Securities Law News
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Once Too Big to Testify, CEOs Feel Backlash to 'Apex Doctrine'

By Mike Vilensky

Deep Dive

- Microsoft, Meta, McDonalds CEOs fail to avoid depositions
- Elon Musk shakes testimony in Florida state court

Bloomberg Law News 2024-10-09T10:09:54571967676-04:00

Once Too Big to Testify, CEOs Feel Backlash to 'Apex Doctrine'

By Mike Vilensky 2024-10-09T05:01:01000-04:00

- Microsoft, Meta, McDonalds CEOs fail to avoid depositions
- Elon Musk shakes testimony in Florida state court

In 2022 Mark Zuckerberg escaped being deposed in Washington, D.C.'s data-privacy lawsuit against Meta Platforms Inc. by invoking the so-called apex doctrine, a four-decade-old principle that top corporate officers are generally too busy and important to be forced to give testimony.

But last month Zuckerberg, making the same argument, wasn't so lucky: a federal judge denied Meta's bid to block the CEO's deposition in a copyright suit against the company over its AI model.

The tech titan's change in fortune reflects a backlash against the apex doctrine by judges swayed by populist arguments that it unfairly favors the powerful. McDonald's Corp. CEO Christopher Kempczinski, Microsoft Corp. CEO Satya Nadella, activist investor Carson Block, Madison Square Garden chief James Dolan, and now Zuckerberg all lost bids in the past year to duck depositions under the apex doctrine in federal courts.

Meanwhile, some state courts, like Washington, are ruling that they won't recognize the apex doctrine, full-stop.

“Single moms, single dads, who’ve got part time jobs, are taking classes, are taking kids to daycare—is their time less valuable than the CEO of a major corporation sitting in a meeting?” Judge Iain D. Johnston, an Illinois federal judge who wrote a frequently-cited law review article on the doctrine, said in an interview with Bloomberg Law. “There should be a healthy skepticism of people’s self-importance.”

A different Chicago area judge’s order in January that Kempczinski sit for a deposition, in a lawsuit by an ex-employee alleging workplace race discrimination, marked a turnabout from the 1985 ruling involving Chrysler Corp. chief Lee Iacocca that inspired the apex doctine.

In that case, Iacocca was shielded from being deposed in a personal injury lawsuit over an allegedly defective Dodge van as being a “singularly unique and important” individual to Chrysler. When McDonald’s tried the same argument almost four decades later, the judge ruled that "[t]he more important consideration...is the executive’s knowledge of relevant information.”

“There’s no free pass anymore,” said Gerald Maatman Jr.,a partner at Duane Morris LLP who represents corporate defendants and CEOs invoking the doctrine in class actions. “There’s no presumption that just because you’re the CEO, you get to avoid depositions.”

The ruling against Dolan last month was a victory for former New York Knicks star Charles Oakley, who has claimed he was assaulted while being ejected from a Knicks game at Madison Square Garden. Oakley argued Dolan had knowledge of the events in question because he was in the arena that night.

Dolan tried to invoke the apex doctrine, but the US District Court for the Southern District of New York ruled that he “had a courtside seat to the action here.”

“The MSG defendants have failed to convincingly show that his deposition will result in harassment or potential disruption of the business of MSG,” the court concluded on Sept. 10.

Valdi Licul of Wigdor LLP, who represents Oakley and has long fought to depose apex witnesses, said the doctrine “started out as a principle that if you tripped on the sidewalk, you don’t get to depose the mayor.”

“The problem is over the years high-level executives have turned it into a special protection for them saying, ‘I’m presumptively too busy for you, court.’ It’s an elitist doctrine that shouldn’t be a doctrine,” he said.

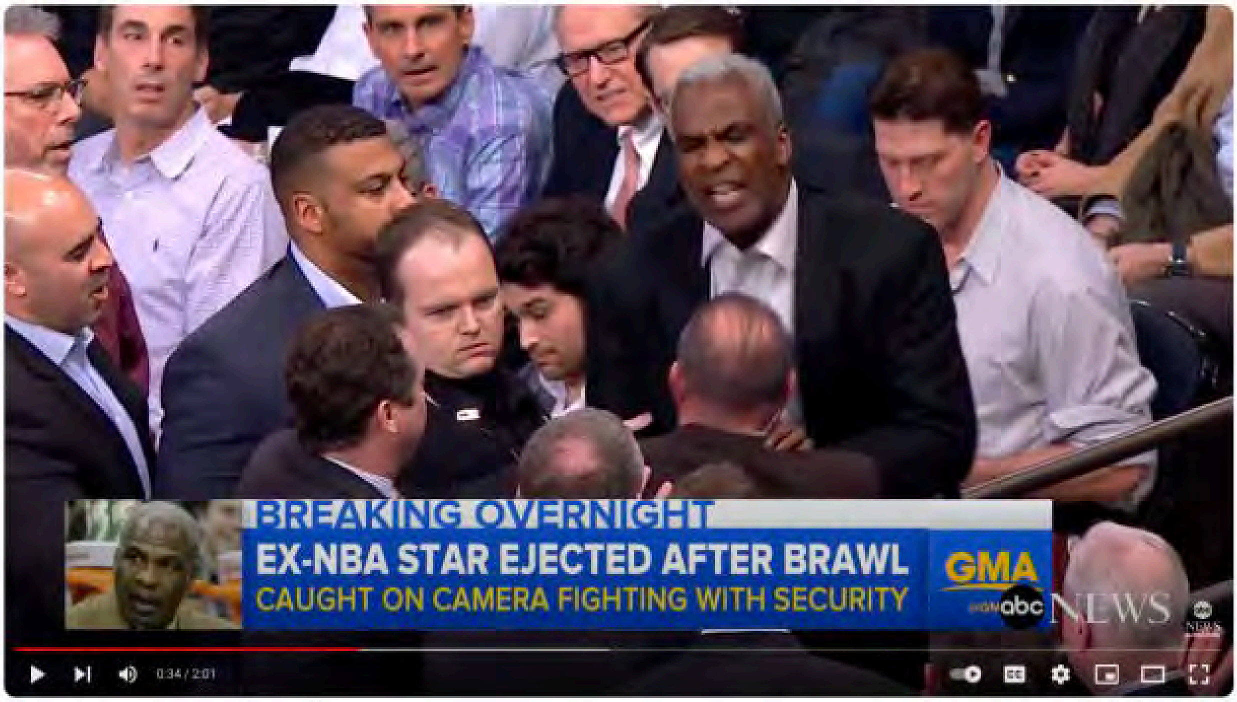


Image: ABC News via YouTube

Shifting Legal Landscape

The apex doctrine generally comes into play when a company or lower-level executives —not the CEOs— are the named defendants but plaintiffs argue the CEOs have information relevant to the conduct of subordinates and the workplace as a whole. Executives seeking to invoke it argue they don't have information that couldn't be gleaned from someone lower ranking, and that sitting for the deposition would impose a hardship in light of their responsibilities.

In defense of the doctrine, some attorneys, academics, and judges say it helps avoid abusive discovery tactics that could force settlements by threatening CEOs with costly, time-consuming, needless, and potentially embarrassing depositions.

"If every time a major corporation gets sued it's possible for the plaintiff to take the deposition of a CEO, how in the world is the CEO going to do their job?" said Nicole Iannarone, a civil procedure professor at Drexel University Thomas R. Kline School of Law. "That doesn't mean that a CEO can never be deposed. What it means is that there needs to be a reason to get the testimony from the CEO."

The spate of recent high-profile rulings against C-suite VIPs has given a boost to plaintiff attorneys and led corporate defenders to strategize differently.

David Fertig, a partner at BakerHostetler who's litigated both sides of the apex doctrine, said the question in litigation is shifting to whether the apex witness has unique information relevant to a case, rather than if the CEO is too busy or otherwise important to be deposed. In some instances, legal fights ensue over limiting the scope and length of the deposition, rather than whether the deposition can happen, Fertig said.

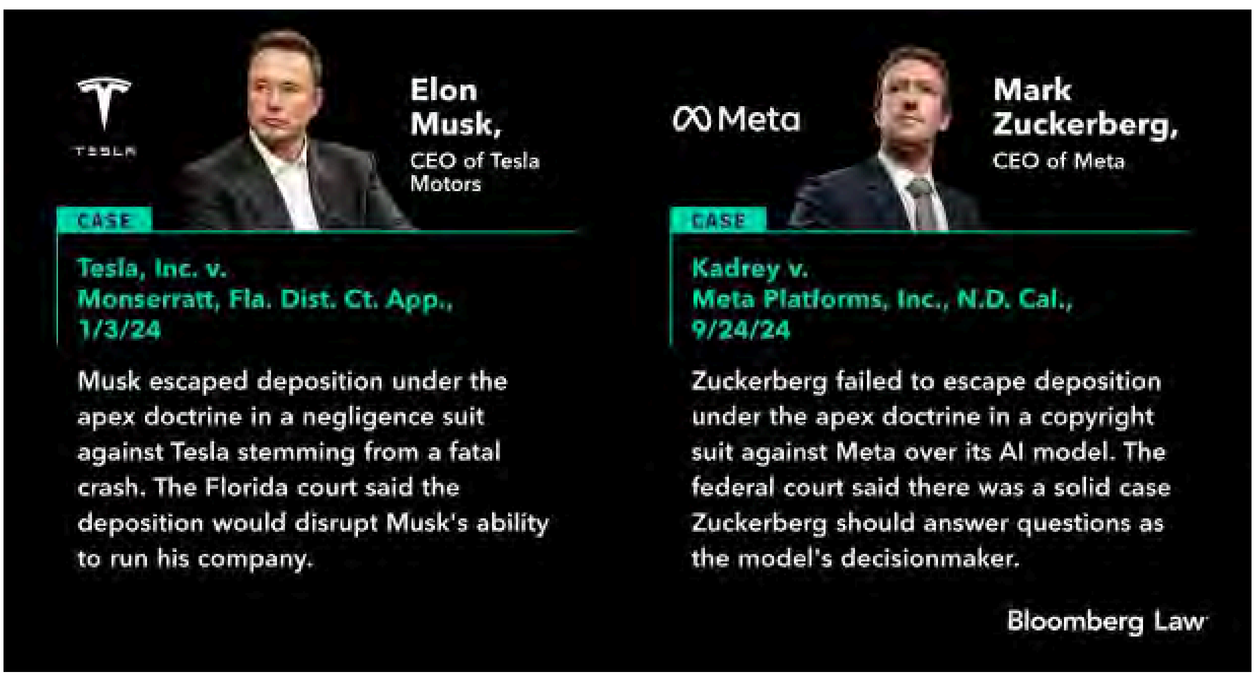
"There's increasing concern and public outcry for people of significant wealth and power to answer for corporate conduct," Fertig said. "Courts have therefore shown some reluctance to the idea that merely by virtue of their status as senior executives, apex witnesses are immune from deposition."

