Examiner’s Optum Reporting Cited in Landmark Complaint

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October 14, 2024

HealthOptum

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This is the 17th installment in an investigative series, launched in December 2022, about CareMount/Optum/UnitedHealth and broader concerns about corporate medical care.

Class Action Status Sought Against UnitedHealth; Allegations Include Insider Trading, Fraud, and Monopolistic Practices

By Adam Stone

“Just when I thought I was out, they pull me back in.”

That famous line from the Michael Corleone character in “The Godfather Part III” jumped to mind last week when a little bird came calling, chirping in my ear about a potentially landmark legal development.

As many of you know, **Hudson Valley patients were alerted** in the fall of 2021 that CareMount Medical had joined Optum Health (a UnitedHealth subsidiary), a transition that has since wreaked havoc in our local medical care system, as it has in markets across the United States.

Some who followed my year-and-a-half **probe** into corporate sick care know that I stepped away from that reporting and all other regular column writing in May, needing to shift my attention back to the demands of newspaper ownership.

Since then, I’ve been contacted time and again by sources new and old, urging a resumption of the series given the disruption wrought by the profits-over-patients culture plaguing the U.S. medical industry.

I promised myself I wouldn’t return to it until I caught my breath.

But then that especially well-informed little bird came to sing an especially newsworthy song last week.

The Latest

Here's the scoop: On Oct. 4, the California Public Employees' Retirement System (CalPERS), the nation's largest state public pension fund with more than two million members and over $500 billion in assets, **filed an amended complaint** against UnitedHealth, the largest health care insurer on the planet, after being appointed as lead plaintiff in July.

Back in May, the City of Hollywood Firefighters' Pension Fund had initiated a **securities fraud complaint** against UnitedHealth Group, citing key corporate figures: Stephen Hemsley, chair of the company's Board of Directors; Andrew Witty, chief executive officer; and Brian Thompson, CEO of UnitedHealth subsidiary UnitedHealthcare.

The **proposed shareholder class action** claimed that the company failed to disclose the reopening of an antitrust investigation by the U.S. Department of Justice (DOJ) related to its acquisition of a health care data company.

It also alleged that top executives sold more than $100 million in shares while aware of the investigation, prior to its public disclosure in my reporting, and subsequent coverage in The Wall Street Journal and other national outlets.

CalPERS, in its consolidated complaint, seeks a jury trial against UnitedHealth and its key executives. The complaint alleges major damages stemming from purchases of the company's common stock, influenced by alleged insider trading.

"When our members' investments are harmed by alleged corporate misconduct, we will take appropriate action to seek restitution and encourage better governance and oversight at companies in which we are significant investors," CalPERS General Counsel Matthew G. Jacobs told me in a statement over the weekend.

CalPERS General Counsel Matthew G. Jacobs emphasized a commitment to accountability in corporate governance amid allegations of misconduct by UnitedHealth.

The plaintiff also describes a widespread scheme by the corporate behemoth to inflate revenues and manipulate the medical industry, citing violations of federal securities law.

The public pension fund, as the lead plaintiff, seeks to represent a class of investors who purchased UnitedHealth Group, Inc. common stock between Sept. 22, 2021, and Feb. 27, 2024.

CalPERS' legal team is vying to have the lawsuit certified as a class action.

'Abuse of Power'

Significantly, the architects of the case appear to be seeking structural reform – accountability and oversight – not just a payday.

UnitedHealth, with a market value exceeding $550 billion (surpassing even the GDP of mid-sized nations like Austria or Nigeria) might not be able to settle this matter by just cutting a fat check, despite its vast resources.

The complaint cites as evidence, in various legal exhibits, my exposés in this series, as well as stellar reporting from The Wall Street Journal and STAT News.

Represented by the renowned **Robbins Geller Rudman & Dowd LLP**, known for its expertise in significant securities litigation, the complaint cites a theory of the case focused on UnitedHealth's alleged "abuse of power."

"The underlying fraud allegations here are marked by seriousness and pervasiveness," Bobby Henssler, a partner at Robbins Geller Rudman & Dowd, told me in prepared remarks late last week. "The suit alleges that UnitedHealth misled investors by, among other things, concealing its pattern and practice of improper 'upcoding' in the company's Medicare Advantage business and failure to maintain necessary network firewalls."

Legal papers claim the defendants "engaged in a scheme and wrongful course of business which was designed to, and did, artificially inflate the Company's revenues, earnings, and stock price."

Beyond the media reports, the complaint also includes assertions that were researched and corroborated independently by the law firm, through a review of public documents, statements from company insiders and other available information.

