

Aug 26 (Reuters) - The city of Baltimore has hit major U.S. shale oil producers including Hess and Permian Resources with a lawsuit alleging they conspired to curb production, leading to higher prices for gasoline, diesel fuel and heating oil.

The proposed class action  , opens new tab was filed on Saturday in New Mexico federal court, where a panel of U.S. judges this month consolidated more than a dozen lawsuits accusing seven shale producers of participating in a price-fixing conspiracy.

The lawsuit was the first by any state or municipality in the consolidated litigation.

Baltimore's lawsuit, filed by the national plaintiffs firm Berger Montague and other firms, also named Chesapeake Energy, Occidental Petroleum, Diamondback Energy and Pioneer Natural Resources, which is now a subsidiary of Exxon Mobil.

The complaint accused the companies of a scheme that artificially inflated the price of crude oil and light petroleum products, in violation of antitrust law. The lawsuit said the alleged conspiracy began in 2017.

Hess, Permian Resources, Chesapeake Energy and other defendants did not immediately respond to requests for comment.

The defendants have said the plaintiffs' complaints fail to state any claim under antitrust law and should be dismissed.

Baltimore and its lawyers also did not immediately respond to requests for comment.

Baltimore, a seaport and the largest city in Maryland, purchased petroleum products from a wholesale supplier. The city said it paid higher prices than it should have for gasoline and other products during the alleged conspiracy.

"The defendants acted against their economic self-interest by declining to ramp up production in the face of high crude oil prices," the lawsuit said.

Baltimore will seek class action status for Maryland and other states that allow monetary damages for claims involving the "indirect" purchase of a product from a defendant. Those states include California, Illinois, Florida, Michigan, New York and North Carolina.

The lawsuit estimated a class size of thousands of members. Baltimore is seeking damages of more than \$5 million and a court order barring any further price coordination.

U.S. District Judge Matthew Garcia in Albuquerque, who was confirmed to the court last year, was selected on Aug. 1 to oversee the multidistrict litigation. Garcia is a former chief of staff to Democratic New Mexico Governor Michelle Grisham.

The case is Mayor and City Council of Baltimore v. Permian Resources Corp et al, U.S. District Court, District of New Mexico, No. 24-cv-842.

Read more:

[US panel appoints New Mexico judge to hear shale-oil antitrust lawsuits](#)

[US House lawmakers seek antitrust probe of OPEC and oil companies](#)

[US greenlights Exxon-Pioneer deal, alleges shale founder colluded with OPEC](#)

[Drivers sue US shale oil producers over alleged price-fixing scheme](#)

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Reporting by Mike Scarcella

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Bloomberg Law News 2024-08-26T09:58:46211106888-04:00

Australians Can Legally Ignore Work Calls, Emails After Hours

By Ben Westcott2024-08-26T00:26:46073-04:00

- New ‘right to disconnect’ laws came into effect Monday
- Business groups have spoken out against the new laws

Australians can now legally ignore unreasonable after-hours work calls and emails under new government legislation that came into effect on Monday, drawing criticism from business groups.

Under the laws, employers face fines of [up to A\\$93,000](#) (\$63,000) for getting in touch with an employee for non-essential reasons outside of working hours.

“Just as people don’t get paid 24 hours a day, they don’t have to work for 24 hours a day,” Prime Minister **Anthony Albanese** told Australian Broadcasting Corp. on Monday, adding that he expected the changes to boost productivity.

“For many Australians, I think they’re getting frustrated that they’re expected to be on their phones, their emails, all of that, for 24 hours a day,” he said. “It’s a mental health issue, frankly.”

Australia follows nations such as France, Spain and Belgium in introducing right to disconnect laws to protect workers from unreasonable contact outside of hours, while other governments around the world are considering similar measures.

Local business groups have already expressed concerns around the new laws. **Andrew McKellar**, chief executive officer of the Australian Chamber of Commerce and Industry, described the changes as a “thought bubble” and said business wasn’t consulted on them.

Any disputes over attempts by employers to contact workers outside office hours could be escalated to Australia’s industrial relations umpire, the Fair Work Commission, for a final determination, Workplace Relations Minister **Murray Watt** said Monday.

However he added that he hoped employers and employees would be able to resolve any disputes through discussions, without needing to escalate.

The right to disconnect will apply to employees from medium and large enterprises immediately, while small businesses will have 12 months before their workers are affected, according to the government.

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SEC Awards Two Whistleblowers Almost \$100 Million Combined

By Stephanie Stoughton

Bloomberg Law News 2024-08-26T09:55:389914266-04:00

SEC Awards Two Whistleblowers Almost \$100 Million Combined

By Stephanie Stoughton2024-08-23T13:07:54532-04:00

Two whistleblowers will receive a total of \$98 million for providing information that helped in a probe by the US Securities and Exchange Commission.

Information provided by the whistleblowers led to SEC enforcement, as well an action by another agency, the regulator said in a statement Friday.

The first tipster, who prompted the opening of the investigations, will receive an \$82 million award. The second, whose information came later, will get \$16 million.

“Without these whistleblowers’ information, the violations would have been difficult to detect,” Creola Kelly, chief of the SEC’s Office of the Whistleblower, said in the statement.

In keeping with agency practice, the whistleblowers weren’t identified.

The whistleblower program was established by the 2010 Dodd-Frank Act to organize and provide incentives to tipsters. Whistleblowers can receive between 10% and 30% of the amount collected in penalties in successful enforcement cases where fines top \$1 million.

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Carl Icahn Had Some Hidden Loans

Published: Mon Aug 26 13:44:04 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

The Icahn thing

Here's one way to think about it. At the end of 2022:

1. Icahn Enterprises LP (usually called IEP) had about 353.6 million shares of stock outstanding.¹
2. Carl Icahn, the chairman of IEP, owned about 85% of them, about 300 million shares.
3. The stock closed the year at \$50.65 per share, giving IEP a market capitalization of about \$18 billion, and making Icahn's stake worth about \$15 billion.
4. Icahn had pledged about 181.4 million of his shares — roughly 60% of his stake, and roughly 51% of the total market capitalization — as collateral to secure margin loans with seven different banks.²
5. Those pledged shares were worth about \$9.2 billion at then-current market prices.
6. Against that \$9.2 billion of collateral, the banks loaned Icahn \$5 billion of cash.

That's pretty good? For one thing, the banks were lending Icahn roughly 54% of the value of his pledged shares. *You* probably couldn't get that much margin in your personal account; generally brokers are only allowed to lend customers 50% of the price of their stocks.

But this wasn't just 100 shares in Icahn's Robinhood account: He pledged *more than half of the company* to secure the margin loans. If for some reason the price fell, the banks sent Icahn a margin call, and he didn't pay, they'd have to sell more than half of the company's stock into the market to get their money back. That would probably be bad for the stock price. Perhaps bad enough that they wouldn't get their money back.

But it gets worse. IEP is, loosely speaking, an investment partnership, owning large stakes in publicly traded companies as well as some private companies. It reports an "indicative net asset value," that is, its own valuation of the stuff that it actually owns. In December 2022, that reported value was about \$5.6 billion, or about \$15.96 per share. That is, IEP traded at more than a 200% premium to its net asset value.

If you thought of IEP not as "a publicly traded company with a market cap of about \$18 billion," but rather as "an investment fund with about \$5.6 billion of assets," then it is *really really weird* that the

banks would lend Icahn \$5 billion against *half* of that fund. Those loans were pretty undersecured?

Should you have thought of IEP that way? Well! We have talked a lot, over the last few years, about meme stocks, and even about the dangers of lending against meme stocks. Loosely speaking, a meme stock is a stock that trades far above its intrinsic value because of online enthusiasm from retail investors. IEP was never *quite* that — Icahn is a popular figure, but IEP was not like a WallStreetBets darling or anything. But it sure did trade far above its intrinsic value for a long time, and it had (and has) a pretty retail-heavy ownership (outside of Icahn's own 85% stake). Why did it trade so high? Here's a reasonable theory:

Beyond the allure of investing with one of the most well-known names on Wall Street, the other key draw to Icahn Enterprises units has been the company's consistent \$2 per quarter cash dividend, amounting to an annualized yield of about 15.8%, giving IEP the highest dividend yield of any large cap (>\$10 billion) company by far, with the next closest being a 9.9% yield, according to FactSet screening.

IEP's dividend – paid consistently for 71 quarters straight – has been the key allure for IEP's retail investor base.

That theory comes from a May 2023 short report published by Hindenburg Research, arguing (1) huh this valuation is really high, (2) it is kept high by the dividend and (3) that dividend is unsustainable, because it is generated not from cash flow but from selling more stock in a “ponzi-like economic structure.” We talked about the report at the time, and it absolutely tanked the stock: IEP closed at \$50.42 per share the day before the Hindenburg report, but was at \$21.81 a month later; it closed at \$15.89 last Friday. One simple model here is that (1) IEP traded at a huge premium to NAV, (2) Hindenburg just *pointed that out*, (3) everyone was like “huh turns out this stock is worth like \$16, not \$50” and (4) the price quickly adjusted.

If you were a retail investor who admired Carl Icahn and liked the dividend, you might reasonably have paid \$50 per share for IEP in late 2022, since that's what the market price was, and you probably didn't notice the net asset value disclosure. If you were a big bank *lending Carl Icahn \$5 billion* against his IEP stake, on the other hand, it seems really weird to lend him *way more than the underlying value of the shares he pledged*. The NAV was reported! “Here's a pot of stuff worth \$5.6 billion, but it trades at \$18 billion, would you lend me \$5 billion against half of it?” No?

A baffling trade, for the banks. ³ Anyway Hindenburg *did* publish the report, the stock *did* tank, Icahn got nervous calls from his banks, and he ended up negotiating a payment plan in which he pledged more collateral (including basically all of his IEP stock and \$2 billion of other investments) and got three years to repay the loans. He reported that new deal publicly, in a securities filing, in July 2023. ⁴ There is an element of “if you owe the bank enough money, that's the bank's problem” here: If the

banks had just seized and sold his collateral, that would have been a disaster for Icahn, but it also would have been a disaster for the banks, so they were willing to work out a payment plan.

One further hiccup here is that he *didn't report the margin loans before that*? Both Icahn (in his Schedule 13D ownership filings) and IEP (in its annual Form 10-K filing) were required to disclose Icahn's borrowing, and they largely didn't. (IEP didn't disclose the loans in its Form 10-K until February 2022, and Icahn didn't disclose them in his Schedule 13D until that July 2023 filing.) That's bad, and last week the US Securities and Exchange Commission fined him a little bit of money for it:

The Securities and Exchange Commission [on Aug. 19] announced charges against Carl C. Icahn and his publicly traded company, Icahn Enterprises L.P. (IEP), for failing to disclose information relating to Icahn's pledges of IEP securities as collateral to secure personal margin loans worth billions of dollars under agreements with various lenders. IEP and Icahn agreed to pay \$1.5 million and \$500,000 in civil penalties, respectively, to settle the SEC's charges. ...

"The federal securities laws imposed independent disclosure obligations on both Icahn and IEP. These disclosures would have revealed that Icahn pledged over half of IEP's outstanding shares at any given time," said Osman Nawaz, Chief of the SEC Enforcement Division's Complex Financial Instruments Unit (CFIU). "Due to both disclosure failures, existing and prospective investors were deprived of required information."

I suppose that's true: If you were a retail investor considering investing in IEP in 2021, and you carefully scoured its financial reports, you could not have learned that Icahn had pledged half of the outstanding shares to secure margin loans, which could have led to disastrous forced selling. On the other hand, you *could* have learned that IEP was trading at a 300% premium to net asset value, so honestly investing after scouring the financial reports was still a weird move.⁵ But the really weird move was for the *banks* to give him all that money, and they knew all about the margin loans: They made them.

RealPage

Let's say that you own some apartment buildings, want to rent out your apartments, and need to figure out how much to ask. If your rents are too high, you won't get any tenants; if they're too low, you'll leave money on the table. How do you do it? I feel like the simple model is:

1. Go on StreetEasy and search for apartments that are sort of similar to yours.
2. See how much they're charging.
3. Charge similar rates, adjusting for how much better or worse your apartments are.
4. If all your apartments are rented in two hours, you undershot, and next time you should adjust

your prices up; if they all languish for weeks, you overshot, and you should lower your rents.

You know: Look at public information, get a sense of the market, develop a feel for the drivers of pricing, and then use your market knowledge and intuition to set prices.

This might take a lot of time, though: You'd have to spend hours on StreetEasy, and you'd have to spend months or years to develop a deep enough feel for the market to make you good at this. You could imagine coding up a little computer program to make the process easier. Scrape StreetEasy for similar apartments, do some analysis of what characteristics drive pricing, use it to set your prices, and iterate if the results are too high or too low. You could do this in a simple dumb way — scrape every one-bedroom apartment in the neighborhood and set your rent at the 70th percentile? — or if you were more sophisticated you could, you know, use machine learning to build more refined pricing models.

Maybe you don't have those technical skills, though, and you might want to hire a computer programmer to build you a nice machine learning model to scrape StreetEasy and figure out the right prices. That's a little inefficient too. Probably other landlords want this same product, right? You don't need to hire a programmer to build it from scratch; probably you can buy it off the shelf. Probably there's one market-leading product that is really good at this, better than your own gut instinct and market knowledge, better than a program that you or your hired programmer could build. Probably the market-leading product is really good at scraping StreetEasy and Zillow and everywhere else that people list apartments for rent, and it has really good algorithms for figuring out exactly what characteristics of an apartment drive the rent up or down, so it can confidently tell you exactly what the going rate is for your apartments.

Here I am saying things like "scraping StreetEasy and Zillow," because after all apartment rental prices are *advertised publicly*, so you can go to some websites and get a sense of the market rates. But it is perhaps an imperfect sense: Not every apartment will necessarily be listed publicly, actual leases might be negotiated at higher or lower rents than what is on the website, etc.

The market-leading product could get around this problem, though, if all (or most) landlords used it. The product could require landlords to *input* their rental rates — the actual prices they're getting for their apartments — and then aggregate those with all of the other landlords' data. And then the product would have a better sense — better than you could get from public data — of what the actual market price is, and it could be more accurate in telling landlords what price to charge.

Would that be ... illegal? Maybe! The general rule of US antitrust law is that is illegal for companies — for instance, landlords — to conspire "in restraint of trade." If all the landlords got together and said "let's agree not to charge less than \$3,000 a month for a one-bedroom," that would be illegal.

If all the landlords got together and went around the room and each one of them said “we’re charging \$3,000 a month for our one-bedrooms,” that would be ... a weird meeting? Like I’d be pretty nervous going to that meeting? Presumably that meeting is not being held for purely informational purposes; presumably telling your competitors “we’re charging \$3,000 a month” is a somewhat subtle way to communicate “let’s not charge less.” It doesn’t have to mean that, though. You could go to that meeting and be like “we’re charging \$2,700 a month to win business from all of you, nyah nyah nyah,” and everyone else could give you dirty looks and you could be fine with it. You could use information about your competitors’ prices to be *more competitive*. It’s not *quite* an agreement to keep prices high, but it looks suspicious.