Florida Shields Musk

Even as cracks in the doctrine emerge, courts vary greatly by circuit and state in how or if they follow it.

In 2021, Florida codified the doctrine into its state rules of civil procedure. In January, a state court shielded Tesla Inc. chief executive Elon Musk from a deposition. Attorneys for the plaintiff—the father of a teenage passenger killed in a 2018 Tesla crash that also killed the driver—said Musk called the driver's father after the accident and discussed the car's speed software, but Musk said he didn't remember discussing that on the call.

"Requiring Mr. Musk to sit for a deposition would serve no purpose other than to harass and burden Tesla and disrupt Mr. Musk's ability to meet his obligations to consumers, stockholders, Tesla's employees, and other activities integral to his position as CEO," the Florida court said.



Graphic: Jonathan Hurtarte/Bloomberg Law

But Washington state's Supreme Court in 2023 not only allowed a deposition of Umpqua CEO Cort O'Haver, it ruled the apex doctrine doesn't apply in Washington's courts because it "undermines the right of access to courts." Discovery rules prohibit deposing someone without knowledge relevant to the case, so there's no need for a VIP carve-out, the court reasoned.

The case involved a home loan borrower who allegedly got a raw deal from a bank officer who'd had his professional license revoked before Umpqua hired him. The plaintiff's attorney, Kevin Roberts, sought to depose O'Haver over the bank's hiring practices, arguing not just that O'Haver had relevant information, but that the doctrine runs counter to constitutional notions of equal justice.

'Repugnant' to Blind Justice

For some attorneys, a case-by-case chipping away isn't good enough. They're seeking its demise.

"Considering the demographic realities of our country's socioeconomic strata generally and executive-level positions particulary, the euphemistically titled 'apex doctrine' is a 'Discrimination Doctrine' plain and simple," the plaintiff firm Robbins Geller Rudman & Dowd wrote in a letter to a California federal court last year. "It is repugnant to any notion that justice is blind."

The firm was asking the court to remove time and scope limits on depositions of Google executives Larry Page and Sundar Pichai in a class action securities suit against Alphabet Inc. The case settled before depositions.

"As you probably discerned, I think the entire concept is a disgrace," Robbins Geller attorney Jason Forge said in an interview.

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Elanco Sued Over Development of Two Drugs for Dogs, Stock Drop

By Martina Barash

- **COURT:** D. Md.
- **TRACK DOCKET:** No. 1:24-cv-02912

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Elanco Sued Over Development of Two Drugs for Dogs, Stock Drop

By Martina Barash 2024-10-08T15:19:33000-04:00

- **COURT:** D. Md.
- **TRACK DOCKET:** No. 1:24-cv-02912

Elanco Animal Health Inc. failed to disclose safety and launch timeline problems for canine products in development, an investor alleges.

Dermatology drug candidate Zenrelia wasn't as safe as expected, Joseph Barpar says in a proposed class action filed Monday in the US District Court for the District of Maryland.

In June, the company disclosed the safety issue—which it said entailed a boxed warning and would "slow the product adoption curve" in the US—and revised its launch schedule for Zenrelia and an anti-parasite product, Barpar says. The announcement on June 27 caused the company's stock price to fall 21%, closing at $14.28 per share, he says. That was the largest percentage drop in the stock's history, according to data compiled by Bloomberg.

"We are unable to comment on pending litigation," Elanco said in an email Monday.

Elanco has faced securities litigation before. In September 2023, it defeated an investor suit alleging it had "stuffed" distribution channels with inventory to create the illusion of growth before an anticipated merger. The plaintiffs' appeal from the decision of the US District Court for the Southern District of Indiana is pending before the US Court of Appeals for the Seventh Circuit.

The proposed class of those who acquired Elanco securities between Nov. 7, 2023, and June 26, 2024, inclusive, consists of hundreds or thousands of members, the complaint says.

Barpar seeks damages on his securities fraud claims.

Cohen Milstein Sellers & Toll PLLC and Pomerantz LLP represent Barpar.

The case is Barpar v. Elanco Animal Health Inc. , D. Md., No. 1:24-cv-02912, complaint 10/7/24 .

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Securities Law News

Oct. 8, 2024, 2:55 PM PDT

Meme Stock Investors Lose Short Squeeze Appeal Against Apex

By Martina Barash

- New York state-law claims can't proceed, 11th Cir. says
- Clearinghouse customers didn't allege specialized duties

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Meme Stock Investors Lose Short Squeeze Appeal Against Apex

By Martina Barash 2024-10-08T17:55:36000-04:00

- New York state-law claims can't proceed, 11th Cir. says
- Clearinghouse customers didn't allege specialized duties

Retail investors can't proceed with claims against Apex Clearing Corp. for shutting down share purchases for more than three hours during the January 2021 "meme stock" frenzy, the Eleventh Circuit ruled Tuesday.

New York law applies to the proposed class action and blocks the clearinghouse customers' claims, the appeals court said in an unsigned, unpublished opinion.

The investors sued Apex over its role in the battle between investors, like them, who held long positions and short sellers to raise or lower three companies' stock prices in January 2021. Because of jurisdictional concerns, the investors sued Apex in federal court in New York; the case then became part of larger multidistrict litigation over the "squeeze" on short sellers in the US District Court for the Southern District of Florida.

Trading platform Robinhood Markets Inc. prevailed in an appeal in June.

In 2023, Chief Judge Cecilia M. Altonaga dismissed Apex from the consolidated litigation over social-media-driven "meme" stocks—those of GameStop Corp., AMC Entertainment Holdings, and Koss Corp.—that were the subject of the tug-of-war. The investors appealed.

The US Court of Appeals for the Eleventh Circuit affirmed the dismissal. Apex's customers failed to state claims under New York law for negligence, breach of fiduciary duty, breach of good faith and fair dealing, or tortious interference with a business relationship, it said.

The investors didn't show that Apex had a specialized duty that would allow them to bring a negligence claim for their purely economic losses, and they didn't show it owed them a fiduciary duty, the appeals court said.

The implied covenant of good faith and fair dealing under New York law "can't create a new fiduciary duty that is stricter than the express terms of the contract," and here the customers' contract with Apex allowed it to suspend trading, the panel said.

And the tortious interference claim was correctly dismissed because the investors "didn't allege that Apex acted out of malice and failed to adequately allege that Apex committed some other unlawful act," it said.

Judges Robin S. Rosenbaum, Kevin C. Newsom, and Robert J. Luck served on the panel.

Safirstein Law LLC, Maderal Byrne & Furst PLLC, and Kantrowitz Goldhamer & Graifman PC represented the investors. White & Case LLP represented Apex.

The case is Jang v. Apex Clearing Corp. , 11th Cir., No. 23-10436, unpublished 10/8/24 .

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GSK agrees to settle about 80,000 Zantac lawsuits for up to $2.2 bln

reuters.com/legal/gsk-reaches-up-22-billion-settlement-zantac-us-state-court-cases-2024-10-09

Brendan Pierson

By Brendan Pierson
October 9, 202410:29 AM PDTUpdated 34 min ago
A bottle of Zantac heartburn drug is seen in this picture illustration taken October 1, 2019. REUTERS/Brendan McDermid/Illustration/File Photo Purchase Licensing Rights, opens new tab

Oct 9 (Reuters) - GSK (GSK.L), opens new tab has agreed to pay up to $2.2 billion to settle most pending U.S. state court lawsuits claiming that a discontinued version of the heartburn drug Zantac caused cancer, the company announced on Wednesday.
The settlement with ten plaintiffs' law firms resolves about 80,000 cases, or 93% of pending cases nationwide, the company said. It did not admit wrongdoing as part of the deal.

The litigation began after the U.S. Food and Drug Administration in 2020 asked manufacturers to pull Zantac drug off the market over concerns that its active ingredient, ranitidine, could degrade into NDMA, a carcinogen, over time or when exposed to heat.

First approved by U.S. regulators in 1983, Zantac became the world's best-selling medicine in 1988 and one of the first to top $1 billion in annual sales.

A drug currently sold under the name Zantac uses a different active ingredient and contains no ranitidine.

Reporting by Aatrayee Chatterjee in Bengaluru; Editing by Aurora Ellis

How much could UFC fighters get paid in new $375 million wage settlement?

reuters.com/legal/litigation/how-much-could-ufc-fighters-get-paid-new-375-million-wage-settlement-2024-10-08

Mike Scarcella

By Mike Scarcella
October 8, 202412:14 PM PDTUpdated 19 hours ago
May 9, 2020; Jacksonville, Florida, USA; A general view of the empty octagon before UFC 249 at VyStar Veterans Memorial Arena. Mandatory Credit: Jasen Vinlove-USA TODAY Sports/File photo Purchase Licensing Rights , opens new tab

Oct 8 (Reuters) - More than 1,000 former Ultimate Fighting Championship martial arts fighters could each receive payouts ranging from $15,000 to more than $1 million in a newly proposed $375 million class action settlement resolving claims that their bout wages were suppressed.

WHY IT MATTERS

UFC parent TKO Group Holdings (TKO.N) , opens new tab, part of Endeavor Group (EDR.N) , opens new tab, was accused in the decade-old Nevada lawsuit of artificially suppressing how much fighters were paid. The proposed settlement, submitted to the court on Monday, would rank among the largest-ever of its type under U.S. antitrust law.

KEY QUOTE

“This would truly be life-changing money for me and for other members of the class,” said Matt Brown, who participated in 15 UFC bouts during the class period from 2010 to 2017. Brown was among dozens of fighters who signed declarations backing the new accord.