> "When our members' investments are harmed by alleged corporate misconduct, we will take appropriate action to seek restitution and encourage better governance and oversight at companies in which we are significant investors." – CalPERS General Counsel Matthew G. Jacobs.

In quoting from my reporting, the legal action notes a scene I spotlighted in my earlier coverage: A troubling January 2024 meeting between Optum executives and health care professionals where nurses were guided on how to add additional diagnosis codes to patient charts.

"The March 18, 2024 The Examiner News report also included inside audiotapes, evidencing UnitedHealth management coaching nurses to add unsupported diagnoses during chart reviews," the complaint states.

Filed in the U.S. District Court for Minnesota, where the multinational corporation is headquartered, the complaint accuses UnitedHealth and its executives of engaging in illegal practices that misled investors, defrauded the government and exploited the company's market dominance to stifle competition.

The filing emphasizes how the defendants "formulated, implemented, and oversaw an illegal, company-wide upcoding gambit."

A UnitedHealthcare corporate media contact did not reply to my request for comment as of press time.

Examiner Reports

One of my reports from earlier this year detailed Optum’s alleged process to deceive the Centers for Medicare & Medicaid Services (CMS), as described in interviews I conducted with a federal **whistleblower** who had also filed an official government complaint.

Nurses reviewed patient charts to resurrect past chronic conditions, adding unsupported diagnoses that had not been detected by primary health care providers, the whistleblower described.

An offshore coder would then submit claims to CMS based on these dubious entries, the public pension fund’s complaint states.

In his statement to Examiner Media, Bobby Henssler, a partner at Robbins Geller Rudman & Dowd, cited the serious allegations of fraud against UnitedHealth in its Medicare Advantage practices.

The plaintiff cites mid-2024 reports from The Wall Street Journal and STAT News detailing widespread fraudulent practices at UnitedHealth, including claims that the company collected billions from Medicare for untreated conditions, with a Wall Street Journal analysis showing that in 2021 alone UnitedHealth received $8.7 billion in taxpayer funds for diagnosis codes that were never treated by doctors.

"Doctors around the country have described panicked calls from UnitedHealth members who noticed alarming new diseases listed on their medical chart that their doctor never mentioned," the complaint states.

The media reporting also described the company using its vast network of doctors and clinics to maximize profits at the expense of patient care.

Code Red

The legal action, which could have far-reaching implications for the industry, alleges that UnitedHealth deliberately inflated its Medicare Advantage payments by "upcoding," a practice in which unwarranted diagnosis codes are added to patient records to increase government reimbursements.

"At the core of Defendants' scheme was their carefully orchestrated plans and procedures to inflate the fees UnitedHealth collected from the government by deliberately 'upcoding' – or adding unwarranted diagnosis codes – across its massive member population," the complaint explains.

UnitedHealth used several strategies, including incentivizing doctors and nurses to misdiagnose patients, particularly through its HouseCalls program, according to the complaint.

"UnitedHealth's HouseCalls program was specifically designed to conduct health risk assessments in members' homes to generate unsupported diagnoses of serious and chronic medical conditions in order to boost Medicare Advantage payments from CMS," the complaint maintains.

These visits allegedly allowed nurse practitioners to perform home assessments and leverage software "specifically programmed to recommend lucrative diagnoses and unreliable medical devices."

'Change' You Can't Believe In

The pension fund's complaint also highlights UnitedHealth's acquisition of Change Healthcare in 2021, a $13 billion deal the plaintiffs say allowed the company to obtain competitor data, positioning it to further manipulate the industry.

In fact, the acquisition provided UnitedHealth access to information from competitors "including pricing structures, claims data, and billing practices," the complaint asserts.

And it's not like regulators didn't know the risks with the Change Healthcare deal at the time.

Grave industry concerns were immediate, and the DOJ filed an antitrust lawsuit to block the deal.

However, UnitedHealth successfully argued that it had robust internal firewalls to protect sensitive information.

> "The underlying fraud allegations here are marked by seriousness and pervasiveness." – Bobby Henssler, partner at Robbins Geller Rudman & Dowd.

But the company's assurances about its data protections were false, the complaint states, noting how "the firewalls UnitedHealth described to the court and the public were illusory – they simply did not exist."

And what happened next?

"The lack of firewalls and lax security also ultimately led to the largest security breach in the history of the United States healthcare system, which hackers achieved simply by acquiring a working username and password," the legal action declares.

UnitedHealth revealed in February that a ransomware group exploited vulnerabilities in Change Healthcare's security, compromising one-third of all patient records in the United States, the complaint explains.

Throwing Stones

A Stone's Throw column I published on Feb. 26 revealed that the DOJ notified the corporation of a nonpublic investigation into the company's antitrust practices in October 2023, a fact I learned from local sources, confirmed through first-hand correspondence.