You don’t need a meeting. If all the landlords sent their rent data to an industry newsletter, which aggregated it and published it every week so the landlords could get a good sense of the market, that would be *better* than meeting in a smoke-filled room, but still risky.⁶

And if all the landlords inputted their rent data into the market-leading pricing algorithm, and that algorithm told them what prices to use based on competitive data, you’d get this:

The US sued Thoma Bravo LLC’s RealPage Inc. for allegedly violating antitrust law by helping property managers collude to drive up rental prices on millions of units across the country.

In a complaint filed by the Justice Department on Friday, antitrust enforcers said RealPage’s software, which helps landlords set rental unit pricing, has effectively raised prices on renters illegally. RealPage is a top software provider to the multifamily rental industry.

Here is the complaint; a sample:

Across America, RealPage sells landlords commercial revenue management software. RealPage develops, markets, and sells this software to enable landlords to sidestep vigorous competition to win renters’ business. Landlords, who would otherwise be competing with each other, submit on a daily basis their competitively sensitive information to RealPage. This nonpublic, material, and granular rental data includes, among other information, a landlord’s rental prices from executed leases, lease terms, and future occupancy. RealPage collects a broad swath of such data from competing landlords, combines it, and feeds it to an algorithm.

Based on this process and algorithm, RealPage provides daily, near realtime pricing “recommendations” back to competing landlords. These recommendations are based on the sensitive information of their rivals. But these are more than just “recommendations.”

Because, in its own words, a “rising tide raises all ships,” RealPage monitors compliance by landlords to its recommendations. RealPage also reviews and weighs in on landlords’ other policies, including trying to—and often succeeding in—ending renter-friendly concessions (like a free month’s rent or waived fees) to attract or retain renters. A significant number of landlords then effectively agree to outsource their pricing function to RealPage with auto acceptance or other settings such that RealPage as a middleman, and not the free market, determines the price that a renter will pay. Competing landlords choose to share their information with RealPage to “eliminate the guessing game” about what their competitors are doing and ultimately take instructions from RealPage on how to make business decisions to “optimize”—or in reality, maximize—rents.

One question that I wonder about is: How close could you get to this *without* any “competitively sensitive information”? If you just built the best possible software for scraping *public* rental data and making pricing recommendations, would it have similar effects? It would, broadly speaking, have the same goals: Using other landlords’ prices to set your price. Is that goal *itself* an antitrust problem?

Rest and vest

I guess in the long span of human history, the most normal move has been that if you get really rich you move into the leisure class and enjoy your wealth. And then the modern capitalist world is somewhat unusual in that, *now*, the pretty stereotypical move is that if you get rich in a lot of fields, you tend to enjoy your work so much — or be a certain personality type — that you keep working even harder despite having more money than you could ever need. And then there are a few modern big tech companies that are sort of an exception to the exception, where it *is* common to get rich, keep your job, but not really do much work anymore: Alphabet and Meta have recreated the leisure class. And then the exception to the exception to the exception is Nvidia Corp.:

Nvidia stock has gained 3,776% since the start of 2019 as the company benefits from selling the main chip necessary for artificial intelligence work, minting many new multimillionaires in the process. But the work hours are just as grueling and high-stress, current and former employees said, leaving little time for the jet-setting, homebuying and leisure many can now afford. A culture problem is brewing, said the 10 people, who asked not to be identified for fear of retribution.

The 31-year-old chipmaker has piled on market cap faster than any other company in history. Founder and Chief Executive Officer Jensen Huang has established expectations of scrappiness and overworking, with a chaotic structure where one manager can have dozens of direct reports, the current and former employees said. Rather than firing employees like his competitors, Huang has said he prefers to “torture them into

greatness.”

One former employee, who worked in technical support for enterprise clients, said he was expected to work 7 days a week, often until 1 a.m. or 2 a.m. He said many of his former colleagues, especially those on engineering teams, worked longer hours. ...

The tech industry trope of “resting and vesting” is so common it was ridiculed by Hollywood in HBO’s “Silicon Valley” show with a character who squanders away his time playing video games and drinking big sodas waiting for his stock to vest. But it doesn’t work at Nvidia. One current employee said it would be embarrassing and even socially difficult to coast. ...

It’s not just about the money. Airan Junior, who was at the chipmaker from 2020 to 2023, said that “working at Nvidia is like Disneyland” because of the many teams solving interesting technical problems. He worked on a sales team based out of Brazil, and said the company’s culture, however unconventional, contributed to its massive success.

The nice thing about modern capitalism is that there is (or can be) a pretty direct line between “solve interesting intellectual puzzles” and “generate tons of money for yourself,” so even after you have enough money that you never have to work again, solving the puzzles might still be more fun than whatever else you’d be doing. Even at 2 a.m., maybe.

Tether

Tether, I have said before, has one of the world’s best business models:

1. People give it \$115 billion of cash to hold onto for them in exchange for Tether’s USDT crypto token.
2. Tether’s job is to invest the cash in safe, liquid assets, Treasury bills and whatnot, so that USDT remains backed by dollars.
3. In the current interest rate environment, those safe assets pay like \$4 billion a year in interest.
4. *Tether doesn’t pass on the interest to the customers.*

It’s just free money! The main flaw in this business model is that it might stop. Interest rates might go down, making it less lucrative. Or interest rates might stay high, creating more pressure for stablecoin issuers like Tether to find some way to pass the interest on to the customers. A perpetual interest-free money market fund doesn’t seem like that stable an equilibrium, though it has worked so far.

So if you’re Tether I suppose the sensible move is ... well, look, one entirely sensible move would be to take the \$4 billion a year of income, buy yachts and houses, and say “ah well if it comes to an end

eventually it was a good run.” (Rest and vest!) But at some point the money gusher is so good that you have to spend some of it on *investments*, investments that might give you a better chance at permanence. Or that might just be fun. I don’t know, who cares, it is all free money. Also because you are Tether and have some history of odd behavior and conflicts of interest, probably the guy who does the investing for you will end up in a Wall Street Journal story like this:

The company has enlisted tech investor and entrepreneur Christian Angermayer to help invest its windfall. The colorful financier has also sought riches in unconventional investments including psychedelics, dinosaur fossils and an Olympics alternative where athletes are encouraged to use performance-enhancing drugs.

So far, Angermayer has helped Tether invest roughly \$1.5 billion into two companies where he already holds stakes. He also earned commissions on some of the transactions. The companies they invested in have frequently lost money.

Within the past year, Tether took majority stakes in Northern Data, a money-losing German data center operator that aspires to be an AI company, and Blackrock Neurotech, a struggling Utah-based brain implant company in competition with Elon Musk’s Neuralink.

Honestly if I ran Tether I would be so, so, so cavalier with the earnings,⁷ so I can’t really criticize this.

Head of macro

We have talked a few times about James Fishback, a guy who worked at Greenlight Capital for a while, and who says that he was the “Head of Macro” at Greenlight, while Greenlight disagrees. There is no more to the story than that, but they’re all really mad about it. Fishback goes around trolling Greenlight on X about how he was head of macro, and Greenlight goes around suing Fishback to make him stop, and it is a delight, though probably not for Greenlight. Definitely for Fishback, though, who is clearly having the time of his life, though perhaps not in a way that will endear him to institutional limited partners.

It probably endears him to college students. If you invite Fishback to your campus, he can speak to two popular topics for college students, (1) getting a fancy job in finance and (2) trolling. Obviously obviously obviously obviously, however, if you do invite Fishback to your campus and he agrees to come speak, you will have to promote the event with posters saying “Come hear James Fishback, former Head of Macro at Greenlight Capital,” because that is his whole schtick: Both the fancy finance job and the trolling must be described with the words “Head of Macro at Greenlight Capital.”

But then you will have a problem, because Greenlight will see your posters (sorry, they will), and they will send you a cease and desist letter telling you to take down the posters because Fishback was never the head of macro at Greenlight. And then ... well, here is an apparently real letter from FIRE, the Foundation for Individual Rights and Expression, to the office of the general counsel of the University of Florida, complaining about some deleted Instagram posts:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech, is concerned that your office ordered the UF chapter of the Association for Latino Professionals for America, an independent student group to remove content from its Instagram page in response to a demand letter from a venture capital firm⁸ alleging the group misrepresented the title of a former employee. This order violates the First Amendment. ...

In March 2023, ALPFA promoted on their Instagram page an event featuring James Fishback, referring to him as the “Head of Global Macroeconomic Investing at Greenlight Capital.” In August, Fishback left the firm, and his former title became a point of contention between him and Greenlight. On May 1, 2024, 14 months after ALPFA promoted the event on Instagram, Greenlight attorney Stephen Baldini wrote UF demanding the university remove several references to Fishback as Greenlight’s “Head of Macro” by May 11, alleging the title was a “misrepresentation.”

A university administrator apparently asked the group to remove the post, and it did, and now FIRE is involved. What are the chances that this will end up in the Supreme Court? Pretty good, right?

Things happen

Telegram CEO Held Over Alleged Child Protection Failures on App. Why Nippon Steel’s \$15 Billion Takeover of U.S. Steel Is in Peril. Shadow banking drives a rural Kentucky lender to the brink. SocGen’s Slawomir Krupa struggles to turn tide as investors snub lacklustre reset. China’s AI Engineers Are Secretly Accessing Banned Nvidia Chips. Big-Bank CEOs Like to Wield Influence—Except in Presidential Politics. Top defence contractors set to rake in record cash after orders soar. Uber Hit by Record \$324 Million Fine for Data Transfers to US. The deluge of work apps. “The police also charged Braun with assaulting his wife on two occasions, and with evading \$160 in bridge tolls by removing license plates from a Ferrari and a Lamborghini he drove, court records show.” “The first man in a century and a half of Major League Baseball to suit up for both teams in the same game.”

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1. Icahn Enterprises is a limited partnership, and those are not really “shares of stock” but rather “partnership units,” or even more technically “depository units representing limited partnership interests.” Nothing turns on this and I am going to call them shares of stock, sorry! The share numbers in the first three bullet points here come from the Form 10-K for 2022 (pages 55 and 123-124); the stock price is from Bloomberg.
2. Numbers here from the SEC order against him.
3. The SEC notes that Icahn pledged “IEP depository units and/or his interests in the IEP Funds as collateral” for various loans, though it only tracks the pledged units; the collateral might have been a bit better than this implies.
4. He pledged 320 million IEP units plus “\$2 billion of interests owned by Mr. Icahn in the private investment funds managed by” IEP, and converted the margin loans into a term loan with involving a \$500 million up-front payment, some smaller quarterly payments, and a \$2.5 billion balloon payment at the end. Importantly, the new loan was based on NAV rather than share price: “Pursuant to the terms of the Loan Agreement, a margin call may only be triggered in the event that the loan-to-value ratio set forth in the Loan Agreement is not maintained. Unlike the previous loan agreements, for purposes of the loan-to-value ratio set forth in the Loan Agreement, the value of the pledged Depository Units will be calculated based upon the Issuer’s indicative net asset value rather than the market price of the Depository Units.” Even after the restructuring, Icahn had about \$3.7 billion of loans outstanding against about \$6 billion of collateral.
5. That's based on (1) \$63.88 per share price on Feb. 26, 2021 (per Bloomberg), (2) 241.3 million shares outstanding that day (per the 10-K) and (3) a \$3.5 billion NAV at the end of 2020 (per the earnings release that day). That gets an NAV of about \$14.70 per share, so about a 335% premium.
6. Here’s a 2023 memo from K&L Gates describing a rough 30-year consensus that information sharing was probably allowed if “the survey was managed by a third party,” “the information shared was more than three months old” and “the information was sufficiently aggregated such that no recipient could identify the prices charged or compensation paid by any particular provider,” so the industry newsletter might be okay. But then last year the Antitrust Division of

the US Department of Justice changed the guidance, because it “no longer believes competitors’ use of a third party to aggregate and share data necessarily reduces the risk of anticompetitive harm” (and “in some instances, data intermediaries can enhance—rather than reduce—anticompetitive effects”), and because it “no longer believes use of aggregated data necessarily eliminates the risk of anticompetitive harm.” So my newsletter looks riskier.

7. To be clear, I’d be super careful with the \$115 billion backing the USDTs. I’d probably even keep a few billion dollars of retained earnings around in safe stuff just in case. But anything over, like, \$120 billion, I’d go nuts.

8. Sic.



NOT FOR REPRINT

SEC, Richard Heart Clash in Dueling Motions Over \$1 Billion Unregistered Securities Litigation

“This case will go down in history as one of those cases that nobody saw coming, and it is very important,” said Ishmael Green, a partner at Diaz, Reus & Targ who is not involved in the matter.

August 23, 2024 at 03:55 PM

Cryptocurrency



Michael A. Mora



The original version of this story was published on [New York Law Journal](#)

What You Need to Know

- The U.S. Securities and Exchange Commission sued Richard Heart over the offer and sale of over \$1 billion in unregistered securities.
- Both sides filed dueling motions on Thursday spanning over 140 pages.
- An uninvolved expert noted the implications of the litigation on the industry at large.

The U.S. Securities and Exchange Commission and the litigators for an embattled cryptocurrency founder escalated their clash this week over a \$1 billion unregistered securities lawsuit before a federal district court in Brooklyn.

Defendant Richard Heart is represented by several law firms, including Am Law 100 firm [Quinn Emanuel](#) Urquhart & Sullivan and its partners Michael Liftik and Kristin Tahler. Heart claimed that the plaintiff, the SEC, “further seeks to cement a role it has assumed for itself as the global governor of blockchain technology—a role exceeding both the limited mandate and the bounds of personal jurisdiction” and the “case should be dismissed with prejudice.”

Within hours of the defendant’s filing, the SEC filed a motion in opposition. Matthew Gulde, a trial attorney who penned the motion for the SEC, pinpointed five points that Heart asserted and doubled down against the notion that the complaint is “deficient in any respect.”

Now, a hearing has been scheduled in October before U.S. District Judge Carol Amon of the Eastern District of New York before she rules on the matter.

Ishmael Green, a partner at [Diaz, Reus & Targ](#) in Miami and uninvolved crypto expert, said the ruling and its fallout could impact other digital assets because “Pulsechain is essentially a copy of Ethereum, and Hex is essentially Bitcoin but with a certificate of deposit function.”

“This provides a roadmap for anyone creating a cryptocurrency who wants to remain outside of the SEC’s enforcement arm,” Green said. “This case will go down in history as one of those cases that nobody saw coming, and it is very important.”

Five Points

In the complaint, the SEC alleged that Heart raised over \$1 billion in the unregistered offer and sale of crypto asset securities to retail investors in the U.S. and elsewhere and personally directed the creation and development of three crypto-assets called Hex, Pulse (PLS) and PLSX. In doing so, Heart personally promoted the securities to investors and misappropriated millions of dollars of Pulsechain investor funds to buy cars, watches and diamonds.