THE BACKGROUND

The proposed settlement , opens new tab marks the second time the plaintiffs' lawyers at Berger Montague, Cohen Milstein Sellers & Toll and Joseph Saveri Law Firm have presented a deal to U.S. District Judge Richard Boulware II in Las Vegas for approval.

Boulware rejected an earlier $335 million proposal that would have resolved two related UFC lawsuits. The court said the amount that was dedicated to the fighters was too small.

BY THE NUMBERS

Class members would receive about $250,000 on average as part of the settlement, court papers showed. Some 35 class members stand to recover more than $1 million. The settlement said nearly 800 fighters would receive more than $50,000.

THE RESPONSE

UFC has denied any wrongdoing. It said it was “in the best interest of all parties to bring this litigation to a close.”

WHAT’S NEXT

The deal requires court approval, and it does not resolve a parallel lawsuit from current UFC fighters claiming they are owed more compensation. UFC could face additional damages in that lawsuit. The UFC’s bid to dismiss that case is pending.

Reporting by Mike Scarcella

Huggies Baby Wipes Accused of Containing Toxic Levels of 'Forever Chemicals'

law.com/therecorder/2024/10/09/huggies-baby-wipes-accused-of-containing-toxic-levels-of-forever-chemicals

Riley Brennan

Kimberly-Clark Corp. headquarters in Irving, Texas. Credit: JHVEPhoto/Adobe Stock

News
Kimberly-Clark, the maker of Kleenex, was named in a consumer class action which alleges that its Huggies Simply Clean Fragrance Free baby wipes contain toxic "forever chemicals," despite representing the product as "simply clean" and using "gentle ingredients."

October 09, 2024 at 10:21 AM

4 minute read

Class Actions
Riley Brennan

Kimberly-Clark, the maker of Kleenex, was named in a consumer class action which alleges that its Huggies Simply Clean Fragrance Free baby wipes contain toxic "forever chemicals," despite representing the product as "simply clean" and using "gentle ingredients."

The complaint was first surfaced by Law.com Radar, ALM's source for immediate alerting on just-filed cases in state and federal courts. Law.com Radar now offers state court coverage nationwide. Sign up today and be among the first to know about new suits in your region, practice area or client sector.

The Oct. 7 suit was filed in the U.S. District Court for the Northern District of California by counsel with Bursor & Fisher. The plaintiff, Bridget Erickson, claims the Huggies Simply Clean Fragrance Free baby wipes contain unsafe levels of per- and polyfluoroalkyl substances and are unfit for their intended use. She further claims that herself and the purported class members paid a premium for the product.

Erickson's counsel conducted independent testing, using a Department of Defense ELAP-certified laboratory, which revealed that the product contained 305 parts per trillion of PFAS chemicals. The lawsuit said that "PFAS are a group of synthetic chemicals known to be harmful to children," and as they "persist and accumulate over time, they are harmful even at very low levels." Furthermore, the Centers for Disease Control and Prevention lists liver damage, decreased fertility, and increased risk of asthma as health effects associated with PFAS exposure.

Erickson, a California resident, maintains that she purchased the product in April from a Safeway store in California. She claims that she relied on Huggies' representations, packaging, and labeling that the product was safe for infants, babies and toddlers, made with "simply clean" and "gentle ingredients."

According to the complaint, Erickson wouldn't have purchased the wipes had she known about the alleged presence of PFAS, or would have under "substantially different terms." The complaint notes that Erickson is still interested in purchasing the product, but is unable to determine if the wipes are actually safe to use.

"Despite defendant's claims that the product is made from 'clean' and 'gentle' ingredients purportedly safe on a baby's sensitive skin, and therefore free from certain harmful chemicals, like alcohol and parabens, Defendant omits the fact that its Product contains, or risks containing, toxic, PFAS chemicals," the complaint said.

Erickson claims that as long as the defendant continues to misrepresent the product, she won't be able to make informed decisions regarding purchasing the product, and is likely to be mislead in the future by the marketing.

"By marketing the Product as 'simply clean,' and made with 'gentle ingredients' while including images of seemingly healthy babies, Defendant leads consumers to understand the product's utility as a safe, clean, toxin-free baby wipe—as any parent would expect—for daily use on their young children," the complaint alleges. "However, nowhere on the product packaging or product description does defendant clarify that the product contains, or risks containing, toxic PFAS chemicals. But, defendant's description of the product's utility as a safe-to-use baby hygiene product is contrary to findings that the product exposes, or risks exposing, children, infants, and babies to high levels of PFAS."

The complaint brings claims for violations of California law, including the consumers legal remedies act, the unfair competition law, and the false advertising law. It also brings claims for breach of express warranty and unjust enrichment.

In addition to class certification, the complaint requests an order declaring the defendant violated the statutes, compensatory, statutory, and punitive damages, prejudgment interest, restitution, injunctive relief, and attorney fees and costs.

Erickson's attorney, L. Timothy Fisher of Bursor & Fisher in Walnut Creek, California, did not immediately respond to a request for comment.

"Kimberly-Clark prohibits the use of PFAS in Huggies Wipes (and all our consumer products) and we require our suppliers to review all raw materials for restricted substances, such as PFAS, to ensure that they meet our demanding safety requirements. We can assure you that we have tested our Huggies Wipes for PFAS and they are safe," a spokesperson for

Kimberly-Clark said. "The recently filed lawsuit does not claim that anyone has been hurt from using the wipes. We will defend the Huggies brand that parents have depended on for decades against this unfounded case."
Counsel have yet to appear for the defendant.

Top Private Universities Accused of Financial Aid Conspiracy (2)

B bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XEL9B6G4000000

College Board, a nonprofit behind college admissions programs, and 40 private universities face a proposed class action accusing them of a scheme tied to financial aid that violates US antitrust law and exacerbates student debt.

The complaint, filed Monday in the US District Court for the Northern District of Illinois, targets an alleged effort by College Board to require schools to consider the income and assets of “noncustodial parents” when making determinations on nonfederal financial aid.

Leaders from such institutions as Harvard University and Northwestern University agreed to adopt the collective aid strategy, which interfered with the competitive process and unlawfully inflated the net price of the schools’ tuition, according to the complaint.

A Boston University student and an alum of Cornell University brought the case, which seeks to represent a class of students who had a noncustodial parent whose financial information was used as a factor in the amount of aid awarded. Their lawsuit cites a variety of statistics on the ballooning price of college in recent decades, while adding that defendants’ conduct “has only made matters worse.”

The two are represented by Hagens Berman Sobol Shapiro LLP, a plaintiffs’ firm that spearheaded antitrust claims from college athletes over pay relating to their name, image, and likeness.

“We are confident that we will prevail in this action,” a College Board spokesperson said. Hagens Berman didn’t immediately return a request for comment.

Noncustodial parents are defined by College Board as parents who did not live with the student “most of the time during the past year.” College Board in 2006 started pushing schools to add their financial assets to students’ nonfederal financial aid financial applications, the lawsuit says, a move affecting a substantial portion of applicants.

The federal government’s methodology for student aid doesn’t include that criterion.

“For a significant minority of students (those from single-parent families),” the 2006 change “essentially at least doubled their available parental assets/income practically overnight,” the lawsuit says.

Eileen Chang, a named plaintiff who graduated from Cornell University in 2021, said that her noncustodial parent's income worked to her disadvantage. The parent, who had a much higher income than her custodial parent, was on disability and unable to contribute, yet Cornell told her "noncustodial parents are expected to help pay tuition," the lawsuit said.

Cornell declined to comment. Harvard, Northwestern, and Boston universities didn't immediately respond to comment requests.

The College Board and the universities are accused of participating in a conspiracy to reduce the amount of financial aid offered to a subset of students in violation of the Sherman Act. The complaint claims to target a market defined as the 50 highest-ranked private universities, per US News & World Report over the past 15 years.

The average net price of school at the 40 universities targeted in the lawsuit is $6,200 higher than the 10 other private universities that don't require noncustodial parent financial data, according to the lawsuit.

The case is Hansen v. Nw. Univ. , N.D. Ill., 1:24-cv-09667, 10/7/24 .

(Updates with College Board comment in sixth paragraph.)

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Industry Groups Point Court to 'Fatal' Flaws in PFAS Water Rule

B bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XQREM38000000

- Opening briefs challenge EPA's PFAS drinking water limits
- Different outcomes sought by water utilities, manufacturers

Flawed data, procedures, and cost-benefit analyses plague the EPA's drinking water limits for PFAS, so the unjustifiably expensive rule must be vacated, water utilities and manufacturing groups told a federal court on Monday.

Two water associations and a coalition consisting of two manufacturing trade groups and the Chemours Co. filed separate opening briefs challenging the first national limits on the amounts of six per- and polyfluoroalkyl substances (PFAS) that can be in drinking water.

Both groups of petitioners detailed similar complaints to the US Court of Appeals for the District of Columbia Circuit, but the outcomes they sought differ.

The National Association of Manufacturers, American Chemistry Council, and Chemours asked the court to vacate the rule in its entirety.

The American Water Works Association and the Association of Metropolitan Water Agencies, whose members provide drinking water to most of the US population, also asked the court to vacate the rule. But they said the court should send the regulation back to the Environmental Protection Agency to redo, and their brief offered a regulatory option that they said "would allow EPA to address the systems presenting the highest potential for health risk without incurring the same nationwide costs."

'Errors, Shoddy' Work

Both groups of petitioners maintained the agency's cost-benefit analysis was unlawfully flawed, resulting in regulatory limits that imposed significant costs without commensurate health benefits.

"EPA's reported cost-benefit analysis favored the rule by an economic hair—just $760,000 annually, or about $2,080 daily," wrote Allon Kedem, with Arnold & Porter Kaye Scholer LLP, and Michael Kimberly, with McDermott Will & Emery LLP, lead counsel for the manufacturing coalition.

The water sector spends more than $1 billion daily providing hundreds of billions of gallons of water each day making a $2,080 daily national benefit "less than a rounding error; it's essentially zero," they wrote.

Given the thin margin, virtually any cost that the EPA failed to consider would likely tip the scale against the rule, they said. “There were many such costs. In fact, the agency’s cost-benefit analysis is pervaded by legal errors and shoddy empirical work. That alone calls for vacatur of the entire rule.”