"The new Justice Department inquiry, reported earlier by the Examiner News, a news organization based in New York's Hudson Valley, is partly examining Optum's acquisitions of doctor groups and how the ownership of physician and health-plan units affects competition, according to the people with knowledge of the matter," stated a Feb. 27 **Wall Street Journal piece** headlined "U.S. Opens UnitedHealth Antitrust Probe."

Previously concealing information about the inquiry from investors and the public, senior executives had taken immediate action after learning of the probe last fall, selling more than $100 million of their own UnitedHealth stock "at artificially inflated prices as the market and other investors remained unaware of the new federal antitrust investigation," the complaint details.

The Wall Street Journal's story, as cited in the complaint, noted that the DOJ was focusing on UnitedHealth's Medicare billing practices and its anti-competitive behavior, including leveraging its dominant position to squeeze competitors and secure billions in unwarranted payments.

Industry analysts and investors then expressed grave concern that the DOJ investigation would expose the scope of the company’s unhealthy practices.

A significant drop in UnitedHealth’s stock followed, with the price declining more than $27 per share, falling from $525.32 on Feb. 26 to $498.28 on Feb. 28, the complaint references.

“The decline…served to remove artificial inflation from the price of UnitedHealth common stock, and was the direct and foreseeable consequences of the revelation of the relevant truth concealed by Defendants,” the complaint argues.

‘Monopoly on Steroids’

Lawmakers have taken notice of the mounting allegations, with figures as politically diverse as U.S. Sen. Elizabeth Warren, a liberal Democrat from Massachusetts, and Rep. Buddy Carter, a conservative Republican from Georgia, calling for further scrutiny.

Warren described UnitedHealth as a “monopoly on steroids,” while Carter echoed calls to “bust up” the company.

“Because UnitedHealth has bought up every link in the healthcare chain, it’s in a position to jack up prices, squeeze competitors, hide revenues, and pressure doctors to put profits ahead of patients,” Warren has stressed.

Several lawmakers have also called for an insider trading investigation into UnitedHealth’s executives related to the stock sales during the DOJ probe.

“Based on the highly suspicious stock sales by Hemsley and others, Senator Warren and 16 other lawmakers sent a letter urging the SEC to open an insider trading investigation,” the complaint points out.

Local Angle

Thankfully, my exit from regular reporting hasn’t spoiled our ability to cover the corrosive impact of Optum’s entry into the region.

As timing would have it, just this week Examiner Editor-in-Chief Martin Wilbur prepared a piece about the latest local development.

We learned that Optum notified about 75 local lab staff and other related personnel on Sept. 30 that they would be laid off after the company contracted out the work to Quest Diagnostics, part of an alleged union busting effort by Optum.

Despite anecdotal evidence of recent operational improvements under local leadership and the commendable efforts of dedicated doctors and other staff, the deeper, systemic issues in our health care system remain uncontained in the area.

It seems difficult to rein in at the local level given the parent company's all-consuming pursuit of profit above all else, which often comes at the expense of patient care.

While the filing of the public pension fund's complaint won't be a quick panacea by itself, it is a momentous scene in this movie.

A pat, uncomplicated happy ending is unlikely, given the vast web of factors that have upended our health care system.

And the claims against UnitedHealth paint a grim picture.

But there is a silver lining: the increased scrutiny has illuminated the depth of the alleged corporate misconduct.

With this broader awareness, reasonable stakeholders should agree that the status quo is unacceptable, possibly paving the way for meaningful reform in the months and years ahead.

Let's hope this legal action marks a key step toward accountability and change.

– Adam Stone is publisher of Examiner Media.

*(To read the full complaint, click **here**).*

Adam Stone
Adam has worked in the local news industry for the past two decades in Westchester County and the broader Hudson Valley. Read more from Adam's author bio here.

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Wirehouses Face More Cash Sweep Class Actions

wealthmanagement.com/industry/wirehouses-face-fresh-round-cash-sweep-class-actions

Patrick Donachie October 14, 2024

Wells Fargo, Merrill Lynch and Morgan Stanley are facing separate class action complaints accusing the wirehouses of generating "massive revenue" to the detriment of clients through their cash sweep programs.

The three suits, which mirror similar class action complaints filed against numerous firms over the past several months, come after Wells Fargo revealed that it lost $128 million in net interest income during 2024's third quarter after it increased its sweep deposit rates.