In the [69-page motion to dismiss](#), Heart argued five key points and the SEC, in [74 pages](#), disputed each point.

First, the lawsuit cannot escape the starting gate because exercising personal jurisdiction over Heart in this action would not comport with due process since Heart lives abroad, has not alleged to have set foot in the U.S. during the time period, and the availability of his speech on the internet does not satisfy the requirements for asserting personal jurisdiction.

The SEC claimed that Heart has direct activity in the U.S. through the offer, sale and purchase of the three crypto assets and that these contacts with the U.S. demonstrated that he “should reasonably have anticipated the possibility of being haled into court in the United States.”

Second, Heart argued that the SEC has not plausibly alleged a domestic securities transaction, as the U.S. Supreme Court has held that the securities laws do not apply extraterritorially. However, the SEC claimed the transactions and conduct at issue are domestic and not impermissibly extraterritorial under *Morrison v. National Australia Bank*.

Third, the SEC failed to satisfy basic pleading requirements for its securities fraud scheme claim regarding PulseChain, per the motion. Heart argued that the SEC failed to allege deceptive conduct or that any of his statements were false or misleading. The SEC countered that Heart misappropriated investor funds and took steps to conceal his actions.

Fourth, Heart claimed that the SEC has not plausibly alleged that the three software programs at issue constitute “investment contracts” subject to federal securities laws. The SEC, in response, argued that *SEC v. W.J. Howey Co.* recognized that investment contracts include “contracts, transactions or schemes.”

Fifth, Heart argued that the SEC’s case amounts to an unconstitutional infringement on the First Amendment guarantees of freedom of speech and association for Heart and those who execute the Hex, PulseChain and PulseX software programs through their commentary. The SEC claimed that the federal district court should not adopt Heart’s “novel position.”

“The SEC does not seek to remove Heart or any crypto enthusiast from the internet; it seeks, as always, to prevent the unregistered offers and sales of securities and to fight securities fraud,” the SEC argued. “Importantly, no case cited by Heart stands for the proposition that a financial software constitutes a ‘public square’ or ‘public forum’ that deserves First Amendment protection.”

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Kraken Must Face SEC Suit Over Crypto Exchange Registration (2)

By Rachel Graf

Bloomberg Law News 2024-08-26T09:57:22991858331-04:00

Kraken Must Face SEC Suit Over Crypto Exchange Registration (2)

By Rachel Graf2024-08-23T17:43:39110-04:00

Cryptocurrency platform Kraken must face a US Securities and Exchange Commission lawsuit accusing it of operating an unregistered securities exchange, a judge ruled.

"The SEC has plausibly alleged that at least some of the cryptocurrency transactions that Kraken facilitates on its network constitute investment contracts, and therefore securities, and are accordingly subject to securities laws," US District Judge William H. Orrick wrote in an opinion published Friday in San Francisco federal court.

Kraken had asked the judge to dismiss the case filed by the SEC in November. The ruling comes after Bloomberg News reported in early June that Kraken, one of the oldest crypto exchanges, was considering raising a final funding round ahead of a possible initial public offering.

The judge said the SEC's labeling of Kraken tokens as "crypto asset securities" is "unclear at best and confusing at worst." Orrick went on to say that he's reading the agency's claims to be focused on assets offered as part of investment contracts, and not as allegations that individual cryptocurrency tokens are themselves securities.

Kraken's chief legal officer hailed the ruling as a finding that none of the tokens trading on Kraken are securities.

"This is a significant win for Kraken, for the principle of clarity and for crypto users everywhere," **Marco Santori** said in a post on X, the social media platform. "It also confirms Kraken's long-standing position that it does not list securities."

An SEC spokesperson said the ruling confirms that "the framework used to identify securities for nearly 80 years still applies, regardless of the labels used."

"Investors in crypto assets offered or sold as securities should get the same protections as investors in other securities, even when they are traded using intermediaries," the spokesperson said in a statement.

The SEC under Chair Gary Gensler argues most digital tokens are unregistered securities that should be subject to its oversight. Gensler is highly critical of crypto exchanges and the digital-asset industry for alleged noncompliance.

But the question of whether digital tokens are securities has divided courts. A Manhattan federal judge ruled last year sales of Ripple Labs XRP token weren't subject to SEC jurisdiction when offered to the public on exchanges, while other judges reached the opposite conclusion in the regulator's cases against Terraform Labs Pte. and Coinbase Global Inc., the largest US crypto exchange.

Read More: Ripple Hit With \$125 Million Penalty, Fraction of SEC Claim

The Ripple ruling, which found XRP was covered by securities law only when sold to institutional investors, was hailed as a major victory for the industry. Earlier this month, Ripple notched another win when it was ordered to pay a civil penalty of \$125 million for the sales to institutional investors — a fraction of the nearly \$2 billion in penalties the SEC had sought.

Kraken had argued, like Ripple, that the SEC doesn't have jurisdiction over digital assets.

At a June court hearing on Kraken's motion to dismiss the SEC suit, the exchange's lawyer urged Orrick not to apply the Terraform and Coinbase rulings to the case.

Read More: Terraform to Pay \$4.47 Billion to Settle SEC Fraud Case

Terraform offered tokens directly, whereas Kraken is an exchange or "secondary market" subject to different regulations, the lawyer told the judge. With regard to Coinbase, the Kraken attorney said he disagreed with that judge's ruling, arguing it was inconsistent with precedents in the US Supreme Court and Ninth Circuit Court of Appeals, the intermediate court for West Coast states.

The case is Securities and Exchange Commission v. Payward Inc., 23-cv-06003, US District Court, Northern District of California (San Francisco).

(Updates with comments by Kraken lawyer, SEC spokesperson)

--With assistance from Chris Dolmetsch and Lydia Beyoud.

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Trump's 'Made in USA' Bitcoin Threatens China Juggernaut's Reign

By Ryan Weeks and Sidhartha Shukla

- Bitmain has 90% mining-rig market share by its own estimate
- Some rivals seize on China-US tensions to grab business

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Trump's 'Made in USA' Bitcoin Threatens China Juggernaut's Reign

By Ryan Weeks and Sidhartha Shukla2024-08-26T06:00:00004-04:00

- Bitmain has 90% mining-rig market share by its own estimate
- Some rivals seize on China-US tensions to grab business

For years, a Chinese company has dominated one of the most lucrative corners of the cryptocurrency universe. Rising political tensions, and the prospect of Donald Trump retaking the White House, pose an unprecedented threat to that reign.

Beijing-based Bitmain Technologies Ltd. has a 90% share of the market for computers used to mine Bitcoin. One top customer likens it to diamond producer De Beers at its height: so powerful that it can dictate global prices just by adjusting the output of its machines.

But with former president and China hawk Trump saying he wants Bitcoin to be “mined, minted and made” in the US, upstart rivals see an opportunity to finally wrest business from Bitmain. Some are leaning hard into the narrative that miners will do well to diversify their supply to hedge against geopolitical risk.



Donald Trump at the Bitcoin 2024 conference in Nashville, Tennessee, on July 27.

Photographer: Brett Carlsen/Bloomberg

Trump's rhetoric adds to an already worsening political environment for Bitmain in the US, where most Bitcoin is mined nowadays and concerns are rising that the equipment could be used for spying.

There are many reasons why Trump may "want to challenge a scenario where there's a single dominant company that is a Chinese company in this space," including national security concerns, said Rajiv Khemani, chief executive of California-based startup Auradine, a Bitmain rival.

The new dynamic is already playing out in the market. In July, Austin, Texas-based Bitcoin miner Core Scientific Inc. broke with tradition and announced an order from a unit of Jack Dorsey's Block Inc. — even though Bitmain is one of its biggest investors.

California-based Auradine raised \$80 million in April and shipped its first mining machines in late July. It counts Marathon Digital Holdings Inc., one of Bitmain's largest clients, among its shareholders.

Bitmain declined to respond to questions from Bloomberg News.

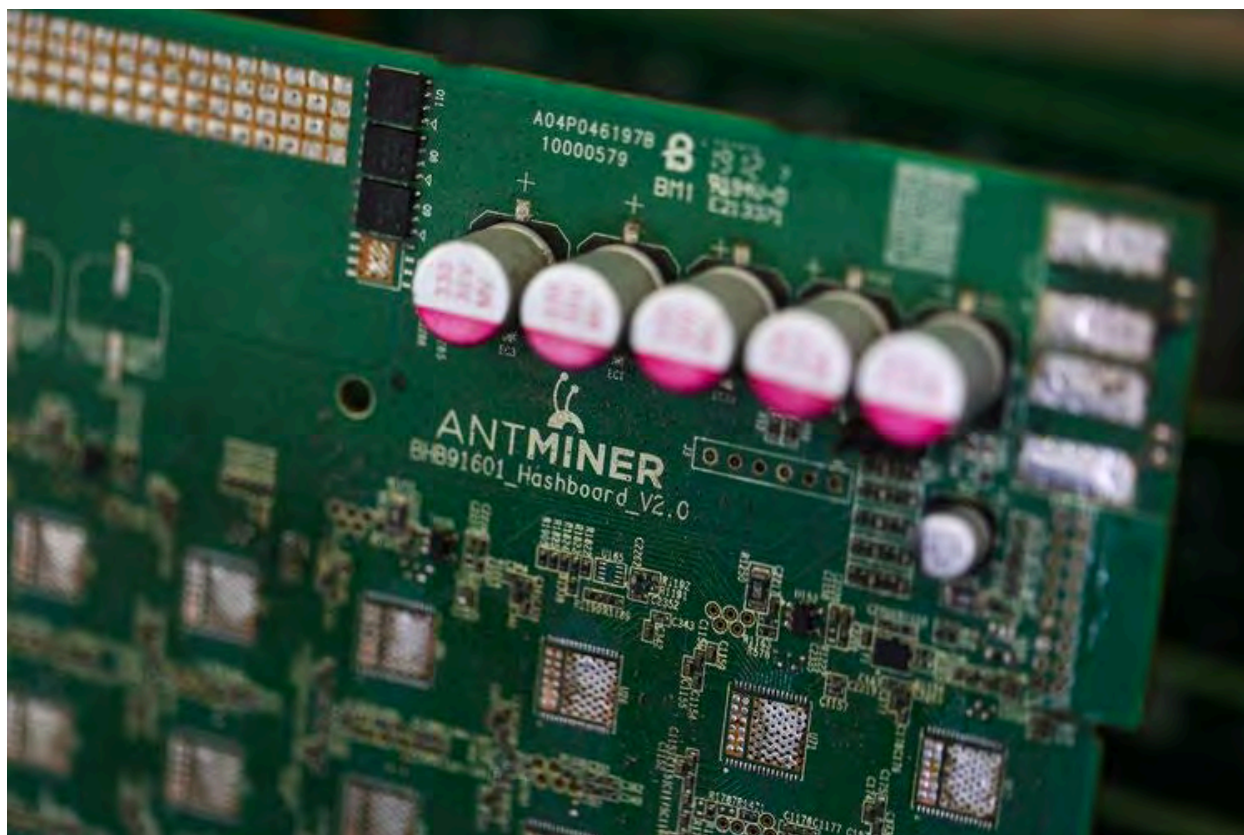
Marathon, Core Scientific Are Two of Bitmain's Top Clients			
Company	Size of Fleet	Bitmain's Share	As of
Marathon Digital	242,000	90%	07/31/24
Core Scientific	200,000	99%	09/21/23
Cipher Mining	71,000	41%	05/31/24
Terawulf	74,200	98%	08/12/24
Bitfarms	66,000	80%	08/16/24
Source: Data compiled by Bloomberg from filings and interviews			Bloomberg

When someone “mines” a Bitcoin, what they’re really doing is using specialized computing equipment to solve an enormously complicated mathematical puzzle. To get there, the machines (known colloquially as “rigs”) essentially use brute force by throwing trillions of guesses per second at the problem. Each successful attempt helps support the blockchain and is rewarded with Bitcoin.

Using a car analogy, mining rigs are akin to drag racers: immensely powerful and built for a narrowly defined purpose. They also gobble up power, accounting for about 0.6% of the world’s electricity consumption last year, according to the Cambridge Center for Alternative Finance.

As a result, the economics of Bitcoin mining largely boils down to the token’s price, access to cheap electricity and having the most efficient rigs.

Bitmain was founded in 2013 by **Micree Zhan** and **Jihan Wu**, according to a 2018 prospectus for a subsequently scrapped listing in Hong Kong. The company’s LinkedIn page says it is headquartered in Beijing.



An Antminer hash board in 2021.

Photographer: Andrey Rudakov/Bloomberg

From its early days, Bitmain set itself apart by offering powerful, reliable machines — and then constantly upgrading its signature Antminers to stay ahead of the competition.

“When they launch a new machine, it resets the competitive dynamic in the marketplace,” said **Fred Thiel**, CEO of Marathon Digital. “The people that get access to that have a competitive advantage immediately.”

Seeking to stave off the threat of tariffs, Bitmain shifted some production from China to Southeast Asia years ago, according to a distributor. Trump in 2018 imposed tariffs on electronics and other goods imported from China.

The company doesn't currently have any US-based manufacturing, four people with knowledge of the matter said, asking not to be identified to avoid jeopardizing business relationships. It has production lines in Indonesia, Malaysia and Thailand, according to Taras Kulyk, CEO of Synteq Digital, a distributor of Bitmain equipment.

Crypto Mining Rig Profitability		
Top-6 models by operating margin are from Bitmain		
Model	Profit (\$/day)	Operating margin (%)
Antminer S21 XP Hydro	12.4	60.3
Antminer S21 XP Immersion	7.2	55.3
Antminer S21 XP	6.5	55.3
Antminer S21 Pro	5.1	50.3
Antminer S21 Hydro	6.9	47.0
Antminer S21	3.7	42.1
Whatsminer M66S Immersion	5.0	38.8
Whatsminer M66S Immersion	4.6	38.8
Whatsminer M63S Hydro	6.6	38.8
Whatsminer M63S Hydro	6.1	38.8

Source: Hashrate Index
 Note: Figures as of Aug. 9 at an estimate electricity cost of 6 cents per kWh

Bloomberg

But even the production moves, and the competitive moat Bitmain built around itself, may not be enough to shield it in an era of increased competition and souring relations between the two top superpowers.

The shift of Bitcoin mining to the US — after China banned it — coincided with intensified US efforts to keep its geopolitical rival from obtaining the most advanced computing equipment, such as chips used to power artificial intelligence. This fight for chip supremacy is roiling entire supply chains. And it's leading to more scrutiny of who's mining cryptocurrency on US soil, and where the hardware comes from.

In May, President Joe Biden ordered a Chinese Bitcoin mining company called MineOne to vacate and sell a 12-acre property near Cheyenne, Wyoming.