Had the EPA set 10 parts per trillion (ppt) limits instead of the 4 ppt it chose for two PFAS—perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS)—many water systems wouldn’t have to build treatment facilities, increasing the rule’s net benefits, wrote Corinne Snow, an attorney with Vinson & Elkins LLP, representing the water associations. That limit also would have addressed the greatest health risks, she wrote.

The water associations support the EPA’s efforts to develop primary drinking water regulations for PFOA and PFOS that cost-effectively protect public health, their brief said.

“This rule, however, is neither feasible nor cost-effective,” as the Safe Drinking Water Act requires, the associations said. And it “creates significant risks for water system compliance and water affordability.”

Occurrence Data Flawed

The EPA’s new strategy to limit mixtures of four types of PFAS violates the drinking water statute, both groups of petitioners said.

Instead of setting a numerical limit for each chemical, the agency said drinking water could not contain mixtures of the four PFAS that exceeded a unit-less “hazard index” that meant the water might be harmful.

The agency failed—as the drinking water law requires—to prove the four PFAS would be so likely to occur in drinking water consumed by the US population that limits were required, the water associations said.

EPA’s data shows that one of the PFAS covered by the rule, hexafluoropropylene oxide dimer acid (HFPO-DA), doesn’t occur in any of the states with water samples “other than North Carolina, where Chemours’ Fayetteville Works facility manufacturers the chemical,” the industry coalition said. HFPO-DA is often called a “GenX” chemical due to the technology that uses it.

Small amounts of the chemical may be formed or present as an unintended byproduct or impurity at two Chemours’ factories in New Jersey, the coalition said. But, regulating HFPO-DA based on such scarce data “is arbitrary agency action at its worst,” it said.

The agency also didn’t prove that mixtures below its threshold would be harmful, the manufacturing coalition said.

The case is American Water Works Ass’n. v. EPA , D.C. Cir., No. 24-01188, Opening briefs filed 10/7/24 .

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Why Uber's MDL Consolidation Fight at 9th Circuit May Be One to Watch

law.com/nationallawjournal/2024/10/09/why-ubers-mdl-consolidation-fight-at-9th-circuit-may-be-one-to-watch

Avalon Zoppo

Photo: Diego M. Radzinschi/ALM

A holding that nonconsolidation clauses are enforceable in the multidistrict litigation context could lead more companies to include such provisions in their contracts, said Lindsay Nako, executive director of Impact Fund.

October 09, 2024 at 12:44 PM

5 minute read

Contractual Disputes
Avalon Zoppo

Uber told a U.S. appeals court Tuesday that a "nonconsolidation clause" in the rideshare company's terms of use prevents sexual-assault claims against it from being centralized under one federal judge in Northern California—a novel position some worry could lead to overwhelmed dockets if accepted.

U.S. District Judge Charles Breyer in May declined to break up the sex-assault suits, holding the "nonconsolidation" provision to be unenforceable because the federal statute that created the multidistrict litigation process is meant to promote judicial efficiency over private parties' contractual agreements not to pursue coordinated claims.

Kannon Shanmugam, with Paul Weiss. Courtesy photo

But Paul, Weiss, Rifkind, Wharton & Garrison partner Kannon Shanmugam told the U.S. Court of Appeals for the Ninth Circuit that the relevant statute neither prohibits nor overrides nonconsolidation clauses.

"Section 1407 is silent on the enforceability of nonconsolidation provisions," Shanmugam said at oral arguments. "And that section serves an interest, not just in judicial efficiency but also in the parties' convenience. It would create an anomaly here, if consolidation were treated differently from other aspects of litigation procedure that parties can contract around this."

The "nonconsolidation" provision says users litigating any claims against Uber must do so "on an individual basis only" and not in a consolidated proceeding.

However, the specialized seven-member Judicial Panel on Multidistrict Litigation ordered that lawsuits in dozens of courts—which all similarly claim Uber passengers were sexually assaulted by drivers—be part of a multidistrict litigation handled by Breyer, who will make decisions that apply to all the cases. Uber is fighting Breyer's decision and the JPML's centralization of the cases.

A Ninth Circuit holding that the clauses are enforceable in the MDL context could lead more companies to include such provisions in their contracts, said Lindsay Nako, executive director of Impact Fund, a nonprofit organization that offers support to public interest lawyers.

She said dockets could become overloaded if cases with overlapping issues went through discovery and dispositive motions individually rather than being supervised by one judge.

"The idea [behind MDLs] is instead of having a separate expert in 100,000 cases, you can have all of the cases in one court and have a single expert report," said Nako, who has been watching the Uber case. "It's also important with dispositive motions, with those pre-trial motions. It's one consistent ruling in all cases that present the same question, rather than running the risk of 100,000 different rulings in cases raising the same question."

Citing JPML data, Breyer wrote in a footnote of his May opinion that 417,137 actions were pending in 171 MDLs on Sept. 30, 2023.

He said if enforcement of nonconsolidation waivers were to become common, the impact on the judiciary would be "momentous."

"MDL defendants are almost certain to be sophisticated parties, and at least some who could insert such clauses in their commercial or consumer contracts would be likely do so," Breyer wrote.

U.S. District Judge Charles Breyer, Northern District of California. Photo: Jason Doiy/ALM

On Tuesday, Ninth Circuit Judge Margaret McKeown questioned whether the nonconsolidation clause goes against the statute's public benefit goal of avoiding overwhelming the courts with suits involving overlapping issues.

Under the federal statute, actions "involving one or more common questions of fact" may be centralized if transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

Shanmugam said the individual cases here involve different underlying facts and consolidating them would not improve efficiency.

"It is not enough simply to say there is a common issue of fact hehre, and therefore there's going to be some benefit to having discovery against a single defendant in one place," he said. "Where individual issues of fact or of law—and we have plenty of both here—overwhelm any common issues of fact, [then] it is not efficient to conduct proceedings before an MDL court."

Ninth Circuit Judge Lucy Koh asked what weight should be given to collective action waivers in creating MDLs.

Koh noted that the Supreme Court in 2013 held that contractual agreements between parties limiting litigation forums, such as through arbitration clauses and class-action waivers, are relevant under a separate statutory provision for general venue changes.

New York University School of Law professor Samuel Issacharoff, who argued for the plaintiffs, distinguished that venue change statute from the one dealing with MDLs.

He said the latter is different because it gives the JPML discretion to initiate centralizations. And those decisions are reviewable only by mandamus in exceptional circumstances not present in this case, Issacharoff said.

"I think the key difference is who's in the driver's seat," Issacharoff said, adding that no appellate court has ever issued a writ of mandamus against an MDL centralization order.

"'This [nonconsolidation clause] is a decision by the parties that purports to bind the court in the exercise of its statutory authority, and they have not cited a single case for that proposition," he said.

Judge Anthony Johnstone also sat on the panel.

The Ninth Circuit heard arguments in *Uber Technologies Inc. v. United States Judicial Panel on Multidistrict Litigation*, No. 23-3445.

That Was Vague

fcpaprofessor.com/that-was-vague

October 9, 2024

Medtronic

Medtronic plc is an American-Irish medical device company with operational and executive headquarters in Minnesota, and legal headquarters in Ireland.

Between 2007 and 2013 Medtronic disclosed FCPA scrutiny concerning its business practices in Greece, Poland, Germany, Turkey, Italy and Malaysia. In mid-2013, Medtronic disclosed: "the SEC and the DOJ both informed the Company that they would be closing their investigations without pursuing any enforcement action or charges against the Company."

In its most recent quarterly filing, the company disclosed:

> "Anti-Corruption Matters
>
> The Company has regular and ongoing interactions with governmental agencies, and its practice is to cooperate with such inquiries. In addition, from time to time, the Company self-discloses potential concerns to governmental regulators. Like many in the medical device industry or with international operations, the Company engages in periodic discussions with the U.S. Securities and Exchange Commission, U.S. Department of Justice, and various authorities in China regarding certain activities, including in China. The Company is committed to regularly evaluating and, as appropriate, strengthening its anti-corruption compliance programs and practices. Any possible future determination that certain of our operations and activities, and/or those of our third-party distributors, are not in compliance with existing laws could result in the imposition of fines, penalties, and equitable remedies in the United States or in other jurisdictions. The Company has not recorded an expense in connection with these matters because any potential loss is not currently probable and reasonably estimable. Additionally, the Company is unable to reasonably estimate the range of loss, if any, that may result from these matters."

That was vague.

Ultra Electronics

Unlike the Department of Justice, the U.K. Serious Fraud Office (the general equivalent of the DOJ) often discloses investigations.

In 2018, the SFO stated that it opened up a "criminal investigation into suspected offences of corruption in the conduct of business in Algeria by Ultra Electronics Holdings Limited (formerly plc) ("Ultra"), its subsidiaries, employees and associated persons, following a self-report by Ultra."

In 2003, the SFO "expanded its criminal investigation to include further suspected corruption in the conduct of business in Oman by Ultra, its subsidiaries, employees and associated persons.

Last week, the SFO provided a further update.

> "The SFO has extended the existing criminal investigation into the activities of Ultra to permit the investigation of any suspected offences of bribery and corruption or linked offending, including money laundering, committed by Ultra, its subsidiaries, employees and agents *in any country*, provided the suspected offences are triable in this jurisdiction."

That was vague.

Securities Law News

Oct. 8, 2024, 7:45 AM PDT

Dimon Says Regulators Should Reduce Hurdles to Going Public (1)

By Hannah Levitt and Lisa Abramowicz

- Midsize US banks should be allowed to merge, JPMorgan CEO says
- Repeats warnings about prospects for inflation, soft landing

Bloomberg Law News 2024-10-09T10:10:3374703842-04:00

Dimon Says Regulators Should Reduce Hurdles to Going Public (1)

By Hannah Levitt and Lisa Abramowicz2024-10-08T10:45:59063-04:00

- Midsize US banks should be allowed to merge, JPMorgan CEO says
- Repeats warnings about prospects for inflation, soft landing

Regulators in the US and UK should make it easier for companies to go public, JPMorgan Chase & Co. Chief Executive Officer Jamie Dimon said.

"It is important that policymakers understand that here and in the United States we have made it hard to go public," Dimon said Tuesday in a Bloomberg Television interview from London. He pointed to the dropoff in research into smaller companies and rising expenses from litigation and regulatory filings.