In a third-quarter earnings call Friday morning, Wells Fargo Chief Financial Officer Michael Santomassimo said the firm's net interest income dipped $233 million (or 2%) between the second and third quarters. According to Santomassimo, $128 million of that drop was due to "the increased pricing on sweep deposits and advisory brokerage accounts and wealth and investment management." Santomassimo also said sweep deposit pricing and advisory brokerage accounts would continue to align with Fed rate cuts. Wells' revenue

in its wealth and investment management division increased 5% year-over-year due to higher asset-based fees driven by market valuations and transaction activity, despite the net interest income dip from sweep deposit rate increases (down 16% YoY for the division). Meanwhile, the Minneapolis-based Safron Capital Corporation brought separate suits against Bank of America Merrill Lynch and Morgan Stanley, while Brickman Investments sued Wells Fargo. The complaints were brought in New York's Southern District, with Robbins Geller Rudman & Dowd and Abraham Fruchter & Twersky listed as the plaintiffs' firms in all three suits.

In the Wells Fargo complaint (similar in content and language to the other two), the plaintiffs described how the firm would automatically sweep eligible clients' uninvested cash balances into "interest-bearing" deposit accounts.

However, Wells faced a conflict of interest by profiting from the spread its affiliated banks earned on those deposits. According to the complaint, they were motivated to enroll clients in the sweep programs even if those sweep accounts paid lower interest rates to customers. The plaintiffs alleged the sweep program rates ranged from 0.02% to 0.2%, lower than many competitors' rates and the Fed's benchmark federal funds rate.

Last September, Wells Fargo revealed that the SEC was investigating its sweep practices. In August, the firm disclosed it was in "resolution discussions" with the commission. The firm also announced late in the second quarter that it would increase pricing on sweep deposits in advisory brokerage accounts, which they expected could lead to an annual $350 million revenue loss.

In the suit, the plaintiffs argued Wells Fargo Advisors' conduct violated fiduciary duties while also owing clients a comparable duty of care to retail clients via the SEC's Regulation Best Interest rule.

According to the complaint, Wells made misleading statements when telling clients that rates may be lower than rates for clients making deposits directly. In reality, the sweep program interest rates were always significantly lower than those of customers making direct deposits (the complaint alleged that Wells Fargo amended its disclosure documents around the time it revealed the SEC investigation to say sweep rates were "typically" lower).

In each suit, the plaintiffs want class action complaints to represent the clients affected by each firm's alleged conduct.

Wells Fargo, Morgan Stanley and others, including LPL, Raymond James, Ameriprise and UBS, have all been named defendants in previously filed class action complaints. Last Friday, a California federal judge ordered a class action suit filed in the state against Wells Fargo to be consolidated with several similar suits also filed in recent months.

Bank of America Merrill Lynch disclosed in SEC filings that it could face legal and regulatory risks due to its cash sweep program. In August, Morgan Stanley disclosed it faced its own SEC probe related to "advisory cash balances swept to affiliate bank deposit programs."

Merrill Lynch declined to comment, and Wells Fargo did not return a request for comment as of press time.

Morgan Stanley believed claims in the suit were "baseless and plainly without merit," according to a spokesperson for the firm.

"The cash sweep program is fully disclosed to clients, who consent to it in connection with the opening of their account," the spokesperson said. "The firm will defend itself against this and the other claims vigorously."

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Securities Law News

Oct. 14, 2024, 11:23 AM PDT

Comerica Investor Suit Tossed for Failing to Prove Economic Harm

By Evan Ochsner

- Investors said Comerica reduced stock drop from alleged fraud
- Judge says investor claims were ‘tenuous’

Bloomberg Law News 2024-10-15T10:42:51078066011-04:00

Comerica Investor Suit Tossed for Failing to Prove Economic Harm

By Evan Ochsner 2024-10-14T14:23:33000-04:00

- Investors said Comerica reduced stock drop from alleged fraud
- Judge says investor claims were ‘tenuous’

Shareholders failed to prove Comerica Inc. made misstatements and omissions that caused investors economic harm related to allegedly impermissible activity in a government aide program, a judge found, granting Comerica’s bid to dismiss an investor suit.

Nova Scotia Health Employees’ Pension Plan, as the lead plaintiff in a proposed securities class action suit, alleged that Comerica tried to minimize the market impact of public revelations that the bank allegedly violated federal law by engaging a Pakistani contractor. The contractor was hired to work on the Direct Express program, through which Comerica provides federal benefits on prepaid debit cards.

But the suit doesn’t plausibly allege economic harm to shareholders and therefore must be dismissed, Judge Stanley Blumenfeld, Jr. of the US District Court for the Central District of California ruled on Oct. 11.

NSHEPP alleged that a letter from Comerica CEO Curtis Farmer impermissibly muted the market impact of the fraud allegations. In a third amended complaint filed in August, NSHEPP said additional disclosures “partially removed fraud-related inflation from Comerica’s stock.”