One of the reasons was the presence of “specialized and foreign-sourced equipment” used to mine cryptocurrency — but “potentially capable of facilitating surveillance and espionage activities,” the Committee on Foreign Investment in the United States said in a statement at the time.

‘Generalized Concern’

At a July 25 hearing of the Senate Committee on Banking, Housing and Urban Affairs, Democratic Senator Elizabeth Warren pressed Treasury Department official Paul Rosen on whether the mining equipment at the North Range facility could have been used to spy on US military operations.

"There is a generalized concern that sophisticated equipment in proximity to sensitive facilities can be used for espionage," Rosen, the assistant secretary for investment security, replied. The North Range site is near the F.E. Warren Air Force Base, which houses US nuclear missiles.

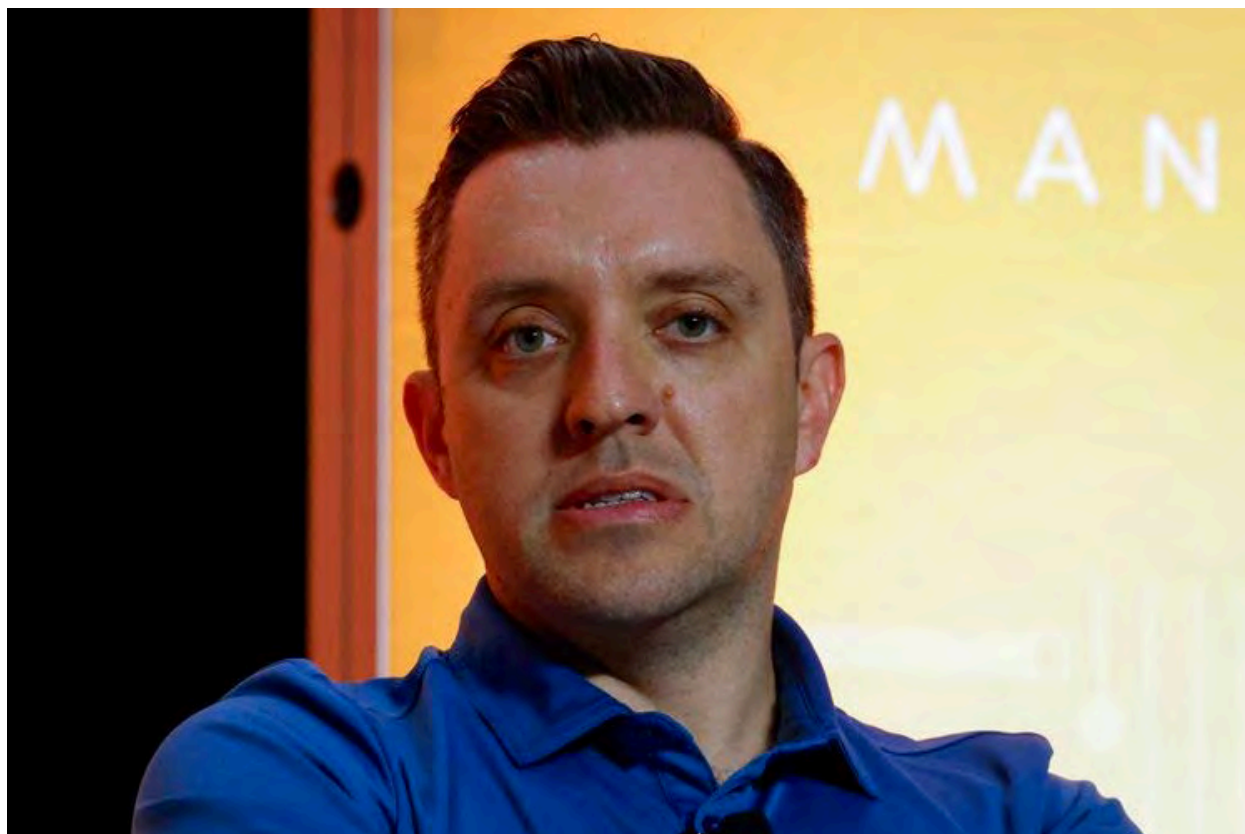
Rosen, who runs CFIUS, didn't elaborate on how crypto mining machines could be used for spying, and the May announcement didn't mention Bitmain. The Treasury Department declined to comment further. The US hasn't presented any public evidence that mining rigs have been used for espionage.

Even so, MineOne was ordered to remove all equipment from the site in addition to vacating the property. Most of the rigs came from Bitmain, according to a person with direct knowledge of the matter.

Peeking Inside Rigs

MineOne agreed to sell its North Range and Campstool mining facilities in Wyoming to CleanSpark Inc. The company, which calls itself "America's Bitcoin Miner," was seeking a home for hundreds of millions of dollars worth of rigs it had agreed to buy in January — all from Bitmain.

That contract, with Bitmain Technologies Delaware Ltd., stipulates that all equipment "shall have a country of origin other than China" or any Office of Foreign Assets Control-sanctioned nation. It also gives CleanSpark the right to reject any products found to originate from China or OFAC-sanctioned countries, in which case Bitmain must replace them with identical machines manufactured elsewhere, the filing shows.



Zach Bradford

Photographer: Eva Marie Uzcategui/Bloomberg

"That's really important for us," said CleanSpark CEO **Zach Bradford**. "Not just for the tariffs, but with the political situation being what it is."

Bradford, however, scoffed at the notion that mining rigs can be used for spying. "There is no memory, there is nothing on these units that could actually be used for espionage," he said.

Sphere 3D Corp., a crypto miner based in Connecticut which bought all its roughly 12,000 rigs from Bitmain, unwittingly got embroiled in the US-China tensions some two years ago.

A scaled-back order for Antminer machines was transferred to US-listed Bitfufu Inc., in which Bitmain owns a 41% stake, for distribution. Then, a paperwork error interrupted the shipment of 4,000 rigs, according to Sphere 3D CEO **Patricia Trompeter**.

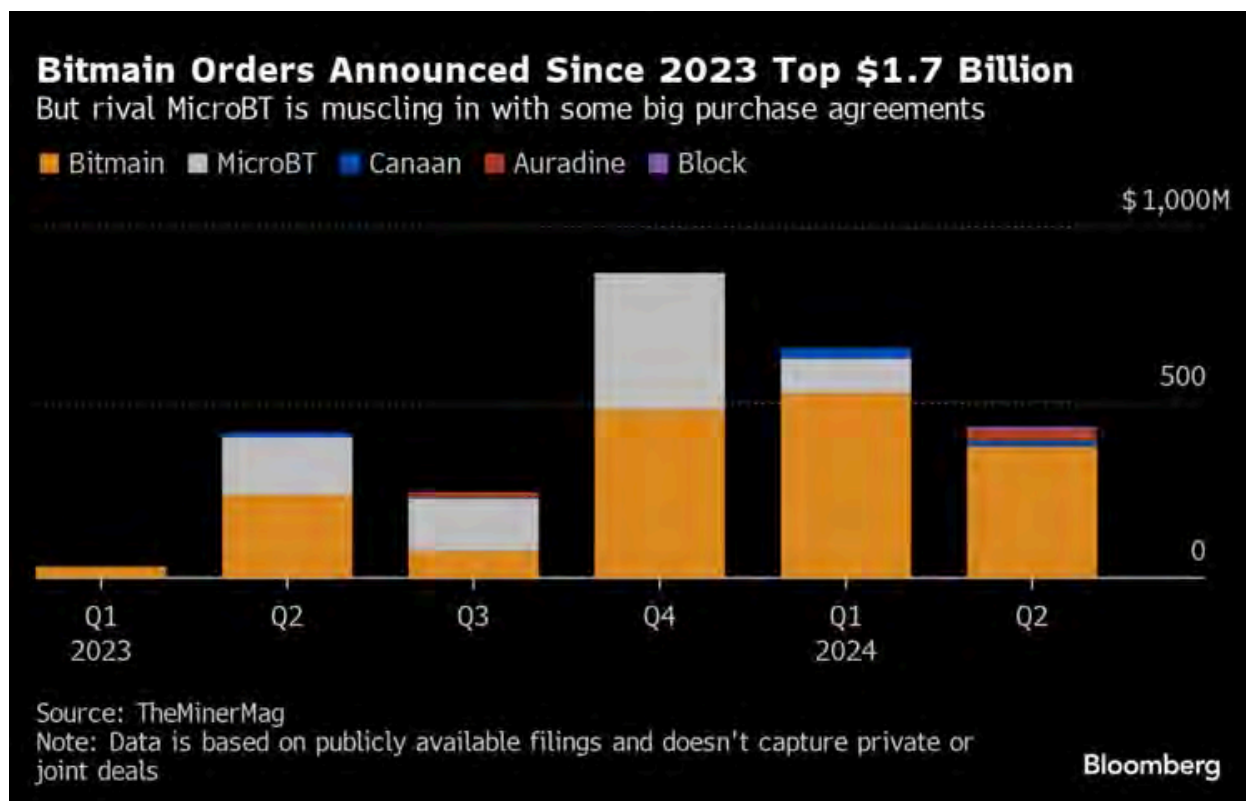
Customs officers seeking to establish the equipment's origins pried open one unit and found a tiny "made in China" tag inside, she said. The gear was held for three months until Bitmain helped resolve the issue, according to Trompeter, who declined to say how. "That was a very tough period for my company."

Bitfufu declined to comment, as did US Customs.

Complicating matters further is the possible return to power of Trump, a crypto skeptic during his first term who has become an industry champion after a wave of donations from prominent digital-asset figures.

Speaking at a Bitcoin conference in Nashville, Tennessee, on July 27 in front of a rapturous crowd, Trump called for crypto to be "mined, minted and made" in the US. In a June interview with Bloomberg Businessweek, he framed it as necessary to stave off China — notwithstanding that country's sweeping ban on cryptocurrencies, which includes mining. "If we don't do it, China is going to figure it out, and China's going to have it — or somebody else," he said.

Trump hasn't commented publicly about Bitmain, or whether he considers mining rigs made in China or elsewhere a potential national security threat. But signs abound that his "made in the USA" calls are starting to resonate.



Riot Blockchain Inc., which as of two years ago only used Bitmain machines, has placed hundreds of millions of dollars of orders with another Chinese manufacturer, MicroBT, since June 2023.

Riot's purchase agreements are with MicroBT's "onshore manufacturing sites within the US," according to a Riot spokesperson. That gives it greater control of the supply chain, the spokesperson said.

For many miners, however, all this supply-chain reshuffling fails to address an uncomfortable fact: Bitmain's rigs remain the gold standard.

"My reaction to people when they say you shouldn't be buying Chinese machines, I say — because I'm a businesswoman — great, give me an alternative that's equal or better that's US-made," Sphere 3D's Trompeter said. "If I'm a Bitcoin miner and I need to be efficient, Bitmain has the most efficient machines."

--With assistance from **Kiuyan Wong**.

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Philip Lagerkranser, Michael P. Regan

China's PDD shares slide after weak consumer spending dents revenue

 [reuters.com/world/china/temu-owner-pdd-holdings-misses-quarterly-revenue-estimates-2024-08-26](https://www.reuters.com/world/china/temu-owner-pdd-holdings-misses-quarterly-revenue-estimates-2024-08-26)

Sophie Yu, Deborah Sophia

Temu logo is seen in this illustration taken August 22, 2024. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

- PDD says stiff competition will weigh on revenue growth
- Will invest to build trust in platform
- Plans to support higher quality merchants

Aug 26 (Reuters) - China's PDD Holdings (PDD.O) , opens new tab missed market estimates for quarterly revenue on Monday, as reduced consumer spending dented business at its domestic e-commerce platform Pinduoduo, sending the company's shares down more than 25% in early trade.

A fragile economy, persistent weakness in the property sector and high unemployment rates, have led Chinese consumers to cut back on purchases, damaging the country's retail and e-commerce sectors.

While Pinduoduo's low prices and steep discounts on anything from groceries to earphones have attracted cost-conscious shoppers, major rivals have also offered heavy promotions on their own platforms, piling competitive pressure on PDD.

"Looking ahead, revenue growth will inevitably face pressure due to intensified competition and external challenges... Profitability will also likely be impacted as we continue to invest resolutely," said PDD's vice president of finance Jun Liu.

PDD said it would invest heavily in the platform's trust and safety, and adopt policies to provide support for high-quality merchants, while tackling low-quality ones.

"We are prepared to accept short-term sacrifices and potential decline in profitability," said Chairman and Co-CEO Chen Lei. "While encouraged by the solid progress we made in the past few quarters, we see many challenges ahead."

M Science analyst Vinci Zhang said he was surprised by PDD Holdings' performance.

"We know there's a consumer spending slowdown, but there was hope that maybe PDD being the budget product platform with cheaper offerings can capture this slowdown, but it turns out that they are also losing," Zhang said.

Chinese e-commerce giant Alibaba (9988.HK) , opens new tab missed market estimates for revenue earlier this month, pinched by weaker domestic e-commerce sales, while

JD.com's (9618.HK) [opens new tab](#) quarterly revenue grew only 1.2%.

PDD reported revenue of 97.06 billion yuan (\$13.64 billion) in the second quarter, compared with analysts' average estimate of 100 billion yuan, according to LSEG data.

Operating expenses rose by 48% in the three months ended June 30, as the company invested in marketing, advertising and promotions to attract shoppers.

General and administrative costs more than tripled in the quarter to 1.84 billion yuan, because of staff-related expenses.

(\$1 = 7.1173 Chinese yuan renminbi)

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Audit Leader Behind US Rule Revamp Defies Calls to Slow Down

By Amanda Iacone

- PCAOB chair pushes for modern rules two decades after Enron
- Auditors call for more time to shape, adopt rapid-fire reforms

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Audit Leader Behind US Rule Revamp Defies Calls to Slow Down

By Amanda Iacone 2024-08-26T04:45:01000-04:00

- PCAOB chair pushes for modern rules two decades after Enron
- Auditors call for more time to shape, adopt rapid-fire reforms

Erica Williams has set a blistering pace to overhaul rules governing audits of public companies that in some cases are decades out of date.

Williams, who has been chair of the Public Company Accounting Oversight Board since 2022, has led the Enron-era regulator as it has finalized five projects and moved six others through various stages of adoption. Last year alone was the board's most active period to modernize its rule book in a decade.

Audit firms, largely unsuccessfully, have demanded more opportunities to shape pending reforms and more time to adopt to changes that guide how they audit corporate accounting for juggernauts like Apple to small R&D firms.

Yet, Williams makes no apologies and has no plans to slow down.

"Maintaining high standards is a tough job," the former White House legal aide and advisor to past Securities and Exchange Commission chairs said in a recent sit-down interview with Bloomberg Tax. "The capital markets don't stand still. And lots of different things have happened in the past 20 years and our standards need to keep up."

Williams, who began a second term in June, oversees a regulator that historically leaned on inspections and the threat of typically small financial penalties to hold auditors accountable.