Dimon said it's "odd" that there's been no commensurate rise in IPOs with the surge in public market valuations. He added, however, that there's a growing IPO backlog — though that doesn't guarantee that they'll happen.

"I think it would be incumbent for us to make it easier and cheaper to go public, and we have to figure out a way to do that," Dimon said.

In the wide-ranging interview, Dimon also said more midsize banks in the US should be allowed to merge.

“This notion that the government should get involved in every single little bank deal I think is just wrong,” Dimon said, adding that it’s “unfair” and the heads of those firms would say they’re “basically ceding ground to JPMorgan.”

Dimon, 68, said the Federal Reserve was right to cut its benchmark interest rate 50 basis points last month, but again warned that inflationary forces remain. He has been cautious on the economy for more than a year, arguing that inflation could be stickier than investors anticipate. After the Fed cut rates in September for the first time in more than four years Dimon said he wouldn’t “count my eggs” on a soft landing.

The CEO has said repeatedly, including on Tuesday, that geopolitics are his biggest concern. He said last month that that issue “dwarfs any one I’ve had since I’ve been working.” Beyond that, he also cited the US deficit, saying that by its nature it’s inflationary. “And at one point we’ve got to deal with this.”

(Updates with additional comments starting in the third paragraph.)

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Whole Earth Sued In Chancery For Docs On Take-Private Deal

By **Jeff Montgomery**

Law360 (October 8, 2024, 5:18 PM EDT) -- A stockholder of global food company Whole Earth Brands sued the company in Delaware's Court of Chancery late Monday for alleged failure to provide requested books and records on the company's agreement in February to be taken private by an affiliate of Sababa Holdings Free LLC.

Stockholder Seetal Dodiya said in the complaint that she took the step to investigate credible concerns that the $4.875 per share **deal**, which closed in August, involved alleged breaches of fiduciary duty, mismanagement and wrongdoing and was unfair to the company's public stockholders, "while providing unique benefits to Whole Earth's insiders."

Whole Earth identifies itself as "enabling healthier lifestyles through premium plant-based sweeteners, flavor enhancers" and other products. It reported about $551 million in net product revenues in 2023, with operating income of $15.4 million and adjusted earnings before income tax, depreciation and amortization of $78.3 million, according to U.S. Securities and Exchange Commission filings.

Buyer Sababa is an investment vehicle of Sir Martin Franklin, founder and CEO of Mariposa Capital and founder of Jarden Corp. In a June 2023 SEC filing, Franklin made an initial, nonbinding proposal to enter into a transaction to buy Whole Earth at $4 per share and combine it with Royal Oak Enterprises, chaired by Franklin.

In 2024, Franklin's revised formal offer came in at $4.875 per share. Kaskela Law LLC, one of the firms serving as counsel to Dodiya, reported soon afterward that it was investigating the deal to determine if shareholders were receiving sufficient consideration under the $4.875 per share offer.

"Notably, at least one analyst firm was maintaining an $8.25 per share price target" for the company's shares at the time of the board's agreement to sell, Kaskela reported at the time.

The complaint filed Monday said Dodiya's demand identified "multiple proper purposes for requesting books and records from the company, all of which are reasonably related to plaintiff's interest as a stockholder."

Whole Earth, the complaint said, indicated that it is "conditionally willing to discuss the potential production of certain documents but has not produced all documents responsive to the demand."

On July 30, prior to closing on the sale, attorneys for Whole Earth agreed that Dodiya would have standing to enforce her demand through Oct. 11. The same agreement provided that the company would not contest a suit to enforce "books and records" claims under Section 220 of Delaware's General Corporation Law in the event Dodiya launched the action after closing but before Oct. 11.

The company's SEC filings noted that "about 31.6% of the company's flavors and ingredients sales and 7.2% of our consolidated net revenues involved the worldwide tobacco industry, for use as tobacco flavor enhancing and moistening agents in the manufacture of American blend cigarettes, moist snuff, chewing tobacco and pipe tobacco."

Dodiya is represented by Corinne Elise Amato, Eric J. Juray and Seth T. Ford of Prickett Jones & Elliott PA, Christopher H. Lyons, Jason M. Avellino, Tayler D. Bolton, David A. Knotts and Michaela Park of

Robbins Geller Rudman & Dowd LLP and D. Seamus Kaskela and Adrienne Bell of Kaskela Law.

Counsel information was not immediately available for Whole Earth Brands.

The case is Seetal Dodiya v. Whole Earth Brands Inc., case number 2024-1033, in the Court of Chancery of the State of Delaware.

--Editing by Daniel King.

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Elanco Misled Investors About Dog Medicine Safety, Suit Says

By **Rae Ann Varona**

Law360 (October 8, 2024, 7:36 PM EDT) -- An Elanco investor lodged a proposed securities class action against the animal pharmaceutics company on Monday, telling a Maryland federal court that the company misled investors about the safety of a canine dermatitis treatment it was developing and its timelines for drug launches.

Elanco Animal Health Inc. investor Joseph Barpar asserted in a new complaint that the Indiana-based company had in early May set timelines for the U.S. Food and Drug Administration approval and commercial launch of two treatments: the once-daily oral dermatitis medication Zenrelia and a broad-spectrum parasiticide product for dogs called Credelio Quattro.

But by the end of June, Elanco revealed that Zenrelia would need a warning based on a trial outcome and that launches in the U.S. for both treatments had to be pushed back, Barpar alleged.

"Defendants had both the motive and opportunity to commit fraud," Barpar said in his complaint. "They also had actual knowledge of the misleading nature of the statements they made, or acted in reckless disregard of the true information known to them at the time."

Barpar seeks to represent a class of all who purchased or acquired Elanco securities between Nov. 7, 2023, and June 26, 2024, and were damaged upon the revelation of Elanco's alleged corrective disclosures.

According to Barpar's complaint, Elanco issued a press release on Nov. 7 stating that its "innovation pipeline" for Zenrelia and Credelio Quattro was on track. Barpar alleged that the company backed its confidence during an earnings call with investors and analysts the same day.

He said that Elanco maintained its confidence in late February and on May 8 said in another press release announcing its first quarter results for 2024 that it had "increased certainty in the expected approval timing" for both treatments.

In an investor presentation in connection with an earnings call the same day, Elanco issued a timeline for both U.S. approval and commercial launch of Zenrelia in the third quarter of 2024, Barpar said. He said the company also stated that Credelio Quattro would get U.S. approval in the third quarter of 2024 and launch in the fourth quarter of 2024.

But the truth emerged on June 27, Barpar alleged, when Elanco provided an "innovation update" press release revealing that it was now anticipating a U.S. launch for Zenrelia in the fourth quarter of 2024.

According to Barpar's complaint, in revealing the need for a boxed warning on safety on the Zenrelia U.S. label based on the outcome of a trial with unvaccinated dogs that received three times the label dose, the company stated that it believed the warning would "slow the production adoption curve in the U.S." and initially limit the number of days the treatment can be safely administered to vaccinated dogs.

As for Credelio Quattro, Barpar said that Elanco moved its expected approval to the fourth quarter of 2024, with the U.S. launch slated for the first quarter of 2025.

Elanco said that on that news, the company's stock price fell $3.69 per share, or 20.53%, to close at $14.28 per share on June 27.

"Defendants participated in a scheme to defraud and committed acts, practices, and participated in a course of business that operated as a fraud or deceit on purchasers of the company's securities during the class period," Barpar alleged in his complaint.

Counsel for Barpar did not immediately respond to a request for comment on Tuesday, nor did Elanco.

Barpar is represented by Steven J. Toll, Daniel S. Sommers and S. Douglas Bunch of Cohen Milstein Sellers & Toll PLLC and Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP.

Counsel information for Elanco was not immediately available.

The case is Joseph Barpar v. Elanco Animal Health Inc. et al., case number 1:24-cv-02912, in the U.S. District Court for the District of Maryland.

--Editing by Jay Jackson Jr.

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AI Software Co. Touted Inflated Revenue, Investor Claims

By **Sydney Price**

Law360 (October 8, 2024, 9:45 PM EDT) -- Artificial intelligence software company iLearningEngines has been hit with a proposed class action alleging investors were damaged when a short seller report revealed that the company was overstating its Indian revenue by nearly 99% by contracting with a related party to inflate sales.

According to the suit filed by shareholder Danny Walker, iLearningEngines purports to be an "AI-powered learning automation" software company. The suit alleges iLearningEngines partnered with an undisclosed technology company to report "largely fake" revenue and expenses, including $138 million in revenue from India in 2022, when in reality, Walker alleges, the actual revenue was only about $850,000.

Although the partner company's identity was hidden from investors, iLearningEngines was allegedly contracting with Dubai-based Experion Technologies, a company at which several iLearningEngines senior employees were directors and shareholders, the suit claims. This information was allegedly "revealed" in August by a short seller report, leading to iLearningEngines' shares declining over 50%.

ILearningEngines CEO Harish Chidambaran and Chief Financial Officer Sayyed Farhan Naqvi are named as individual defendants in the suit.

The class period begins April 22, 2024, the day iLearningEngines announced its 2023 fourth-quarter and full-year earnings. On that day, iLearningEngines reported fourth-quarter revenue in India increased by $24.8 million "primarily due to two new contracts, through upsell to our existing customers of $19.4 million, one contract churn and remaining coming from in increase in license revenue as part of renewals," according to the suit.

The company also explained to investors the numerous revenue and expenses attributable to its "technology partner," the suit states, and allegedly told investors that its technology partner purchases and integrates iLearningEngines' platform into a software solution provided to the partner's customers. According to iLearningEngines' filings, the company entered a master agreement with the technology partner in 2019, the suit states.

ILearningEngines continued to report inflated revenue and assured investors that it maintained adequate financial controls throughout the remainder of the class period, the suit alleges.

On Aug. 29, short-seller Hindenburg Research published its report with allegations that iLearningEngines had "artificial partners and revenue," and that its Indian revenue was only about 1% of the $138 million figure it had reported earlier.

The report alleged that the unnamed partner was Experion Technologies, which was allegedly discovered through an analysis of filings and lists of senior employees and directors for both companies.

The latest financials for iLearningEngines' sole Indian subsidiary reported $853,471 in revenue for its latest fiscal year, or about 99% less revenue attributed to the country than iLearningEngines previously claimed, according to the suit.