The new allegations amount to an “increasingly sprawling theory that lacks coherence,” Blumenfeld wrote.

Six of those disclosures were analyst reports that didn’t discuss the allegedly fraudulent conduct directly but NSHEPP said were red flags because they discussed matters that were relevant to the Direct Express program.

“This argument is, to say the least, tenuous,” Blumenfeld wrote.

Other communications NSHEPP relied on didn’t actually disclose to the market the information that the pension fund was alleging to have previously been fraudulently concealed, Blumenfeld found.

NSHEPP also unsuccessfully argued that a 10.5% drop in Comerica’s stock was due to a revelation of previously hidden fraud. It’s much more likely that the drop occurred because it became public that Comerica’s contract to administer Direct Express wasn’t being renewed, Blumenfeld wrote.

“NSHEPP has not plausibly alleged that Comerica’s July 2024 stock price drop represents the removal of fraud from the market rather than a reaction to the loss of hundreds of millions of dollars in revenue that Comerica otherwise might have received from the Direct Express program,” the judge wrote.

Nova Scotia Health Employees Pension Plan is represented by Pomerantz LLP. Comerica is represented by Wachtell Lipton Rosen & Katz.

The case is Ramos v. Comerica Inc. , C.D. Cal., No. 2:23-cv-06843, 10/11/24 .

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Overstock Short Sellers Lose Appeal Over Market Manipulation

B **bloomberglaw.com**/product/blaw/bloomberglawnews/class-action/X1BJMHM4000000

- Digital dividend allegedly issued to harm short sellers
- Lower court said pleadings insufficient to maintain claims

Short sellers can't continue to press their case that Overstock.com Inc. and its leaders forced them into a "squeeze" through improper tactics, the Tenth Circuit ruled Tuesday.

The suit stemmed from a bitter fight between Overstock's leadership and investment funds betting on a loss in its share value. The short sellers, who say they were effectively forced to purchase shares in circumstances known as a short squeeze, sought to revive the case after the US District Court for the District of Utah dismissed it in 2021.

The short sellers' claims for misrepresentations, market manipulation and insider trading all fail, a three-judge panel of the US Court of Appeals for the Tenth Circuit said in a unanimous ruling.

Mangrove Partners Master Fund Ltd. and other short sellers didn't show they relied on the Overstock statements they challenged as misleading, Judge Joel M. Carson said for the appeals court. They didn't show market manipulation stemming from a dividend issuance because Overstock disclosed what it was going to do, Carson said. And with no underlying violation, the claims for insider trading can't proceed, he said.

Short sellers profit when a company's stock price rises and then falls again. They do this by borrowing the shares from a brokerage, Judge Dale A. Kimball of the District of Utah said in his dismissal opinion. If dividends are issued on stock that short-sellers have borrowed from lenders, they must pay the dividend or else purchase the stock on the open market rather than waiting for a low price, Kimball said.

Digital Securities, Dividends

Overstock, an online seller of home goods, began to develop blockchain technologies and a trading platform for digital securities, according to an earlier decision of the district court.

Overstock decided to issue unregistered digital dividends, but this would mean that these dividends couldn't be traded for about six months, Kimball said. Market observers remarked that this transaction "locked up" the dividend and short sellers would have to purchase stock in a short squeeze to satisfy obligations to the brokerages.

Mangrove Partners and the other short sellers sued Overstock, its former CEO Patrick Byrne, and other executives, alleging that Byrne was hostile to short sellers and hatched the plan to punish them and enrich himself.

In August 2019, several weeks after the digital dividend announcement, Byrne resigned from Overstock and left the US amid a scandal over his romantic involvement with alleged Russian spy Maria Butina. While share prices were still high as a result of a short squeeze, Byrne allegedly sold all his stock.

The short sellers, on behalf of a class, also alleged they lost money based on Overstock statements about its search-engine optimization and other financial metrics related to its retail operations.

Kimball dismissed the suit, saying the short sellers failed to adequately allege misleading statements, market manipulation—because the digital dividend and related statements weren't deceptive—and Overstock's intention.

Mangrove Partners appealed, telling the Tenth Circuit that Byrne's statements give enough evidence of intent to move past the dismissal stage on the market manipulation claim.

Misrepresentation, Manipulation Claims

The appeals court, in its opinion Tuesday, looked first at the misrepresentation claim. Mangrove Partners "admitted that Overstock's looming crypto dividend—not the retail statements or the fairness of Overstock's market price—caused it to buy its Overstock stock," Carson said.

The investment company "cannot have it both ways: if Plaintiff bought its shares to avoid breaching its lending contracts, it cannot also have bought its shares because of Defendant's alleged misstatements," he said.