During her tenure, the board upped the cost of common infractions like backdating papers that document the audit along with more serious charges. The board in April levied a record \$25 million fine against the Dutch arm of KPMG for cheating on training tests.

Some stakeholders have argued the board should focus less on fines and sanctions that can end careers and more on ensuring firms comply with basic standards through guidance and inspections. The US Chamber of Commerce, for instance, called a rule change “draconian” and unnecessary that would hold partners and senior staff accountable for negligence if their missteps contributed to audit failures.

One thing that could derail Williams’ agenda: the outcome of the upcoming presidential election. A new administration could choose to overhaul PCAOB leadership for what would be the third time since 2017.

Enron-era Rules

Congress created the board in 2002 to protect investors from accounting scandals like those that toppled Enron Corp. and WorldCom Inc. Among its duties, lawmakers tasked the regulator with writing new rules to ensure auditors deliver a reliable picture of corporate health to shareholders.

Despite that authority, the board’s rule book relies on standards largely written by the accounting industry, in some cases decades ago. Those measures were adopted as a stop-gap but despite Williams’ progress the majority remain unchanged even as international audit rules and requirements for private company audits continued to evolve.

The need for tougher audit standards that meet the risks of today’s capital markets hasn’t ebbed in the board’s two-decade history, Williams said.

As PCAOB modernizes its rules, the regulator relies on comment letters as well as other sources of feedback including years of accumulated input and research.

“We’ve seen concept releases, we’ve seen research projects, we’ve seen proposals and re-proposals,” Williams said. “Now’s really the time to bring those efforts to fruition and deliver updated standards and rules so that we can make sure that investors are best protected.”

Although firms support the board’s efforts to update its standards, they are concerned how those rule-changes might interact and whether they would meet the needs of a wide range of audits, said Dennis McGowan, vice president of professional practice at the Center for Audit Quality, which represents the interest of auditors.

“To guard against unintended consequences, sufficient time is necessary for all stakeholders to absorb, adapt, and consider the cumulative impact of modernized requirements,” McGowan said in a statement.

The Road to Quality

One of the marquee projects pushed by the board under Williams would overhaul foundational rules for how firms manage their audit practice, known as quality controls. The new standard, which is pending review before the Securities and Exchange Commission, would require firms to design safeguards for routine risks in their practice.

Firms that have invested in those internal guardrails—which cover ethics, staffing levels, and whether to take on a client—have decreased problems uncovered during inspections and boosted audit quality, Williams said.

Nearly half of company audits PCAOB inspected last year fell short of basic standards, according to results the board released earlier this month.

Mid-tier firms struggled compared to their Big Four competitors among firms that undergo annual assessments. Eight out of 10 of those mid-tier firms had deficiency rates of 40% or greater.

Issuing staff guidance more frequently and publishing inspection results faster are among the steps the board is taking to help firms adapt to new mandates for audit practice oversight.

The board published 2023 inspection results for auditors with the largest market share six months earlier than its previous findings. So far this year the board turned around results for most small firms within six months.

Next in Line

Still pending are projects that cover information firms must report to the board and public.

Another project would require auditors to dig deeper when looking for fraud or other crimes that tank stock values and investor confidence. Williams wouldn't say what next steps PCAOB would take with the controversial project, known as non-compliance with laws and regulations.

"We're not on a timeline and we want to make sure that we're getting this right," Williams said of the board's rule-writing process.

Williams, however, serves at the whim of the political party in power. Yet she's not moved by the election calendar.

"We're laser focused on moving forward on the key goals in our strategic plan and I will continue to do that as long as I'm in this job," Williams said.

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In the Span of 72 Hours, Four People Tied to a Hewlett-Packard Criminal Case Died in Two Separate Events

 wallstreetonparade.com/2024/08/in-the-span-of-72-hours-four-people-tied-to-a-hewlett-packard-criminal-case-died-in-two-separate-events

By Pam Martens and Russ Martens: August 26, 2024 ~

On May 12, 2023, the U.S. Department of Justice announced that it had extradited from the United Kingdom, Michael Lynch, the former CEO of Autonomy Corporation, to stand trial in the Northern District Court of California, alongside the former Vice President of Finance at Autonomy, Stephen Chamberlain.



Mike Lynch

Among the numerous charges brought by the Justice Department were these:

“...between 2009 and 2011, Lynch and Chamberlain, and other co-conspirators, (1) artificially inflated Autonomy’s revenues by backdating written agreements to record revenue in prior periods; recorded revenue on contracts that were subject to side letters or other contingencies that impacted revenue recognition; and improperly recorded revenue for reciprocal or roundtrip transactions...”

As part of this alleged scheme to defraud, according to the Justice Department, “...Lynch and Chamberlain caused Autonomy to make materially false and misleading statements directly to HP [Hewlett-Packard] regarding Autonomy’s financial condition, performance, and business during the negotiations between HP and Autonomy leading up to the August 18, 2011, announcement by HP to acquire Autonomy for approximately \$11 billion.”

It has been reported that Lynch made approximately \$800 million on the sale of Autonomy to HP.

Both Lynch and Chamberlain were acquitted on all charges on June 7, following a jury trial that lasted three months.

Less than two months following the trial, on Saturday, August 17, Chamberlain was out running in Cambridgeshire, England and was hit by a car. Chamberlain died of his injuries after being hospitalized.

Two days later, on Monday, August 19, Mike Lynch, Chamberlain’s co-defendant in the Justice Department trial, died when his “unsinkable” 184-foot sailing yacht sunk to the bottom of the Mediterranean Sea off the coast of Sicily during a storm that failed to harm other nearby yachts.

Making these deaths all the more suspicious, two other individuals involved in the criminal trial died in the sinking of the yacht: the Chair of Morgan Stanley International, Jonathan Bloomer, who had been a witness for the defense; and the attorney for Mike Lynch during the trial, Chris Morvillo, of law firm Clifford Chance.

The statistical improbability of four people connected to one criminal case dying within 72 hours in two separate unusual events is raising eyebrows.

Equally suspect, there were 22 people on board the yacht with 15 people surviving, including 9 members of the 10-member crew, who made it to a life boat. Other survivors in the life boat included Lynch's wife, Angela Bacares; the Managing Partner of Lynch's venture capital firm, Invoke Capital, Charlotte Golunshi and her one-year old daughter; and Clifford Chance lawyer Ayla Ronald and her partner, Matthew Fletcher.

The seven deceased victims from the sinking of the yacht were Lynch; his 18-year old daughter, Hannah; Bloomer and his wife, Judy; Morvillo and his wife, Neda; and the yacht's chef, Recaldo Thomas.

To put that more starkly, the crew had a 90 percent survival rate while the other passengers had a 58 percent survival rate.

Reuters is reporting this morning that Italian prosecutors have opened an investigation and have conducted multiple interviews with the Captain of the yacht, James Cutfield. Maritime law places the safety of the ship, crew and all passengers as the responsibility of the Captain.

For unknown reasons, the Captain was able to make it to the lifeboat while six of the seven who died were trapped below deck in cabins or hallways, where their bodies were eventually located by divers. The chef was reportedly found floating in the water.

Lynch's life had been a living hell for the five years before the tragedy on the yacht. Prior to his acquittal in June, he had been living under house arrest for a year in a townhouse in San Francisco, with guards watching his every move.

On April 30, 2018, the former CFO of Autonomy, Sushovan Hussain, was separately tried and convicted by the U.S. Department of Justice in the same U.S. District Court that heard the case against Lynch and Chamberlain. Hussain was convicted of one count of conspiracy, fourteen counts of wire fraud and one count of securities fraud involving Autonomy's sale to Hewlett-Packard. Hussain served five years in prison.

Another company in which Lynch's venture capital firm had invested money following the sale of Autonomy to Hewlett-Packard was Darktrace, a cyber-security firm which was packed with people from the U.K.'s intelligence agency MI5 and the U.S. National Security Agency

(NSA). In 2023, the short-seller, Quintessential Capital Management, published a lengthy report alleging claims against Darktrace that had a familiar ring to some of the charges brought by the Justice Department against Autonomy executives.

Quintessential Capital's researchers wrote this about Darktrace:

"Our opinion is based primarily on numerous transactions we detected during the period leading to DT's [Darktrace's] IPO seemingly involving simulated or anticipated sales to phantom end-users through a network of willing resellers. Darktrace seems to have repeatedly used marketing activities to channel funds back into its partners as payment for apparently fictitious purchases. These alleged channel stuffing and round-tripping activities seem to have even involved shell companies in offshore jurisdictions...."

Hewlett-Packard is no boy scout either. The company was scandalized in 2006 when Newsweek broke the story that it had spied on its own Board of Directors and journalists, illegally obtaining their phone records in some cases to ascertain with whom they had been in contact.



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NEWS

Clifford Chance Amsterdam Partner Bas Boris Visser Dies Unexpectedly

Bas Boris Visser, the firm's global head of innovation, had served as Amsterdam managing partner twice over the course of his long career at the U.K. firm. The announcement of his death came just days after Clifford Chance lost another partner, Christopher Morvillo, who was with billionaire client Mike Lynch when his yacht sank off the coast of Sicily in a freak storm.

August 24, 2024 at 09:01 AM

Law Firm Partners



Linda A. Thompson
Brussels Correspondent

 The original version of this story was published on [Law.com International](#)

Longtime Clifford Chance partner Bas Boris Visser, the firm’s global head of innovation and business change, has died. He was 56.

A spokesperson for the U.K.-headquartered firm confirmed to Law.com International that Visser, who was also a partner in the Amsterdam global financial markets group, “unexpectedly” passed away on Aug. 15. The firm did not specify a cause of death.

“Visser had the unique ability to bring people together and he was a valued friend and mentor to many,” Clifford Chance said in a statement. “He led with vision, kindness and respect and was widely recognized for being one of the leading financial services legal experts in the Netherlands, and a driving force behind innovation in the legal industry. He will be greatly missed, and our thoughts and condolences are with his family, his friends and close colleagues at this time.”

Visser held a variety of roles during his 23 years at the firm, according to his LinkedIn profile. He joined Clifford Chance as an associate in 2001 and made partner only two years later, with a financial-sector practice focused on advising Dutch and international financial institutions, fintech companies and regulatory authorities. In 2009, he was appointed managing partner of the firm’s Amsterdam office.

“CC is one of the leading international law firms with an unrivaled network and client base. It is a fantastic challenge to manage the Amsterdam office for the next four years while continuing to grow my finance practice,” Visser told Law.com International at the time.

In 2015, Visser stepped down as the Amsterdam office’s managing partner to take on the position of global head of innovation and business change. In this role, he positioned the Magic Circle firm “at the forefront of innovation in legal service delivery,” Clifford Chance said in a statement.

Between 2019 and 2021, he served as the Amsterdam base’s co-managing partner together with Titus de Vries, combining the local role with his global innovation chief position for almost three years. He went on a seven-month sabbatical between January and July of last year.

Clifford Chance suffered another big loss last week. Prominent New York partner Christopher J. Morvillo was among those who died on board the superyacht owned by Autonomy founder and former CEO Mike Lynch. The yacht sank off the coast of Sicily last week.

In June, Lynch was acquitted after a three-month trial in the U.S. in which he and others were charged with inflating revenues in the lead-up to Autonomy’s \$11.7 billion acquisition by Hewlett-Packard in 2011. Morvillo, who had known Lynch for many years, co-led his defense in the case and was on the yacht to celebrate the victory.

Stephen Chamberlain, Lynch’s co-defendant in the trial, also died earlier this week after being hit by a car while on a morning run in Cambridgeshire in the U.K.

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Cantor, Lutnick OK \$12M Deal To End View Inc. Suit In Del.

By **Jeff Montgomery**

Law360 (August 23, 2024, 6:58 PM EDT) -- Cantor Fitzgerald LP and its billionaire Chair and CEO Howard Lutnick on Thursday agreed to a \$12 million settlement to resolve stockholder challenges to a special purpose acquisition company transaction that took window company View Inc. public, with a Delaware Court of Chancery hearing set for Dec. 6.

The terms, reached after mediation on May 3, potentially salvage a recovery for stockholders that had been threatened by View Inc.'s April 2 retreat into a voluntary, "prepackaged" Chapter 11 plan in the U.S. Bankruptcy Court for the District of Delaware, just five months after the Chancery suit was filed.

According to the settlement, the Chapter 11 plan, "without consultation or knowledge of plaintiffs," provided that View Inc. stockholders who launched the Chancery suit would release their claims. Those named in the suit were beneficiaries of the releases.

One month later, after a one-day mediation session, Lutnick, Cantor and the six individuals and two Cantor affiliates named in the Chancery suit agreed to carve out some potential litigation claims from the bankruptcy. Recoveries were limited to the proceeds, if any, from debtor insurance policies.

Those who sued "continue to believe that the claims asserted in the [Chancery Court] action have merit, but also believe that the settlement set forth herein provides substantial and immediate benefits for the class," the Thursday settlement stipulation said.

Lutnick and those named in the Chancery action were described as denying all allegations in the complaint, "including, but not limited to, any allegations that defendants have committed any violations of law or breach of any duty owed" to SPAC stockholders.

Terms of the deal include a requirement for insurers to release \$500,000 initially for administration of the settlement. Up to \$10,000 will also be sought for service awards to lead stockholders Mariano Siseles and Zalmon Uvaydov.

The suit, filed on Nov. 13, sought hundreds of millions of dollars for alleged breaches of fiduciary duty, aiding and abetting breaches, and unjust enrichment claims against Lutnick and other individuals and corporate entities that lined up some \$800 million in stock sales to finance the SPAC — CF Acquisition Corp. II — and its search in 2021 for a take-public target.

The cash was assembled from investors in the run-up to a reverse merger with View, creating a newly public company touted as having a \$1.6 billion value but destined for delisting threats and a U.S. Securities and Exchange Commission probe. Only a 60-for-1 reverse stock split averted a delisting for shares that otherwise would now be worth only 5 cents apiece.

A report published by Jehoshaphat Research one month after the de-SPAC deal closed pointed to what the suit said were damning but previously undisclosed facts. Among them: a finding that View's products "cost four times more to manufacture than they sold" for or that the company "burned through \$900 million in cash over the prior three years and would need to spend an additional \$660 million to meet revenue projections in the proxy."

Months later, the newly public company's financials threatened to trigger a delisting, based in part on

a required restatement of accrued warranty claim expenses, which the SEC found had been low-balled by tens of millions of dollars.

The SEC announced in July that it had settled charges relating to View's warranty accrual, and also said it was charging the company's former Chief Financial Officer Vidul Prakash with financial reporting and accounting fraud.

Prakash is currently awaiting trial in the U.S. District Court for the Northern District of California, facing claims that he underreported the company's warranty liabilities by signing off on reports in 2020 and 2021 showing costs of \$22 million to \$25 million for manufacturing replacement windows, while the actual liabilities amounted to \$48 million to \$53 million in additional undisclosed window installation costs.