"ILearningEngines claims it generates $50 million in revenue per year from one unnamed customer, but spends $30 million per year to buy 'proprietary datasets' from the same customer based on the size of the customer," the research report said, according to the suit. "The circular deal appears to either be with technology partner Experion or facilitated through them ... we suspect both the revenue and expenses are largely fake."

Following the report's publication, shares of iLearningEngines declined by $1.70, or about 53%, to close at $1.49 on Aug. 29.

The suit accuses the defendants of violating the Exchange Act and alleges their statements aren't covered by the safe harbor provisions of securities laws.

Counsel for Walker and a representative of iLearningEngines did not immediately respond to requests for comment on Tuesday.

Walker is represented by Stephen A. Weisbrod and William E. Jacobs of Weisbrod Matteis & Copley PLLC, Robert V. Prongay and Charles H. Linehan of Glancy Prongay & Murray and Corey D. Holzer of Holzer & Holzer LLC.

Counsel information for the defendants was not immediately available on Tuesday.

The case is Walker v. iLearningEngines Inc. et al., case number 8:24-cv-02900, in the U.S. District Court for the District of Maryland.

--Editing by Jay Jackson Jr.

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Chancery OKs $9.75M In Atty Fees For SPAC Stock Drop Suits

By **Jeff Montgomery**

Law360 (October 8, 2024, 9:24 PM EDT) -- Settlements and attorney fee rulings closed the book Tuesday on two GigCapital-related blank check deals that settled before trial in Delaware's Court of Chancery, with a vice chancellor approving combined public stockholder payouts and fee awards of $7.25 million and $2.5 million.

At issue in both cases were special purpose acquisition company projects assembled to collect investors for take-public transactions — in one case lining up $1.35 billion worth of investments in digital health manager UpHealth Inc. and in the other, $1.57 billion for artificial intelligence venture BigBear.ai.

Vice Chancellor Lori W. Will on Tuesday awarded the equivalent of $1.94 per share to UpHealth investors who sued in September 2021 after they were left queasy when their post-deal shares plummeted amid complaints of conflicted insiders and undisclosed company weaknesses.

BigBear.ai investors who felt they got clawed when their shares tanked for the same reasons and sued in July 2023 received $2.5 million, or the equivalent of $2.38 per share.

"Those numbers in and of themselves, for the Court of Chancery, don't sound like big numbers. But on a per-share basis recovery, these results are really extraordinary," Michael Barry of Grant & Eisenhofer PA, lead counsel for both cases, told Vice Chancellor Will.

Barry said estimated per-share recoveries were 31% to 40% or more of the potential amounts, and told the vice chancellor that, while smaller than some other SPAC disputes, Gig2 was a very important case.

"In terms of complexity, I think Gig2 was the first case where the issue of net cash per share was actually resolved," Barry said. He added separately, "We reached these agreements after extensive negotiations and renegotiations of settlement terms."

Also representing the stockholders in both cases was Michael Klausner, the Nancy and Charles Munger Professor of Business and Professor of Law at Stanford Law School. Michael Rogovin of Weiss Law was also co-counsel in BigBear.ai.

In addition to similar broad outlines, the two cases settled on Tuesday had in common interests of GigCapital and its founder, chairman and CEO Avi S. Katz, named in both suits.

In so-called de-SPAC proposals, early investors buy shares in a "blank check company" that will later acquire and take another company public. Stockholders who bought units in initial public offering for the shell company must choose between cashing out for their $10 per share investment plus interest or staying with the post-merger company.

SPAC architects, meanwhile face potentially conflicted pressure to minimize redemptions in order to pump up returns for sponsoring investors, who bought a 20% interest at low cost.

In the case of UpHealth, the newly public enterprise quickly lost more than 62% of its initial estimated value, according to the complaint. Katz and GigAcquisitions2, however, emerged at closing with warrants worth $43 million after a $4.8 million investment.

In the case of BigBear.ai, when the take-public merger closed, founding investors and insiders realized a 359,000% return on their initial investments, while public investors saw their $10 buy soon fall to $4.61 and 2.39% when the complaint was filed in mid-2023.

A brief filed in support of the GigAcquistions4 settlement observed that, although the case settled before running up heavy discovery costs, attorneys were "able to secure a substantially large benefit for the class prior to engaging in costly litigation that would have reduced class damages if the process continued."

Vice Chancellor Will issued a landmark corporate governance ruling in January 2022 during a rush of SPAC cases, allowing a class suit to proceed against former Citigroup Inc. executive Michael Klein and trustees of Churchill Capital Corp. III after it combined in a de-SPAC transaction with health data analytics firm MultiPlan Corp. Shareholders agreed to a $33.75 million settlement to end their suit, with class attorneys awarded a $6.75 million fee in February 2023. The $11 billion merger was viewed as giving rise to the first major test of how Delaware corporate law would treat a rush of breach of fiduciary duty claims directed against de-SPAC deal principles.

Vice Chancellor Will approved a $1.305 million attorney fee for UpHealth, including expenses, saying that the result "falls somewhere between early settlement" for which 10 to 15% of the total award is warranted, and "meaningful litigation," with 15 to 25% of the settlement warranted for a fee in light of extensive discovery and motions.

"This was very hard fought, and there was new territory being explored," the vice chancellor said.

Although the attorneys sought $425,000, including expenses, for BigBear.ai, the vice chancellor pared the total back to $328,000 in light of what the court viewed as a lower risk and earlier stage of settlement while also acknowledging a "great recovery."

GigAcquisitions2 LLC stockholder Cody Laidlaw and the class are represented by Michael J. Barry of Grant & Eisenhofer PA and Michael Klausner.

GigAquisitions2 LLC is represented by John L. Reed, Ronald N. Brown, Kelly L. Freund and Melanie E. Walker of DLA Piper.

GigAcquisitions4 LLC stockholder Stephen Bushansky and the class are represented by Michael J. Barry and Kelly L. Tucker of Grant & Eisenhofer PA Michael Klausner, and Michael Rogovin of Weiss Law.

GigAquisitions4 LLC is represented by John L. Reed, Ronald N. Brown, Kelly L. Freund and Melanie E. Walker of DLA Piper .

The cases are Cody Laidlaw v. GigAcquisitions2 LLC, case number 2021-0821 and Stephen Bushansky v. GigAcquisitions4 LLC, case number 2023-0685, both in the Court of Chancery of the State of Delaware.

--Additional reporting by Tom Zanki and Rose Krebs. Editing by Dave Trumbore.

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AGs Slam TikTok With Youth Addiction, Fraud Claims

By **George Woolston**

Law360 (October 8, 2024, 11:15 AM EDT) -- More than a dozen states have sued TikTok, alleging the popular social media platform targets young users and manipulates them into becoming habitual users while downplaying the harmful effects it can have on mental health and development.

A suit filed in state court by New Jersey Attorney General Matthew Platkin asserts multiple violations of the Garden State's Consumer Fraud Act. Attorneys general in New York, Illinois, Kentucky, Louisiana, Massachusetts, Mississippi, South Carolina, Vermont, Washington, the District of Columbia, North Carolina and California filed similar suits in their state courts.

Platkin said at a Tuesday press conference that TikTok, which is owned by Chinese company ByteDance Ltd., violated state law by "designing a platform that consistently and deliberately targets our youth to become more compulsive users, without making them or their parents fully aware of the risks."

"TikTok pushes its young users to spend all of their time on the platform with no regard for the effect it has on their mental health and well-being," Platkin said. "TikTok built a platform to exploit teens for profit, and its reason for doing so is simple. One word: greed."

A TikTok spokesperson defended the social media platform's work to protect teens and said it believes many of the claims made by Platkin and other attorneys general are "misleading."

"We strongly disagree with these claims, many of which we believe to be inaccurate and misleading," TikTok spokesperson Michael Hughes said. "We provide robust safeguards, proactively remove suspected underage users, and have voluntarily launched safety features such as default screen time limits, family pairing, and privacy by default for minors under 16. We've endeavored to work with the attorneys general for over two years, and it is incredibly disappointing they have taken this step rather than work with us on constructive solutions to industrywide challenges."

According to New Jersey's suit, TikTok misled parents about the app's safety for younger users by advertising itself as a safe source of entertainment while failing to address or remediate features that encourage compulsive use.

It claims to have a 60-minute limit for teens, but the limit can be easily bypassed by entering the account's password or by disabling the limit altogether, the suit said.

TikTok knows the recommendation system that powers the For You video feed incites excessive, compulsive and habitual use by children, the suit alleged, and maximizes engagement by giving rewards that prompt dopamine responses in vulnerable young users.

Research shows young users' habitual use of the app causes harms including insufficient sleep, trouble completing work and school assignments and impaired social connections, as well as increasing levels of depression, anxiety and self-harm due to social media use, the suit said.

"TikTok's algorithms and design decisions are intended to cause young users to compulsively spend increasing amounts of time on the platform. Autoplay, Infinite Scroll and the platform's recommendation system are all design features that feed into these vulnerabilities," Platkin said Tuesday.

According to the suit, TikTok maintains a more restrictive platform for children under the age of 18 in the Chinese market in order to reduce harm. The second platform, which is used by the rest of the world, mainly targets the United States.

Platkin said Tuesday a former TikTok executive called American teenagers a "golden audience" because of the amount of time they have to spend on social media.

"This is not an accidental byproduct of its efforts to grow its base of young users and increase its advertising revenues. Rather, coercing young users to maximize time on its platform is a central pillar in its growth strategy — and one that TikTok has doggedly pursued notwithstanding the harm caused to those young users," the suit said.

Cari Fais, acting director of the New Jersey Division of Consumer Affairs, compared the alleged deceptive advertising and misrepresentations about its practices made by TikTok to the practices of tobacco and opioid companies.

"We've seen this before. We've seen it with tobacco. We've seen it with opioids. Large, sophisticated companies with tremendous resources targeting and deceiving vulnerable users with misleading marketing," Fais said at the Tuesday press conference.

"The ugly truth is that despite knowing the harm its platform is causing to a generation of children, and despite claiming to have implemented features to limit those harms, TikTok continues to use unconscionable practices aimed at turning our children into social media addicts," Fais said.

According to the suit, tens of millions of American teens use TikTok, and the average user between 13 and 17 years old uses TikTok for nearly two hours a day.