In a footnote, however, he said the court wasn't adopting a "blanket rule" preventing short sellers from using market efficiency to show reliance.

On the manipulation claim, where the allegedly manipulative dividend was disclosed in advance, the court joined the Second Circuit in holding "that an open-market transaction may qualify as manipulative conduct, but only if accompanied by plausibly alleged deception." In the circumstances of this case, the claim falls short, Carson said.

Judges Carlos F. Lucero and Veronica S. Rossman also served on the panel.

Cohen Milstein Sellers & Toll PLLC and Clyde Snow & Sessions PC represented the short sellers. Parsons Behle & Latimer and Cooley LLP represented Overstock.

The case is In re Overstock Sec. Litig. , 10th Cir., No. 21-04126, 3/10/23 .

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Securities Law News
Oct. 11, 2024, 2:59 PM PDT

Missfresh, Investors Get Final Nod for $4.9 Million Settlement

By Martina Barash

Bloomberg Law News 2024-10-15T10:42:22441226794-04:00

Missfresh, Investors Get Final Nod for $4.9 Million Settlement

By Martina Barash 2024-10-11T17:59:30000-04:00

Grocery delivery company Missfresh Ltd. and its US investors received final court approval for their $4.9 million settlement of claims that the Chinese company overstated its revenue before its initial public offering.

Judge Jed Rakoff signed off on the deal in an order entered Friday in the US District Court for the Southern District of New York, and approved attorneys' fees of about $1.2 million, or 25% of the total. He had trimmed claims from the suit in November 2023.

- The investors alleged that Missfresh overstated net revenues and sales before it held its IPO of American depository shares in June 2021, leading to restated financial reports and stock losses
- In requesting final approval, the investors highlighted the risks and potential expenses of continuing to litigate the complex case involving China, where depositions aren't permitted and US judgments are hard to enforce
- The settlement represents 1.7% of the total maximum damages from the plaintiffs' perspective or 51% of recoverable damages from the company's perspective, they said

Rosen Law Firm PA and Labaton Keller Sucharow LLP were lead counsel for the investors. Stinson LLP represented Missfresh.

The case is Chen v. Missfresh Ltd. , S.D.N.Y., No. 1:22-cv-09836, entered 10/11/24 .

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Securities Law Prof Blog

lawprofessors.typepad.com/securities/2024/10/new-securities-law-articles-in-print-1.html

Tuesday, October 15, 2024

New Securities Law Articles in Print

The following law review articles relating to securities regulation are now available in paper format:

Barbara Ballan & Jason J. Czarnezki, *Disclosure, Greenwashing, and the Future of ESG Litigation*, 81 Wash. & Lee L. Rev. 545 (2024).

Sharon Hannes, Adi Libson & Gideon Parchomovsky, *The ESG Gap*, 49 BYU L. Rev. 1137 (2024).

Juliet P. Kostritsky, Jillian T. Fox & Blake Spiller, *The Hidden Cost of Contracting for ESG: A New Perspective on Private Ordering*, 74 Case W. Res. L. Rev. 91 (2023).

Jac Hipkins, Note, *Invigorating Corporate Democracy: Rethinking "Control" under the Williams Act*, 99 N.Y.U. L. Rev. 745 (2024).

Kaileigh Mallin, Comment, *Government-Mandated ESG Disclosure: It's Not Easy Being Green*, 61 Hous. L. Rev. 855 (2024).

J.S. Nelson, *Corporate Criminal ESG*, 109 Iowa L. Rev. 1429 (2024).

Blue Cross Blue Shield settles US health provider class action for $2.8 billion

reuters.com/legal/blue-cross-blue-shield-agrees-pay-28-bln-settle-us-health-provider-class-action-2024-10-14

Mike Scarcella

A file photo of a healthcare provider in California, U.S., January 18, 2018. REUTERS/Mike Blake Purchase Licensing Rights, opens new tab

Oct 14 (Reuters) - Insurer Blue Cross Blue Shield has agreed to pay $2.8 billion to resolve antitrust class action claims by hospital systems, physicians and other health providers alleging they were underpaid for reimbursements, the plaintiffs said in an Alabama federal court filing on Monday.

The settlement is the largest ever for a healthcare antitrust case, they added.

Blue Cross Blue Shield denied the allegations in a statement, but said it agreed to the settlement and make operational changes to "put years of litigation behind us."

The providers' lead attorneys, Joe Whatley and Edith Kallas, said in a statement the proposed settlement would "transform" the BlueCard program through which providers submit claims.