In a February decision, U.S. District Court Judge Beth Labson Freeman kept alive the SEC's claims, including the commission's call for a ruling that would bar Prakash from holding officer or director positions in the future.

Siseles and Uvaydov are represented by Christine M. Mackintosh, Kelly L. Tucker and David Wissbroecker of Grant & Eisenhofer PA, Christopher H. Lyons, Tayler D. Bolton, Randall J. Baron, Benny Goodman and Erik Luedeke of Robbins Geller Rudman & Dowd LLP, Brian J. Robbins, Gregory Del Gaizo and Mario D. Valdovinos of Robbins LLP, and Leonid Kandinov of Morris Kandinov LLP.

Cantor Fitzgerald, Lutnick and others are represented by Eric Leon, Blair Connelly and Nathan Taylor of Latham & Watkins LLP, and C. Barr Flinn, Paul J. Loughman, Alberto E. Chávez of Young Conaway Stargatt & Taylor LLP.

The case is Siseles et al. v. Lutnick et al., case number 2023-1152, in the Court of Chancery of the State of Delaware.

The federal court case is SEC v. Prakash, case number 3:23-cv-03300, in the U.S. District Court for the Northern District of California.

--Additional reporting by Benjamin Horney, Leslie Pappas, Sydney Price, Alex Wittenberg and Henrik Nilsson. Editing by Melissa Treolo.



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Class Actions At The Circuit Courts: August Lessons

By **Mitchell Engel** (August 23, 2024, 5:49 PM EDT)

This article is part of a monthly column that highlights federal appellate decisions with takeaways for attorneys at various stages of class action litigation. In this installment, I discuss seven recent rulings and identify practice tips from cases involving debt collection practices, the Employee Retirement Income Security Act, the Telephone Consumer Protection Act, personal injury claims, civil rights, Chinese Ponzi schemes and data breaches.



Mitchell Engel

Last month, seven federal courts published decisions in class certification cases. These cases touched on:

- What is needed to show classwide evidence of injury from debt collection practices;
- What is required to establish standing in class actions;
- What is a coupon settlement under the Class Action Fairness Act, and what consequences such a finding has on approving settlements;
- When consolidation of otherwise nonremovable cases triggers federal jurisdiction under the Class Action Fairness Act;
- Whether a class can be certified under Rule 23(b)(2) where the requested relief is to set up a trust to manage and sell property for class members; and
- Whether to use a percentage of award or lodestar approach to evaluate attorney fees awarded in class action settlements.

Below, I provide an overview of each decision, discuss the determining factors in each case, and identify key takeaways for class action practitioners to keep in mind.

Nightingale v. National Grid

In *Nightingale v. National Grid USA Service Co.*, U.S. District Judge Nathaniel Gorton of the U.S. District Court for the District of Massachusetts denied certification of a class that alleged National Grid, a provider of gas and electricity, violated consumer protection laws of Massachusetts when it hired debt collectors to badger customers to repay debts.[1]

The plaintiff alleged that after he incurred a debt for electricity services, the defendants called his cell phone five times to collect the debt, causing him emotional distress, invading his privacy and wasting his time.

The district court found the class failed the predominance requirement, because whether any individual was injured — and therefore suffered an injury in fact — would require an individual determination to establish that each class member actually heard and was bothered by the calls or voicemails, lost memory space or battery performance, or had their time wasted.

The court held that privacy violations would only be cognizable if they rose to the level of intrusion

upon seclusion, which would require an individualized showing into the severity of the inclusion. The court subsequently granted summary judgment in National Grid's favor.

The U.S. Court of Appeals for the First Circuit **vacated the denial** of the district court's order denying class certification, and reversed the summary judgment order, finding the plaintiff offered proof of cognizable privacy-related injuries and emotional distress injuries.

The First Circuit's decision focused on the summary judgment analysis. But the key takeaway related to class certification is for parties to focus on how the alleged injuries are framed.

The First Circuit held that the district court erred in its legal analysis when it "assumed that each class member would need to demonstrate the elements of intrusion upon seclusion to demonstrate the elements of intrusion upon seclusion to establish liability." The district court held this could not be proved on a classwide basis.

But the First Circuit held that mere receipt of the unwanted debt collections would constitute a cognizable invasion of privacy, and thus the call logs — which showed when class members were called, how often members were called and the results of the calls — might serve as common proof that National Grid invaded each class member's privacy.

Chavez v. Plan Benefit Services

In Chavez v. Plan Benefit Services Inc., the U.S. District Court for the Western District of Texas certified a class in which the plaintiffs claimed that the defendants — companies that help employers design and administer employee retirement and health and welfare programs — charged different rates for identical services, charged an excessive base fee, accepted excessive fees, handpicked providers to maximize its profits, controlled disbursements from the trusts for its own benefit, and unlawfully procured indirect compensation.[2]

The district court certified classes under Rules 23(b)(1) and 23(b)(3) of the Federal Rules of Civil Procedure. The U.S. Court of Appeals for the Fifth Circuit **partially affirmed**.

The appeal centered on the defendants' argument that the class lacked standing, and the Fifth Circuit's exploration of the two methods appellate courts have used to address standing in class situations. The defendants argued that the class could not be certified, because the plaintiffs did not have standing to challenge fees that they were never subjected to, in plans that they never participated in, relating to services that they never received, from employers for whom they never worked.

The Fifth Circuit noted that courts have taken two different approaches to determine standing in class actions. Under the first approach, referred to as the class certification approach, a court determines whether the class representative has standing to pursue her own claims, and views the standing of putative class members as an issue to be considered under the Rule 23 class certification standards.

This approach is followed in the Sixth, First and Third Circuits, and in most district courts.

Under the second approach, referred to as the standing approach, courts hold that class representatives lack standing to pursue claims of class members that did not suffer the same injury. This approach is followed to different degrees in the Ninth, Second and Eleventh Circuits.

The Ninth Circuit only requires a broad similarity of injury between the named plaintiffs and passive class members. The Second and Eleventh Circuits, meanwhile, require the named plaintiff have suffered some actual injury that such conduct implicates the same set of concerns alleged to have caused injury to the putative class members.

The key takeaway here is to be cognizant of what approach each circuit takes to the threshold standing inquiry. If you are in the Second, Ninth or Eleventh Circuit, the test should, in theory, benefit defendants, by allowing them to narrow what classes can be certified, based on the injury suffered by the named plaintiffs. Cases in the First, Third and Sixth Circuits, in contrast, favor plaintiffs, by allowing the certification of broader claims, as long as standing issues do not defeat Rule 23 requirements.

In Chavez, the Fifth Circuit declined to adopt either approach, because it found the plaintiffs had standing under both approaches. It then reversed the certification under Rule 23(b)(1), because the action was primarily an action for damages, and it was not evident that individual adjudications would substantially impair the interests of members not parties to the individual adjudications.

The Fifth Circuit affirmed the certification of a Rule 23(b)(3) class. It then remanded the case to the district court to consider whether severing liability from individual damage issues, and trying them separately, would be appropriate.

Drazen v. Pinto

In Drazen v. Pinto, the plaintiffs alleged that GoDaddy.com LLC violated the Telephone Consumer Protection Act when it called and texted class members to market its services and products through a prohibited automatic telephone dialing system.[3] The U.S. District Court for the Southern District of Alabama approved a class action settlement to resolve the matter.

Under the settlement, GoDaddy would provide up to \$35 million to pay class members' claims, and up to \$10.5 million in attorney fees. GoDaddy only paid class members based on claims made, and less than 2% of class members submitted a claim.

The U.S. Court of Appeals for the Eleventh Circuit vacated. It found the district court abused its discretion in several ways.

The Eleventh Circuit found the district court overlooked evidence indicating the settlement was the product of collusion, such as an overbroad release provision — binding 98.1% of class members in exchange for nothing, because of the low number of claims submitted — and inadequate relief for class members relative to that of class counsel and GoDaddy.

The Eleventh Circuit also found that the district court failed to inform the absent class members of the claims, issues or defenses in the plaintiffs' cases, and that, based on recent U.S. Supreme Court precedent, the class members could potentially recover \$500 for each phone call or text message received — or \$1,500 if the violations were made willingly.

And the Eleventh Circuit found that the district court erred when it calculated attorneys' fees, because it treated the settlement as a common fund when it was a claims-made fund, and incorrectly held the settlement did not involve coupons under the Class Action Fairness Act and thus declined to ensure compliance with CAFA's mandated scrutiny and procedures.

A key takeaway is the Eleventh's Circuit's interpretation of what constitutes a coupon under the Class Action Fairness Act. The Eleventh Circuit defined a "coupon" as a voucher, certificate or form that can be exchanged for one or more goods or services, or for a discount on one or more good services.

It then determined the \$150 voucher awards at issue were coupons because "[t]hey are credits redeemable for GoDaddy's products and services. Plain and simple." The importance of determining whether the settlement provides coupons to class members is, in part, because if the relief provided to the class is a coupon, the attorney fees may be based on the value of the coupons that are redeemed, the lodestar method or a combination of both.

Here, however, the attorney fees were calculated based on a percentage of the possible relief available. The district court thus used the wrong legal standard — making its approval of the settlement an abuse of discretion.

U.S. Circuit Judge Charles Wilson concurred in the judgment, but would have addressed only the district court's erroneous determination that this was not a coupon settlement, and the related attorney fees calculation issue.

Bacher v. Boehringer Ingelheim Pharmaceuticals

In Bacher ex rel. Bacher v. Boehringer Ingelheim Pharmaceuticals Inc., the U.S. Court of Appeals for the Second Circuit **affirmed** the U.S. District Court for the District of Connecticut's order remanding

to state court a case removed under the Class Action Fairness Act.[4]

The case involved nine virtually identical cases filed in Connecticut state court asserting state-law personal injury claims stemming from the usage of the gastrointestinal medication Zantac. The CAFA provision at issue confers on federal courts subject matter jurisdiction over "any civil action ... in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."

CAFA, however, does not apply to actions consolidated "solely for pretrial purposes." The defendants in Bacher argued that CAFA jurisdiction was satisfied when the plaintiffs filed a motion to consolidate.

The Second Circuit held this motion did not satisfy CAFA's requirements, because the plaintiffs did not "propose" the cases be tried jointly. The Second Circuit said that this was evidenced by the careful precautions the plaintiffs took — adding only 99 plaintiffs to each case, having one plaintiff from Connecticut in each case to avoid diversity between the parties, and disclaiming any federal claims.

Given the great lengths the plaintiffs had gone to in order to avoid federal jurisdiction, the Second Circuit found that the plaintiffs' motion could be fairly construed to request only consolidation for pretrial purposes.

U.S. Circuit Judge Amalya Kearse filed a dissent. She held that nothing in the record indicated that the plaintiffs intended only consolidation for pretrial purposes, and that they moved for consolidation under a statute that referred only to consolidation "for trial."

The key takeaway is that if plaintiffs want to avoid CAFA removal jurisdiction, they should be as careful as possible to avoid triggering the CAFA statute. The majority opinion focused on the things the plaintiffs affirmatively did to avoid jurisdiction, including making sure to have less than 100 plaintiffs in any action, having a home-state plaintiff in each action to defeat diversity, and affirmatively stating they were not bringing federal claims.

The dissent, in contrast, focused on the things the plaintiffs did not do. Namely, Judge Kearse focused on the fact that the plaintiffs' motion to consolidate the cases did not affirmatively state that the consolidation would only be for pretrial purposes and, when requesting consolidation, cited a statute that provided a mechanism for consolidation for trial.

If the plaintiffs had affirmatively requested only pretrial consolidation, and expressly disclaimed trial consolidation, it would have further shown their efforts to avoid CAFA jurisdiction.

Carter v. City of Montgomery

In *Carter v. City of Montgomery*, the Eleventh Circuit affirmed the denial of certification of classes challenging the practice of the city of Montgomery, Alabama, of jailing traffic offenders for failing to pay their fines.[5] The city ordered traffic offenders to pay a fine, placed residents who couldn't pay their fines on probation, and when a probationer missed a meeting or payment, often asked a municipal court to revoke the probation, which resulted in a hearing to determine whether to convert the outstanding fine into a jail sentence.

The Eleventh Circuit agreed that the various challenges to this policy and practice could not be resolved on a classwide basis, because what happened to Montgomery probationers before, during and after their revocation hearings could not be established on a common, classwide basis.

The key takeaway is that it is not always enough to allege that a defendant engaged in a common practice or policy, if each individual case must still be resolved using individual evidence. Here, the Eleventh Circuit held that each class member's claim would ultimately hinge on whether he was individually denied a proper hearing.

The court considered the test set forth by the Supreme Court in *Bearden v. Georgia* in 1983, which held that before sentencing a probationer to jail time for failing to pay a fine, a court must first determine whether he made "reasonable efforts" to pay, and then, if he did, must consider "whether adequate alternative methods of punishing the defendant are available."

The Eleventh Circuit ultimately found that the predominance requirement was not met, because "several showings central to the plaintiffs' claims require knowledge about 'what happened to individual probationers at individual hearings.'"

Cheng v. Liu

In *Cheng v. Liu*, the U.S. Court of Appeals for the Fourth Circuit **affirmed** the denial of class certification of a group of individuals who entered into investment contracts in China as part of a fraudulent Ponzi scheme.[6] The class alleged that money from the scheme was funneled through other companies, and ultimately used to purchase golf courses and other real estate in South Carolina.

The class requested that the court establish a constructive trust to hold the properties and eventually sell them, with the proceeds to go to the class, or institute a receivership to take control of the properties and manage them for the benefit of the class.

The Fourth Circuit affirmed the class could not be certified under Rule 23(b)(2) because it sought primarily monetary damages. Seven of the 10 claims sought damages, and counts asking for a constructive trust and receivership were seeking ultimately to sell the properties and distribute proceeds to the class.

The Fourth Circuit also noted that damages could not be calculated on a classwide basis, and so the determination of what each class member would be entitled to recover would vary according to a number of factors — how many contracts the investor had entered and in what amounts; whether the investor had recovered on any contracts, and if so, how much was received from subsequent investors; and whether the investor received restitution as a result of the underlying criminal case, and if so, how much.

The Fourth Circuit further affirmed the class could not be certified under Rule 23(b)(3) because it failed the superiority requirement, as the investors were Chinese citizens who invested in Chinese companies with Chinese money, the material evidence was located in China, and it was unlikely that China would allow for, or cooperate in, American-type discovery.

The key takeaway is that courts are not willing to certify classes under Rule 23(b)(2) if the classes are seeking monetary damages, even indirectly. The class attempted to avoid this limitation by requesting for injunctive relief in the form of a trust and receivership, but the Fourth Circuit looked past the form of the requested relief to ascertain its function, which, ultimately, was designed to provide monetary awards to class members.