According to the suit, TikTok previously had to pay the U.S. Federal Trade Commission **$5.7 million** to settle allegations that it had illegally collected and used personal information from children without parental consent in violation of the Children's Online Privacy Protection Act. Despite this prior settlement, in August of this year, the FTC, along with the Justice Department, **filed a federal lawsuit** against TikTok accusing it of continuing to violate COPPA.

The suit is seeking a court order stopping TikTok from violating the state's consumer fraud law, and to pay penalties as well as disgorge any profits stemming from the alleged unlawful conduct.

The suit follows a similar suit filed by several states **against Meta**, the owner of Facebook and Instagram. Both the Meta and TikTok complaints arose from the same national investigation, which began in 2022.

The states are represented by their respective attorneys general.

Counsel information for the defendants was not immediately available.

The New Jersey case is Platkin et al. v. TikTok Inc. et al., case number ESX-C-228-24, in the Superior Court of New Jersey, County of Essex.

--Editing by Robert Rudinger.

Update: This article has been updated with more about the lawsuits and comment from TikTok.

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BREAKING: GSK Settles Nearly All State Zantac Cases For Up To $2.2B

By **Celeste Bott**

Law360 (October 9, 2024, 1:24 PM EDT) -- GSK said Wednesday that it will pay up to $2.2 billion to settle roughly 80,000 state court cases claiming Zantac heartburn medication or the generic ranitidine caused them to develop cancer.

The pharmaceutical giant said it has reached agreements with 10 plaintiff's firms who together represent users of the drug in about 93% of the Zantac litigation pending against GSK in the United States.

Further details of the settlements were not immediately available, but GSK says it admits no liability in the various pending cases and that it expects the terms of those confidential deals to be implemented by mid-2025.

The company also said it struck a $70 million deal in a Connecticut laboratory's qui tam case alleging that GSK defrauded federal health insurance programs for billions of dollars by hiding for 40 years that Zantac decomposes into a carcinogen even when just sitting on the shelf.

That agreement is subject to approval by the U.S. Department of Justice, the company said, but would resolve Valisure LLC's lawsuit, filed in May in Pennsylvania federal court.

"While the scientific consensus remains that there is no consistent or reliable evidence that ranitidine increases the risk of any cancer, GSK strongly believes that these settlements are in the best long-term interests of the company and its shareholders as they remove significant financial uncertainty, risk and distraction associated with protracted litigation," the company said in a statement Wednesday.

This is a developing story.

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Kimberly-Clark Says Plaintiff Can't Link Tampon To Lead Test

By **Rae Ann Varona**

Law360 (October 8, 2024, 10:40 PM EDT) -- Kimberly-Clark moved Monday to toss a California woman's proposed class action accusing the personal care goods multinational of concealing unsafe lead levels in a line of its U by Kotex tampons, saying the consumer did not even say she used the tampons.

Texas-based Kimberly-Clark Corporation argued in a motion to dismiss that San Diego resident Allison Barton lacked standing to sue because her theory of harm also relied on testing of tampons she didn't purchase.

"Testing of tampons that Plaintiff did not buy does not meet Plaintiff's burden of alleging well-pleaded facts about her purchase — especially when those testing results had only the faintest detections, which plausibly could have been caused by many other sources, including laboratory error," Kimberly-Clark argued.

It added that Barton notably did not attach the testing results on which she based her case, or provide "any details at all about who, when, and how the testing was conducted."

The suit is one of two Barton filed in California federal court alleging deceptive advertising, unfair competition, and violations of the Golden State's Consumer Legal Remedies Act in connection to tampon products allegedly tainted with toxic levels of lead.

Barton first **sued** Procter & Gamble in late July, alleging that it did not disclose that its Tampax Pearl tampons contained an unsafe amount of the chemical element.

She sued Kimberly-Clark a day later over Kimberly-Clark's U by Kotex Click compact tampons.

Barton, filing an amended complaint in September, asserted that Kimberly-Clark advertised its Kotex products as containing "no harsh ingredients" and "elemental chlorine-free rayon." The company also touted the products as being "pesticide free," "made without fragrance," "gynecologist tested," and "BPA free," Barton said.

But such labels were misleading "based on the lead contained."

California's Proposition 65 established a maximum allowable dose level of 0.5 micrograms of lead per day for reproductive toxicity, Barton said. An independent lab test and analysis revealed that the Kotex products contain 0.189 mcg of lead per gram of product, she said. Based on an average number of tampons used per day, "consumers are exposed to lead in excess of the MADL, irrespective of the size of the Product used," Barton argued.

Quoting a 2023 World Health Organization fact sheet, Barton said that lead exposure can affect "multiple body systems and is particularly harmful to young children and women of child-bearing age."

But Kimberly-Clark said Monday that its tampons are tested for safety before going to market and that product testing has found them to be safe. It said that the tampons are also regulated and approved by the U.S. Food and Drug Administration and "do not contain lead as an ingredient."

In attacking Barton's standing to sue, the company said she "fails to connect the dots" between her alleged purchase and two economic harm theories she invoked "because all of the problems she identifies are in tampons she did not buy."

The company said Barton believes lead is present in her tampons "because some other tampon tested positive for trace amounts of lead."

"But she provides no reason why the results of a single standalone study can be extrapolated across all of the Products or to the specific tampons that Plaintiff purchased," Kimberly-Clark said.

Barton also did not plead facts establishing that the company made a "false" representation that caused her to overpay for the tampons, the company said.

Kimberly-Clark had also argued in its dismissal bid that regulation of tampons is for the FDA, "not private plaintiffs."

It said, for instance, that the FDA confirmed that a matter raised in a June 2024 research article that discussed whether tampons could generally be regarded as a potential source of heavy metal exposure was a novel issue that warranted the agency's own assessment.

"The FDA's acknowledgment that this is a novel issue, which depends on unperformed scientific assessments, leaves little room for any serious contention that both threshold conditions for primary jurisdiction are met," Kimberly-Clark said.

P&G had also moved to toss Barton's suit against it late last month similarly arguing that her proposed class suit fell "squarely within the **primary jurisdiction**" of the FDA. It said the agency had just announced a review of the "unproven scientific theory" that trace amounts of lead through tampons could be harmful.

And, like Kimberly-Clark, P&G argued that Barton and a co-plaintiff "do not even allege" that they tested their own tampons.

Counsel for the parties did not immediately respond to requests for comment on Tuesday, nor did Kimberly-Clark.

Barton is represented by Naomi B. Spector of KamberLaw LLP.

Kimberly-Clark is represented by Timothy W. Loose of Gibson Dunn & Crutcher LLP.

The case is Allison Barton v. Kimberly-Clark Corporation, case number 3:24-cv-01337, in the U.S. District Court for the Southern District of California.

--Additional reporting by Bonnie Eslinger and Jonathan Capriel. Editing by Peter Rozovsky.

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Uber Tells 9th Circ. JPML Can't Consolidate Assault Cases

By **Dorothy Atkins**

Law360 (October 8, 2024, 9:12 PM EDT) -- Uber Technologies Inc. urged the Ninth Circuit on Tuesday to find that the Judicial Panel on Multidistrict Litigation and a district judge erred in refusing to enforce Uber's "non-consolidation" clause with passengers, arguing the contractual provision binds federal courts and prohibits the JPML from the centralization of sexual-assault litigation before a single judge.

Uber's counsel, Kannon K. Shanmugam of Paul Weiss Rifkind Wharton & Garrison LLP, made the arguments before a three-judge panel during a hearing on Uber's **petition** for a writ of mandamus asking the appellate court to vacate a JPML order transferring dozens of cases to U.S. District Judge Charles R. Breyer's court.

The hearing also addressed Uber's separate interlocutory appeal challenging Judge Breyer's subsequent finding that Uber's nonconsolidation provision in its terms of use is unenforceable.

The MDL at issue involves dozens of personal injury lawsuits **pending before Judge Breyer** in which Uber passengers in California and Texas seek to hold the San Francisco-based ride-hailing giant **liable** for sexual assaults and harassment allegedly committed by drivers.

Shanmugam told the panel Tuesday that dozens of plaintiffs had accepted Uber's terms of service, which included a nonconsolidation provision, and those plaintiffs should be required to litigate their claims individually before their home courts.

Shanmugam also argued that the provision is like other class action waivers and arbitration provisions in contracts, which not only bind parties but bind courts and are routinely upheld. Shanmugam said the JPML and Judge Breyer erred in refusing to enforce the provision, and the JPML should have squarely decided the issue instead of sending the cases to Judge Breyer.

He noted that the JPML's transfer order even commented on the provision, thereby preserving Uber's arguments before Judge Breyer. The JPML's transfer order stated that some plaintiffs suggested in their briefing that they would challenge the enforceability of the provision, and, therefore, centralizing the cases before a single judge would allow the courts to streamline litigation over the provision.

"The parties all operated on the understanding that the question of the validity of these non-consolidation provisions is for Judge Breyer to address," Shanmugam said.

But each judge on the panel appeared skeptical of Uber's position, with U.S. Circuit Judge M. Margaret McKeown calling Shanmugam's arguments "word salad" that she "couldn't quite get [her] head around."

U.S. Circuit Judge Lucy Koh repeatedly asked Uber's counsel if the Ninth Circuit must review the JPML decision for abuse of discretion or clear error.

Although Shanmugam acknowledged that the appeals raise a novel issue regarding a contractual provision that has never been clearly addressed by the courts, the attorney argued that the JPML's transfer ruling was a clear legal error given its lack of clarity regarding the validity of Uber's nonconsolidation provision.

"The JPML seems to have left the issue of relevance of the non-consolidation provision with Judge Breyer," he said. "If the JPML concluded that the non-consolidation provisions do not preclude centralization, we would submit that that is a clear error."

But Judge Koh appeared skeptical, asking, "How is it legal error to not rule in your favor when there's no precedent to guide the JPML's decision here?"

U.S. Circuit Judge Anthony Johnstone also suggested Uber's interlocutory appeal appears to be an attempt to get an "end-run around" the mandamus petition rules.

For the plaintiffs' part, the Uber passengers' counsel, Samuel Issacharoff of the New York University School of Law, argued that the Ninth Circuit lacks authority to hear Uber's appeals because Congress specifically designated the JPML as the sole authority to decide whether to consolidate litigation, and denials aren't appealable.