The agreement, opens new tab is subject to approval from U.S. District Judge R. David Proctor.
The health providers first sued in 2012, claiming Blue Cross and its affiliates divided the country into exclusive areas where they did not compete with each other. The lawsuit said the nationwide conspiracy increased the cost of insurance and drove down reimbursements.

Under the settlement, Blue Cross will create a system-wide information platform facilitating member benefits, eligibility verification and claims tracking that the attorneys said would lead to more transparency, efficiency and accountability.

The settlement will also give providers more contracting opportunities with Blue Cross.

Blue Cross will spend hundreds of millions of dollars implementing the non-monetary part of the settlement, the filing said.

The settlement covers U.S. healthcare service providers, including hospitals and some doctors, with Blue plan patients between July 2008 and October 2024.

The lawyers said they would ask for up to $700 million in legal fees from Blue Cross.

Blue Cross agreed in 2020 to pay $2.7 billion to resolve related antitrust claims from commercial and individual subscribers. The U.S. Supreme Court upheld that deal in June.

Reporting by Mike Scarcella Editing by David Bario and Richard Chang

Judge in sprawling hair relaxer case limits fees for lead lawyers

reuters.com/legal/litigation/column-judge-sprawling-hair-relaxer-case-limits-fees-lead-lawyers-2024-10-14

Alison Frankel

A logo is seen over the entrance of Cosmetics company L'Oreal building in Paris, August 16, 2013. REUTERS/Christian Hartmann/File Photo Purchase Licensing Rights , opens new tab

Oct 14 (Reuters) - Someday, federal judges in the U.S. will likely be required to abide by a single, nationwide standard for how to compensate the lawyers they've appointed to lead sprawling cases involving hundreds or even thousands of plaintiffs.

That day is not today.

A fight over a so-called common benefit fund in the consolidated litigation involving allegedly carcinogenic chemical hair relaxer products highlights the roiling debate over these fees, which are meant to compensate plaintiffs lawyers whose work benefits not just their own clients but everyone whose cases have been consolidated before a single federal judge. (Defendants in the hair relaxer case include L'Oreal and Revlon, both of which have told Reuters their products are rigorously tested and safe.)

On Friday, U.S. District Judge Mary Rowland of Chicago denied , opens new tab a motion , opens new tab by the lawyers leading the hair relaxer case to revisit her Aug. 22 order , opens new tab limiting their common benefit fees.
In the August order, Rowland ruled that all plaintiffs lawyers in the consolidated hair relaxer multidistrict litigation, or MDL, must pay a portion of their fees from any settlement in the MDL to a common benefit fund to compensate the lawyers leading the litigation. That part of her order is not at all controversial: Common benefit fees, which are intended to prevent plaintiffs lawyers from "free riding" on discovery and pretrial decisions obtained by lead lawyers in the MDL, are a staple of these consolidated cases.

Rowland also sided with lead counsel from Wallace Miller; DiCello Levitt; Motley Rice; Douglas & London; and the Ben Crump Law firm on the percentage of fees that other lawyers should contribute to the common benefit fund: 11% — 8% to compensate the lead firms for their time and 3% for their expenses.

But the judge balked at lead counsel's request that she order other plaintiffs lawyers to pay common benefit fees from settlements they reach outside of the MDL. Rowland concluded that she does not have authority over cases that are litigated in state court or over potential cases that settle before a formal complaint is filed.

On that point, the judge sided with plaintiffs lawyers from Keller Postman, which objected, opens new tab to the initial common benefit fee request, opens new tab from the lawyers leading the hair relaxer case.

Keller Postman said it had explicitly opted not to participate in the MDL and had instead filed its clients' hair relaxer lawsuits in state court. (The firm did assert claims against Revlon in the MDL but said that was only because of Revlon's Chapter 11 bankruptcy.) Keller Postman said it was working up its state-court cases without the benefit of any work performed by lead lawyers in the MDL, so it should not be forced to surrender a portion of its fees to those lawyers.

Rowland held in August that it doesn't matter whether Keller Postman is participating in the MDL. She said that as a matter of law, she cannot order fees from cases that she is not overseeing.

"State court cases and unfiled cases, even if related, are not before this court and thus not subject to the court's managerial authority," Rowland said. "Regardless of whether the non-MDL plaintiffs' attorneys participated in the MDL, the court does not have authority."

Her holding might seem obvious – how can a judge claim authority over cases outside of her courtroom? — but federal trial and appellate courts are divided on the issue.

I told you last year about a decision from the 9th U.S. Circuit Court of Appeals in a case presenting a similar set of facts. The 9th Circuit ruled that a plaintiffs lawyer who had filed cases that were consolidated in an MDL involving Bard IVC filters was required to pay a portion of his fees from cases settled outside of the MDL. Its reasoning: Because the lawyer participated in the MDL, he subjected himself to the authority of the MDL judge, even in cases outside of the consolidated proceeding.