Attorneys should also be cognizant of bringing class action lawsuits where a majority of the underlying conduct occurs in another country. As the Fourth Circuit noted, the U.S. Department of State has warned that taking depositions for use in foreign proceedings is prohibited by Chinese law, and "could result in the arrest, detention or deportation of the American attorneys and other participants."

T-Mobile Customer Data Security Breach Litigation

In *In re: T-Mobile Customer Data Security Breach Litigation*, the U.S. Court of Appeals for the Eighth Circuit **reversed** the U.S. District Court for the Western District of Missouri's approval of attorney fees awarded in a class action settlement.[7] The case involved data breach claims after cybercriminals hacked into T-Mobile US Inc. computer systems and obtained confidential personal information for an estimated 76.6 million people.

Under the settlement, T-Mobile agreed to create a \$350 million fund for individual class members, and committed to spend an additional \$150 million over two years to improve its data security. Class counsel requested the district court approve an attorney fee award of \$22.5% of the \$350 million, or \$78.75 million.

Multiple class members objected. The district court struck the objection relevant to the appeal because it found the counsel representing the objector were serial objectors to class action settlements, and the objection was "vexatious," "brought in bad faith" and brought "for the sole

purpose of extracting a fee from the settlement fund."

The Eighth Circuit reversed. It found that the district court erred in relying on Rule 12(f) of the Federal Rules of Civil Procedure as a basis to strike, because that rule does not apply to settlement objections. It also found the district court abused its discretion in using its inherent authority to strike, because there was no evidence the objector or her attorneys were attempting to extort a payout, acted vexatiously, broke any rules or acted unethically — and because her objection was meritorious.

The Eighth Circuit next examined the attorney fee award. It rejected the notion that a court must award a reduced percentage in "megafund" cases — i.e., cases where the settlement was over \$100 million, and the large amount was driven by the size of the class.

The Eighth Circuit did find, however, that the award was excessive here, because it amounted to a lodestar multiplier of 9.6 — meaning that class counsel would get paid about 9.6 times their customary hourly rates. The court noted that class counsel worked on this case for just a matter of months, conducted relatively little discovery and engaged in no substantial motions practice.

It also noted that, if the award were allowed to stand, class counsel would make \$7,000 to \$9,000 an hour, which no reasonable class member would be willing to pay to help resolve this claim — especially considering that there were dozens of attorneys willing to offer their assistance.

The key takeaway is that courts will scrutinize the amount of attorney fees awarded in class action settlements carefully. Although courts are willing to look at, and sometimes award, attorney fees as a percentage of the amount recovered, they will not do in situations where the lodestar check indicates such an award would create an unfair windfall to the attorney.

Mitchell Engel is a partner at Shook Hardy & Bacon LLP.

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[1] [Nightingale v. National Grid USA Service Co. Inc.](#) , 107 F.4th 1 (1st Cir. July 9, 2024).

[2] [Chavez v. Plan Benefit Services Inc.](#) , 108 F.4th 297 (5th Cir. July 15, 2024).

[3] [Drazen v. Pinto](#) , 106 F.4th 1302 (11th Cir. July 16, 2024).

[4] [Bacher ex rel. Bacher v. Boehringer Ingelheim Pharmaceuticals Inc.](#) , --- F.4th ---, 2024 WL 3503528 (2d Cir. July 23, 2024).

[5] [Carter v. City of Montgomery](#) , 108 F.4th 1334 (11th Cir. July 26, 2024).

[6] [Cheng v. Liu](#) , 2024 WL 3579606 (4th Cir. July 29, 2024).

[7] [In re: T-Mobile Customer Data Security Breach Litigation](#) , --- F.4th ---, 2024 WL 3561874 (8th Cir. July 29, 2024).

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Insurance Software Co. Probe, Insider Sales Prompt Del. Suit

By **Jeff Montgomery**

Law360 (August 23, 2024, 6:47 PM EDT) -- A MediaAlpha Inc. stockholder sued in Delaware's Court of Chancery on Thursday for access to the insurance marketing platform developer's books and records, pointing to stock sales by the company's two controlling investors that allegedly allowed them to avoid \$66 million in stock drop losses.

Stockholder Michael O'Neill said the stock declines followed reports that the company is under Federal Trade Commission scrutiny for allegedly selling customers' personal information without authorization. Probes of the allegations, first reported in February 2023, had cost the company \$5 million in legal fees as of March 30, according to a company regulatory filing.

MediaAlpha provides insurance carriers and distributors with a source of customer contacts and targets and brings carriers and customers together in what it describes as a "real-time, transparent and results-driven ecosystem" focused on property and casualty, health and life insurance.

The company is governed in part by a stockholders agreement dated Oct. 27, 2020, with controlling investors White Mountains and Insignia, along with MediaAlpha co-founders Steven Yi, Eugene Nonko and Ambrose Wang. The group owns a majority of the venture's common stock and is entitled to nominate a majority of MediaAlpha's board.

O'Neill's **complaint** said the controllers' stock sales appeared to be suspicious based on timing, because a few weeks afterward on June 24, 2024, Wolfpack Research reported that MediaAlpha was engaging in consumer fraud by tricking customers into providing personal information in return for a health insurance "quote."

Wolfpack asserted that it believed MediaAlpha, which trades under the stock ticker MAX, "uses dishonest and sometimes outright fraudulent ads along with deceptive websites to trick consumers into providing their personal information in exchange for a health insurance 'quote.'"

MediaAlpha sold the personal information or used it for the benefit of partners, Wolfpack alleged. White Mountains and Yi, MediaAlpha's CEO and a White Mountains director, both knew of the severity of the purported wrongdoing, the report said.

The company disclosed information regarding an FTC investigation into the business in a U.S. Securities and Exchange Commission filing on Feb. 27, 2023.

Just over a year later, and just ahead of the negative investor report, Insignia sold \$58.6 million in shares, or 33% of its holdings, on March 12. White Mountains and Insignia then sold a combined \$144.2 million on May 7, the complaint said, with Insignia reducing its ownership by 44% and White Mountain by 21%.

According to O'Neill's complaint, the company declined to produce board-level materials in response to a stockholder demand on July 17. Among other concerns, the complaint said, the company declined to produce some materials on MediaAlpha's stock price, earnings, and sales.

Among the refused items were documents regarding individual board member "interestedness" and loyalties involving "ties, or social or business relationships" among any members of the board, the company's senior management or executives, White Mountains and Insignia.

The "interestedness" items were described in the complaint as necessary and essential to showing potential director conflicts that are the focus of investigations into the independence and "disinterestedness" of directors and their ability or inability to address wrongdoing by the company's corporate fiduciaries.

Also a focus, the complaint said, is information involving the company's stock prices, earnings and sales, "including any forecasts and analysis of historic or anticipated changes or fluctuations in stock price."

Stockholder Michael O'Neill is represented by Daniel E. Meyer, Jeroen van Kwawegen, Christopher J. Orrico and Shiva Mohan of Bernstein Litowitz Berger & Grossmann LLP, Robert E. Bishop and Frank Partnoy of Bishop Partnoy LLP and Richard A. Maniskas of RM Law PC.

Counsel information for MediaAlpha Inc. was not immediately available.

The case is Michael O'Neill v. MediaAlpha Inc, case number 2024-0879, in the Court of Chancery of the State of Delaware.

--Editing by Haylee Pearl.

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SPAC Investors Ask Full 9th Circ. To Rethink Lucid Merger

By **Katryna Perera**

Law360 (August 23, 2024, 5:02 PM EDT) -- Investors have urged the full Ninth Circuit to rethink a panel's refusal to revive their proposed class action alleging that Lucid duped them into buying stock in a special purpose acquisition company ahead of the electric vehicle maker's \$11.75 billion merger, arguing that the panel's holding misconstrues U.S. Supreme Court precedent, among other issues.

The investors filed a **petition** on Thursday for a panel rehearing and a rehearing en banc of the appeals court's decision handed down earlier this month that an acquiring company's investors can't sue the target company over its alleged misstatements before the merger.

In early August, a three-judge Ninth Circuit panel issued a published opinion **affirming the dismissal** of a lawsuit brought by investors who purchased shares of the special purpose acquisition company Churchill Capital Corp. IV in early 2021 before it merged with Lucid in an **11-figure deal** that closed in July 2021.

The panel, whose reasoning differed from the district court's analysis, found that the Churchill investors lacked standing to sue Lucid under the U.S. Supreme Court's so-called Birnbaum rule, which confines standing to those who bought or sold the stock related to the alleged misrepresentations.

However, on Thursday, the investors argued that the panel's holding misconstrues the high court precedent, violates Ninth Circuit precedent, and "picks sides in a circuit split without recognizing the contrary authority."

According to the petition, the Birnbaum rule comes from the Supreme Court's ruling in **Blue Chip Stamps v. Manor Drug Stores** . The investors say the rule only requires that a plaintiff must have actually purchased the security about which they are claiming losses, but the panel held that the related misstatements must also strictly be "about" the purchased security.

"The [panel's] opinion mistakenly ruled that Blue Chip's reference to claims arising from 'the security to which the prospectus, representation, or omission relates' also imposes the far more drastic requirement that plaintiffs only have standing if the misstatement is 'about' the security the plaintiffs bought or sold," the petition states.

But in Blue Chip, the court was explicitly addressing whether those investors who abstained from trading should have standing, according to the investors.

"The 'situation' confronted by Blue Chip and by Birnbaum — where plaintiffs did not purchase or sell any securities at all — was entirely distinct from the circumstances here. Plaintiffs here indisputably purchased the securities about which they are suing," the petition states.

The panel's holding that misstatements must be "about" the purchased security also created an "entirely ad hoc standard," the investors argue, since the panel did not clarify what it means for a misstatement to be "about" a security.

The investors also noted in their petition that the Third Circuit has held that investors in a target company have standing against an acquirer for misstatements made before a potential merger, which the panel in the current action ignored.

Finally, the investors said the panel's holding establishes "perverse public policy and charts a roadmap for fraud" since it "not only immunizes merger targets from liability for serious fraud, but also goes much further by authorizing fraudulent conduct in a plethora of other scenarios."

According to the petition, the panel acknowledged that the "about" rule they imposed is arbitrary but stated it was justified on the ground that it is a "bright-line rule," since the investors' proposed approach would allegedly result in case-by-case analyses that would "empower the world at large to sue issuers."

The investors said Thursday that "this gets it exactly backward."

"The panel's rule disturbs the status quo, gives rise to fact-dependent disputes about whether a misstatement is 'about' a security, and serves no policy goal not otherwise achieved by longstanding Ninth Circuit and Supreme Court limitations on viable suits," the petition states.

The trip to the Ninth Circuit is the latest chapter in a lawsuit that Churchill investors filed in 2021, following Lucid's merger with the SPAC, which are shell vehicles designed to raise money to acquire an entity, take it public and generally take over businesses in industries where their executives have expertise.

The investors alleged that Atieva Inc., which does business as Lucid Motors, and its CEO Peter Rawlinson coerced them into buying Churchill stock by overstating Lucid's electric-vehicle production forecasts and capabilities, despite knowing at the time that the Lucid factory was not functional.

After the merger was official and trading closed, Lucid announced the company would produce only 577 of its vehicles, dubbed Lucid Airs, in 2021, not 6,000 to 7,000, as it had previously stated, prompting the post-merger stock's price to plummet 49.9%. The suit sought to certify a class of investors who bought the SPAC stock before the merger from Feb. 5, 2021, through Feb. 22, 2021.

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

The investors are represented by Carol C. Villegas, Jake Bissell-Linsk and Guillaume Buell of Labaton Keller Sucharow LLP, Jeremy A. Lieberman and Brenda F. Szydlow of Pomerantz LLP, and Shannon L. Hopkins of Levi & Korsinsky LLP.

The defendants are represented by Neal Potischman, Brian M. Burnovski, Daniel J. Schwartz and Chui-Lai Cheung of Davis Polk & Wardwell LLP.

The case is Max Royal LLC et al. v. Atieva Inc. et al., case number 23-16049, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Lauren Berg. Editing by Vaqas Asghar.



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McKinsey Opioid Suits Sent Back To NY, Illinois State Courts

By **Lauren Berg**

Law360 (August 23, 2024, 9:43 PM EDT) -- A California federal judge has remanded, to their respective state courts, cases brought by dozens of New York municipalities and two Illinois counties against McKinsey & Co. over its alleged role in the opioid crisis, saying the consulting firm's "tortured interpretations of state law" don't give the Golden State jurisdiction.

U.S. District Judge Charles R. Breyer, in a brief **order** Thursday, granted two consolidated remand motions brought by **44 New York municipalities** and the **Illinois counties** of St. Clair and Madison, finding McKinsey has not met its burden to show the lawsuits belong in the Northern District of California.

"It asks the court to adopt tortured interpretations of state law or otherwise exercise discretion to find jurisdiction where none exists," said Judge Breyer, who is overseeing the multidistrict litigation against McKinsey. "The court declines to so creatively extend its jurisdiction."

The New York plaintiffs — which include the cities of Buffalo, Ithaca and Poughkeepsie and the counties of Hamilton, Westchester and Genesee — argued in their motion that McKinsey is based in New York, and they are asserting exclusively state-law tort claims based on the consulting firm's role in marketing opioids made by Purdue Pharma LP, as well as distributors, like Walgreens.

"Given that plaintiffs have asserted no federal law claims and there is no diversity of citizenship, plaintiffs' lawsuits could not have been filed in federal court," the motion states. "Nonetheless, McKinsey improperly removed the lawsuits to federal court."

The Illinois counties of Madison and St. Clair asked in their motion that their cases be remanded to their respective state circuit courts, where they can be consolidated with other opioid consultant litigation involving the same alleged conduct and legal claims.

However, in its **opposition brief** last month, McKinsey argued the cases should stay put, saying the two groups of plaintiffs want to "derail this MDL proceeding before it fulfills its promise" of eliminating duplicate discovery and avoiding inconsistent pretrial rulings.

The consulting firm scoffed at the plaintiffs' argument that cases brought "by a governmental unit to enforce such governmental unit's police or regulatory power" cannot be removed to federal court, according to the opposition.

According to McKinsey, the plaintiffs have changed their tune from their previous argument that they were "not in privity with state attorneys general because their claims were brought to recover for unique, local injuries [and] not to address generally applicable public health concerns."

"Now plaintiffs insist that their lawsuits are brought under their 'police power' to 'protect the public health,' even though they can point to nothing in Illinois or New York law granting them the supposed police power they assume to pursue their lawsuits," McKinsey said.

The consulting company argued both sets of plaintiffs are pursuing the same legal interests that the attorneys general of Illinois and New York have already brought.

But in his order Thursday, Judge Breyer rejected McKinsey's arguments, saying it hasn't shown the

cases belong in California federal court.

"McKinsey, who made millions helping guide evildoers like the opioid drugmakers ... [the Sackler family], Purdue, Endo and all the others push more opioids into our communities, thought they bought peace with a secret deal foisted on communities across the country," Hunter Shkolnik of Napoli Shkolnik PLLC, an attorney representing the New York plaintiffs, said in a statement Friday.