Issacharoff agreed with Judge Johnstone's suggestion that Uber's interlocutory appeal is an attempt to get an "end run around" the mandamus petition rules.

He argued that, ultimately, Judge Breyer had no authority to review the JPML's centralization ruling and any argument regarding Uber's nonconsolidation provision should have been litigated before the JPML.

However, Judge Koh asked Issacharoff what weight he thinks the court should give Uber's nonconsolidation provision given the high court's 2013 legal precedent in Atlantic Marine Construction Co. Inc. v. U.S. District Court for the Western District of Texas , instructing courts to enforce contracts.

Issacharoff argued that the Atlantic Marine holding indicates that parties can't create a forum when there is a statutory venue requirement, and in deciding the appeals, the panel shouldn't give Uber's nonconsolidation provision any weight at all, particularly since there is no legal precedent supporting Uber's position.

He added that there's a public benefit in having the assault cases centralized so that depositions of Uber executives and other potential witnesses can be shared in discovery, adding that Uber's terms of service "go on for almost 80 pages," and there are three versions.

"I would defy any human being to actually read those," he said.

The panel has taken the arguments under consideration.

U.S. Circuit Judges M. Margaret McKeown, Lucy Koh and Anthony Johnstone sat on the panel.

Uber Technologies Inc., Rasier LLC and Petitioner Rasier-CA are represented by Kannon K. Shanmugam of Paul Weiss Rifkind Wharton & Garrison LLP.

The passenger plaintiffs are represented by Samuel Issacharoff of the New York University School of Law.

The case is Uber Technologies Inc. et al. v. U.S. Judicial Panel on Multidistrict Litigation, case numbers 23-3445 and 24-5063, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Drashti Mehta.

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SEC Texting Sweep: Message Received, Guidance Needed

By **Sarah Jarvis**

Law360 (October 8, 2024, 9:58 PM EDT) -- After financial firms have paid billions of dollars in recordkeeping fines around employees' use of off-channel communications, recent criticism of the U.S. Securities and Exchange Commission's approach by its Republican members has drawn support from attorneys who worry the agency is pushing for an impossible standard of perfect compliance.

Over the last three years, scores of firms have landed in the crosshairs of the SEC and the Commodity Futures Trading Commission, which have doled out more than $2 billion in civil penalties over recordkeeping failures tied to Wall Street's texting habits.

But attorneys told Law360 that rather than ratcheting up fines, more guidance, and potentially updated rules, are needed to account for developments in electronic communication that aren't contemplated by the federal statutes at issue in the agency's enforcement sweep.

In doing so, they welcomed a **recent call** from SEC Commissioners Hester M. Peirce and Mark T. Uyeda to update the recordkeeping rules, although they expressed doubt that would happen anytime soon.

Meanwhile, firms have made recordkeeping compliance a top focus as the agency has emphasized that even reasonable policies are insufficient if violations persist, the attorneys said.

A 'Qatalyst' for Rule Updates?

In a joint statement released last month, the Republican commissioners Peirce and Uyeda voted against a settlement with boutique investment bank Qatalyst Partners LP, which was spared a penalty in a **wave of fines** the agency announced over recordkeeping violations tied to employee use of unapproved communication methods to conduct business.

The SEC said the firm "self-reported its recordkeeping violations, cooperated with the staff's investigation, and demonstrated substantial efforts at compliance with the recordkeeping requirements," while other banks agreed to pay fines totaling nearly $120 million.

Peirce and Uyeda said the case underscores why they have "struggled" with the agency's enforcement approach in this area.

"It does not appear that firms have an achievable path to compliance," the commissioners said in their joint statement. "Under the standard applied in this case, even well-intentioned firms could find themselves in the commission's enforcement queue time and again."

Qatalyst, they said, has had a policy against off-channel communications since at least 2008, and it reinforces this policy with regular employee training and reminders. It has also made other efforts in recent years to discourage personal device use and adopt compliant technology solutions, yet it still wound up on the receiving end of an SEC enforcement action, Uyeda and Peirce said.

"People are not perfect and so compliance will not be perfect — even at a firm that tries as hard as Qatalyst," they said. "Firing up our enforcement machinery every couple years to haul the industry in for headline-making penalties will not make people perfect."

Uyeda and Peirce argued the SEC should instead look to strike a more "pragmatic and privacy-respecting" balance in its approach to recordkeeping, including by potentially updating its existing rules to account for changing technology and communication preferences.

"This case should serve as a catalyst for the commission," they said.

Counsel for Qatalyst declined to comment on the enforcement action or the commissioners' statement.

Jennifer Lee, a partner at Jenner & Block LLP and former assistant director of the SEC's enforcement division, said it's hard to imagine what more a firm in Qatalyst's position could have done to have reasonable policies and procedures in place to address off-channel messaging.

"I think that is what firms are grappling with right now," Lee said. "You could have the best policies on paper, you could even do all of the things that you would think a reasonable compliance program would do. But if there are a couple of messages that fall outside that; if there are a couple of employees that are not fully complying, then the SEC is essentially saying to that firm, you still have a compliance problem that will result in an enforcement action."

Perfection Is Impossible

Lowenstein Sandler LLP partner Scott Moss noted the difference between off-channel cases involving systemic issues and those in which compliance and legal departments are doing everything they can and have reasonable policies and procedures in place, but specific individuals don't comply. He said the latter isn't really appropriate for enforcement, noting that "recordkeeping is an area where it's very easy — especially in one-off situations — to not comply."

"There is no one good solution or magic wand, and no matter how good the solution is, there's still a human element to it, which is why perfection is really impossible," Moss said.

Moss pointed to one statute specifically: Rule 204-2 of the Investment Advisers Act of 1940, which lays out what books and records investment advisers must maintain. He noted that while the regulatory off-channel sweep initially focused on brokers, who were easier targets because they have broader recordkeeping requirements, actions have since come to encompass dual registrants and investment advisers.

Moss said Rule 204-2 is a specific and content-driven rule, but it's ambiguous in several places and difficult to implement with modern technology that the rule does not contemplate.

"I've been practicing law for 23 years, and I have studied Rule 204-2 over and over and over again, and I don't know exactly what it means," Moss said, adding it isn't always clear what communications are personal and don't need to be archived and what communication is covered by Rule 204-2.

He said he'd want more clarity and practical implementation considerations around the ambiguous parts of the rules, and he wants the rules to account for the technology that firms actually use today.

Moss thinks the SEC has been successful with enforcement in sending a message to regulated entities to get them to focus more on record retention, noting that what was previously the most boring part of annual trainings now gets the most engagement. That claim was supported by a **recent survey** of compliance professionals representing nearly 600 investment advisers, who listed electronic communications surveillance as their hottest topic.

When it comes to credit that firms might receive for self-reporting potential noncompliance issues, Moss said he has advised registrants to self-report, and they've secured no penalties as a result. However, he noted firms still incur time and expenses such as legal fees in that process.

Tim Fitzmaurice, a partner at Alston & Bird LLP, said it's difficult for the SEC to provide a clear road map for self-reporting and its benefits, because it isn't a one-size-fits-all matter for firms.

Fitzmaurice said clients want to communicate with their investment advisers and professionals in the most convenient way possible for them, which isn't always pushed through a formal communications channel that the firm can very actively monitor.

He also noted that employees may assume that communications on apps such as WhatsApp will stay on their devices, without realizing or understanding that their phone may delete communications after certain periods of time.

"If the standard is perfection, that's going to be tricky in this day and age," Fitzmaurice said.

More Guidance Needed

Richard Hong, a partner with Morrison Cohen LLP and former prosecutor and SEC trial lawyer, said the agency should issue reports when it declines to bring enforcement actions in the area of off-channel communications. He said that would clarify the boundaries better than bringing enforcement actions without penalties, but he noted that would be a "highly unusual" move from the SEC.

The SEC's outgoing enforcement director Gurbir Grewal **previously told** Law360 that the agency cannot publicize the details of its declinations, unlike the U.S. Department of Justice's Criminal Division, which posts its Corporate Enforcement Policy declinations online.

Hong said Peirce and Uyeda's joint statement was long overdue, saying the SEC probably didn't know the extent of recordkeeping violations when it began its first off-channel communications investigations several years ago.

"After a series of sweeps, it would have been better to come up with some new rules," Hong said. "Regulation by enforcement, which is more haphazard, doesn't work as well."

Tami Stark, a White & Case LLP partner and former assistant regional director in the SEC's Enforcement Division, said it's a difficult time for SEC rulemaking, in light of the U.S. Supreme Court overturning the Chevron deference and the legal challenges trade groups are bringing against various SEC rules.

While it may be difficult for the agency to issue new rules in this area anytime soon, Stark said it's the appropriate time for them to be updated. And those updates should offer firms guidance on what types of electronic communications they should be retaining, she said.

Short of issuing new rules — a process that could take years — the SEC could issue a risk alert or some kind of other guidance on what they expect from the surveillance portion of corporate compliance programs, Stark said.

In the meantime, she noted that self-reporting recordkeeping issues may be a good approach. Determining whether to self-report usually depends on the facts and circumstances of a particular matter, but when it comes to off-channel communications, Stark said there is a pretty high chance that SEC staff would uncover issues during examinations if firms don't self-report potential violations.

Jenner & Block's Lee said the SEC's enforcement message has been successful, so it's hard to see what exactly a rule — even a more specific one — might do to provide more of that message. But it depends on what more the SEC wants to say in this space, she said.

Lee said the SEC's messaging around self-reporting, cooperation and remediation could be clearer, noting the ceiling for any credit lately seems to be just a reduction in penalties. And even when the SEC has highlighted penalty reductions for firms in these settlements, it's not clear what the credit was actually for, she said.

Peirce and Uyeda's joint statement highlighted the SEC's current perspective that reasonable policies are not sufficient to avoid enforcement action if the policies fail to prevent violations, Lee said. That trend is prevalent across the SEC's enforcement program when it comes to internal controls, not just in recordkeeping, but also in cybersecurity and financial reporting matters.

"The Qatalyst case marks another instance in which the SEC has shifted away from crediting companies who are trying to do the right thing," she said, adding that the SEC now offers "less deference to a company that is working on compliance issues but ultimately not perfect."