"Our New York municipalities said no," he added. "We want our day in court in our state. It's time McKinsey realizes the piper is calling."

Ann Callis of Holland Law Firm, an attorney for the Illinois plaintiffs, told Law360 on Friday, "We are pleased that Judge Breyer has recognized the rights for our clients, Madison and St. Clair County, Illinois, to litigate their cases where they belong."

Counsel for McKinsey did not immediately respond to requests for comment Friday.

McKinsey has reached some settlements in the MDL before Judge Breyer, including a **\$39.5 million nationwide deal** that resolves all opioid litigation brought by federally recognized tribes. About 365 tribes participated in the settlement, which was open to all 574 federally recognized tribes, whether or not a tribe had filed litigation against McKinsey.

According to the tribes' counsel, the amount of funds given to tribes was determined by a formula related to the distribution of prescription opioids.

McKinsey most recently inked a **\$78 million settlement** to resolve claims on behalf of approximately 42,000 third-party payors, with class counsel receiving \$15.1 million in fees.

The plaintiffs launched the sprawling **McKinsey litigation** in June 2021 amid a nationwide legal reckoning for opioid drugmakers, distributors, suppliers and marketers who pushed the highly addictive painkillers over the past two decades. Before the MDL, McKinsey cut a **\$640 million deal** in February 2021 with attorneys general from all 50 states.

Judge Breyer in May **refused to toss** claims in the MDL seeking to hold McKinsey liable for infant neonatal abstinence syndrome, which is caused by a pregnant person's use of opioids.

During the course of the litigation, the judge has called McKinsey the **"Don Draper for the industry"** — referring to the fictional character and the protagonist of the hit AMC television series "Mad Men," which chronicles the rise of a Madison Avenue advertising firm in the 1960s.

The New York municipalities are represented by Hunter J. Shkolnik, Paul J. Napoli, Nestor D. Galarza, Rebeca Martinez, Salvatore C. Badala and Shayna E. Sacks of Napoli Shkolnik PLLC.

St. Clair County and Madison County, Illinois, are represented by Ann Callis, Eric D. Holland and Robert J. Evola of Holland Law Firm, David Cates of Cates Law Firm and Matthew Browne of Browne Pelican PLLC.

McKinsey is represented by Mark David McPherson of Goodwin Procter LLP, James L. Bernard and David M. Cheifetz of Hogan Lovells and Caitlin S. Blythe and Jessica Kaufman of Morrison & Foerster LLP.

The case is In Re: McKinsey & Co. Inc. National Prescription Opiate Litigation, case numbers 3:21-md-02996, 3:21-cv-04386, 3:21-cv-04387, 3:21-cv-04642 and 3:21-cv-05467, in the U.S. District Court for the Northern District of California.

--Additional reporting by Joyce Hanson, Dorothy Atkins and Jeff Overley. Editing by Drashti Mehta.



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Firms Seek \$20M Fee After \$58M Deal In Shire Antitrust Suit

By **Chris Villani**

Law360 (August 23, 2024, 12:45 PM EDT) -- A group of nine firms led by Hagens Berman Sobol Shapiro LLP asked a Massachusetts federal judge to sign off on \$20 million in fees and expenses after securing a \$58 million settlement with drugmaker Shire PLC in a yearslong antitrust class action.

The suit, which alleged that Shire and co-defendant Actavis struck an anticompetitive deal to delay the production of a generic version of the attention-deficit/hyperactivity disorder drug Intuniv, dates back to 2016 and featured more than 700,000 pages of documents and multiple delays caused by the COVID-19 pandemic, according to Thursday's filing.

The parties told U.S. District Judge Allison D. Burroughs in May that they had reached a deal, but no details of the settlement were available at the time. In Thursday's memorandum, attorneys for a class of direct purchasers of Intuniv said the deal with Shire is worth \$58 million, "a fair outcome that will provide a certain and immediate benefit to all class members."

Actavis **cut a deal** in September 2020 to settle claims with the class for \$19.9 million.

The attorneys asked for one-third of the Shire settlement — just over \$19 million — plus nearly \$800,000 in litigation costs. They argued the amount was reasonable, pointing to the complexity of class action litigation.

"This case was no exception; indeed, the novel issues it presented introduced unique challenges in an already notoriously difficult area of law," the memorandum states. "Unraveling a complex scheme orchestrated by sophisticated pharmaceutical manufacturers to artificially raise prices required a substantial investment of time and resources from the outset."

The suit accused Shire and Actavis of striking a "reverse payment agreement" under which the latter company would stall its generic Intuniv until Dec. 1, 2014.

In exchange, Shire allegedly agreed not to produce its own authorized generic of the ADHD medication to compete against Actavis' version during the manufacturer's 180-day exclusivity period.

"The defendants chose to structure their alleged anticompetitive behavior through a patent litigation settlement and commercial licensing agreement, requiring the direct purchasers to investigate the merits of complex pharmaceutical patents and utilize economic expertise to establish how a commercial licensing deal functioned in this market to disincentivize competition and impact prices," Thursday's memorandum argues.

The years of litigation have seen a number of twists and turns after the case was first filed in 2016 by FWK Holdings LLC, an assignee of claims for Michigan wholesaler Frank W. Kerr Co.

FWK claimed the deal between the two companies was worth \$477 million in sales to Shire — which is now a unit of Takeda Pharmaceutical Co. Ltd. — and about \$61 million in profits to Actavis compared to what the companies would have earned under ordinary market competition.

In 2019, Judge Burroughs **tapped** Rochester Drug Co-Operative to lead the class of Intuniv buyers. Shire and Actavis objected to the appointment due to the U.S. Department of Justice entering a deferred prosecution agreement with Rochester Drug earlier that year over allegations that the

distributor had sold prescription opioids to pharmacies despite evidence the drugs were being diverted for illicit use.

After Rochester Drug defaulted on a \$20 million fine that was a part of the deferred prosecution agreement and declared bankruptcy, Judge Burroughs disqualified it as lead plaintiff but refused to decertify the class.

Judge Burroughs also dismissed FWK Holdings as a class representative, finding it was not engaged in "meaningful supervision" of the case.

Attorneys for the class on Thursday asked Judge Burroughs to approve \$60,000 in service awards for the class representatives, including \$50,000 to Meijer Inc. and Meijer Distribution Inc. and \$10,000 to QK Healthcare Inc. "in recognition of their participation and the time and effort they expended prosecuting this action on behalf of the class (or, in QKH's case, ensuring its conclusion)."

Counsel for the direct purchasers declined to comment Friday. Shire's attorneys did not immediately respond to a request for comment.

The class is represented by Lauren G. Barns, Thomas Sobol, Abbye Ognibene, Claudia Morera and Rachel Downey of Hagens Berman Sobol Shapiro LLP, Steve Shadowen, Richard Burnell and Tina Miranda of Hilliard Shadowen LLP, John Radice, Kenneth Pickle, Clark Craddock and April Lambert of Radice Law Firm PC, Joseph Meltzer and Terence Ziegler of Kessler Topaz Meltzer & Check LLP, Sharon Robertson and Donna Evans of Cohen Milstein Sellers & Toll PLLC, Linda Nussbaum and Peter Moran of Nussbaum Law Group PC, Peter Kohn and Joseph Lukens of Faruqi & Faruqi LLP, David Sorensen and Caitlin Coslett of Berger Montague PC and Joseph Vanek, Paul Slater, David Germaine and John Bjork of Sperling & Slater LLC.

Shire is represented by Joshua Barlow and Fred Kelly Jr. of Arnold & Porter Kaye Scholer LLP and Michael Brockmeyer and David Shotlander of Haug Partners LLP.

The case is FWK Holdings LLC et al. v. Shire PLC et al., case number 1:16-cv-12653, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Matthew Perlman and Elliot Weld. Editing by Patrick Reagan.



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Split 9th Circ. Says Ponzi Schemes Don't Need Proof Of Intent

By **Dorothy Atkins**

Law360 (August 23, 2024, 7:45 PM EDT) -- A split Ninth Circuit panel affirmed Friday a jury's finding in a fraudulent-transfer fight that a now-bankrupt company was a Ponzi scheme, with the majority writing that jurors didn't need to find an intent to defraud, while a dissenting judge slammed the majority's reasoning as "circular."

In a 2-1 published opinion, U.S. Circuit Judge Gabriel P. Sanchez wrote for the majority that "substantial evidence" presented by the bankrupt company's trustee during a clawback trial supports the jury's finding that Jerrold Pressman's company, EPD Investment Co., operated as a Ponzi scheme for years. And although some funds were legitimately invested, that doesn't necessarily "negate the existence of a Ponzi scheme as a matter of law," Judge Sanchez wrote.

The majority also held that the trial judge wasn't required to specifically instruct jurors on Pressman's intent to defraud "as a matter of law" to prove a Ponzi scheme, because such intent can be inferred from a jury instruction defining a Ponzi scheme as funneling old investors' money to new investors without a legitimate profit-making business opportunity.

The majority pointed out that jurors additionally relied on evidence of the company's financial practices, including its co-mingling of investment funds and its steady eight-figure financial losses, to infer fraudulent intent.

"Implicit in the jury's finding that EPD was a Ponzi scheme was its finding that Pressman harbored the intent to defraud his investors by operating a scheme that had no legitimate profit-making opportunity," the majority opinion said. "The jury therefore properly presumed Pressman's actual intent to defraud his creditors."

The majority added that there's no case law supporting an intent requirement to prove a Ponzi scheme in fraudulent transfer disputes, and such a requirement could, in practice, prove to be impossible.

"Trustees are unlikely to find direct evidence of the operator's subjective intent to operate a Ponzi scheme because, as one bankruptcy court noted, it is 'highly unusual' to 'have a confession of guilt with respect to the fraudulent nature of the transactions as well as the actual fraudulent intent of the perpetrator,'" the majority opinion said.

But in an 11-page dissenting opinion, U.S. Circuit Judge Richard R. Clifton criticized the majority's reasoning, saying without explicit proof of intent, the presence of legitimate investments and the broader economic context cast doubt on the majority's conclusion.

"Under the facts of this case, a finding of intent to defraud was not inevitable and cannot be presumed," Judge Clifton wrote. "The judgment of the bankruptcy court should be vacated and the case remanded for further proceedings."

The split decision is the latest action in sprawling litigation stemming from EPD's involuntary Chapter 7 bankruptcy proceeding that was filed in 2010 amid demands by the company's creditors following its financial collapse the prior year with \$32 million in questionable assets and roughly \$70 million in liabilities.

According to court documents, from 2003 to 2010, EPD, which was owned by Jerrold Pressman and his son, Keith Pressman, borrowed money from individuals, who were called "investors" instead of lenders, in exchange for short-term, 30-day notes, which promised above-market, double-digit annual interest rates.

Although participants could use EPD's funds to make payments on their own mortgages and other household expenses, over the seven year period at issue, the Pressmans also used the loaned funds to pay for their own personal expenses, including credit cards, car payments and mortgages, and they withdrew \$6.8 million to pay themselves, according to court documents.

The pair also used the funds to personally invest in other legitimate businesses in which Jerrold Pressman held partial ownership interests, including ice rinks, night clubs and marketing companies, court documents show.

But as a result of their spending, EPD ran an annual income net loss of \$14.4 million, with negative net equity ranging from \$3 million to \$24.2 million, while Jerrold Pressman was simultaneously personally backing most of EPD's notes despite facing \$144 million in personal liabilities, court documents show.

Amid the bankruptcy proceeding, the trustee, Jason M. Rund, filed an adversary proceeding against Ann Kirkland and her husband, attorney John Kirkland, who had once served as EPD's counsel. The clawback lawsuit accused EPD of fraudulently transferring funds to John Kirkland, who had loaned EPD \$2 million and assigned his interest in EPD to the irrevocable trust Bright Conscience, which named Ann Kirkland as its trustee and the couple's children as beneficiaries.

Although the Kirklands claimed EPD owed them \$3.5 million for their loan plus interest, the trustee sought to recover funds transferred from EPD to the couple's trust, and the clawback fight was eventually moved from bankruptcy court to district court.

Over Ann Kirkland's objections, in 2019, the district court bifurcated the trial against the couple, and following a six-day trial, a jury concluded that EPD's business was in fact a Ponzi scheme, but that John Kirkland had received payments from EPD in good faith, and he wasn't an insider aware of the scheme.

Following the trial, the district court remanded the dispute back to the bankruptcy judge, who entered judgment against the Kirklands and found the verdict binding on claims against their trust.

However, Ann Kirkland appealed the jury's determination that EPD was a Ponzi scheme and challenged numerous aspects of the trial, arguing, among other things, that the lower court erred by refusing to include any intent requirement in the Ponzi scheme jury instructions and by wrongly instructing jurors to suggest lenders are the same as investors.

But on Friday, the majority opinion rejected Ann Kirkland's arguments across the board, finding that the district court's jury instruction on Ponzi schemes "tracks, almost verbatim, how this Circuit has defined a Ponzi scheme for over thirty years."

But Judge Clifton disagreed, and noted in his dissenting opinion that the jury didn't know that intent is a required element of fraud. Although such wrongful intent can be inferred from circumstantial evidence, "at some point, the jury must be required to find fraudulent intent," which didn't happen in this case, Judge Clifton wrote.

"The instructions and the jury's conclusion based upon those instructions were circular: The jury found the existence of a Ponzi scheme without being instructed that fraudulent intent was required, and the finding of a Ponzi scheme was taken to establish fraudulent intent," the dissenting opinion said.

Judge Clifton added that it "seems far from obvious" that Jerrold Pressman actually knew or intended to run a Ponzi scheme, particularly since EPD had some legitimate investments and the company's collapse occurred in 2009 amid the Great Recession and a broader national financial crisis in which many businesses failed.

Counsel and representatives for the parties didn't immediately respond to requests for comment Friday.

U.S. Circuit Judges Richard R. Clifton and Gabriel P. Sanchez, and U.S. District Judge Edward R. Korman sat on the panel for the Ninth Circuit.

Poshow Ann Kirkland, as trustee of the Bright Conscience, is represented by Daniel J. Gonzalez, Steven S. Fleischman and Peder K. Batalden of Horvitz & Levy LLP, Stephen E. Hyam of Hyam Law APC and Lewis R. Landau of the Law Office of L. Landau.

Jason M. Rund Chapter 7 Trustee is represented by Corey R. Weber and Steven T. Gubner of BG Law LLP and Ryan F. Coy of Saul Ewing LLP.

The consolidated bankruptcy case is In re: EPD Investment Company LLC and Jerrold S. Pressman, case number 2:10-bk-62208, in the U.S. Bankruptcy Court for the Central District of California.

The adversary case appeal is In re: Poshow Ann Kirkland, et al v. Jason Rund, case number 22-55944, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Alex Hubbard.

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