The 3rd Circuit reached the same conclusion back in 2015, holding, opens new tab that plaintiffs firm Girardi Keese owed common benefit fees from state-court settlements involving the diabetes drug Avandia because the firm participated in a federal-court MDL against Avandia's manufacturer.

But the 4th and 8th Circuits have both ruled that MDL judges cannot levy common benefit fees from state court settlements, albeit in cases involving plaintiffs lawyers who did not participate in the MDLs. The 8th Circuit's 2014 ruling, opens new tab, in litigation over genetically modified rice, flatly said that MDL judges do not have authority to impose fees from cases outside the bounds of consolidated proceedings in federal court. (The 7th Circuit, where the hair relaxer MDL is being litigated, has not weighed in.)

In their motion for reconsideration, lead counsel urged Rowland to adopt the 9th Circuit's framing from the 9th Circuit's 2023 Bard decision, focusing on lawyers instead of plaintiffs. MDL judges, they argued, can exercise authority over lawyers appearing before them, even if some or most of the lawyers' clients are not litigating in the MDL.

Rowland rejected that reasoning in Friday's order. "The court cannot order holdbacks from an attorneys' recoveries from cases not before the court," she said. "Despite recognizing the risk of free riders, courts are unwilling and unable to extend the boundaries of their jurisdiction to provide a solution."

I emailed the MDL lead counsel to ask about Rowland's rejection of their motion for reconsideration but didn't hear back. Ashley Keller of Keller Postman said by email that Rowland reached the right conclusion on lead counsel's rehashed arguments.

The plaintiffs lawyer who lost the Bard case at the 9th Circuit said at the time that he might ask the U.S. Supreme Court to take up the issue but does not appear to have petitioned for review. Eventually, the justices will probably have to resolve this slow-rolling circuit split. But, like I said, that's not happening anytime soon.

Read more:

Hair relaxer class action over reimbursement for products can move forward, judge says
Thousands of Black women claim hair relaxers gave them cancer
Appeals court OKs 'common benefit' fees in Bard IVC filter litigation. Next stop Supreme Court?
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Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

Law firm Boies Schiller denies hedge fund collusion in home buyer class action

reuters.com/legal/legalindustry/law-firm-boies-schiller-denies-hedge-fund-collusion-home-buyer-class-action-2024-10-14

Mike Scarcella

By Mike Scarcella
October 14, 20242:44 PM PDTUpdated 16 hours ago
The logo of law firm Boies Schiller Flexner LLP is seen outside of their office in Washington, D.C., U.S., August 31, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights, opens new tab

Oct 14 (Reuters) - Law firm Boies Schiller Flexner is pushing back against litigation misconduct claims in a proposed class action against United Wholesale Mortgage, hoping to derail the home lending giant's bid to dismiss the case and recoup legal fees.

The six-month-old lawsuit alleged that UWM conspired with brokers to force home buyers into expensive mortgages and pocketed billions of dollars in excess fees.
UWM last month asked the court, opens new tab to throw out the case and sanction the plaintiffs' lawyers at Boies Schiller, arguing that the firm is in league with a hedge fund that is shorting UWM stock.
In a court filing, opens new tab on Friday, Boies Schiller denied colluding with the hedge fund, Hunterbrook Capital, calling UWM's bid to sanction the firm a "side-show." It said no entity associated with Hunterbrook was paying for the proposed class action, and that the law firm has “has no interest — none — in any trade by any Hunterbrook entity on UWM’s stock.”
Pontiac, Michigan-based United Wholesale Mortgage declined to comment on Monday. The lender has denied the allegations in the lawsuit.

New York-based Boies Schiller declined to comment. It pointed to an earlier statement that called United Wholesale's collusion claims a "baseless attempt to further distract from the underlying issues" in the case.

A Hunterbrook representative did not immediately respond to a request for comment.

Boies Schiller filed the lawsuit in April on behalf of four home buyers after Hunterbrook’s media arm, Hunterbrook Press, published an investigation questioning the mortgage company's practices.

Boies Schiller has said the nonprofit Hunterbrook Foundation shared data analysis and research with the law firm before the lawsuit was filed.

In its request for sanctions and dismissal in September, UWM accused , opens new tab Hunterbrook and Boies Schiller of mounting a "coordinated campaign to disparage its business and destroy its stock value."
Boies Schiller in its new filing said UWM had made "specious allegations" of professional misconduct.

"Counsel and plaintiffs — without qualification — had complete control over whether and when to commence this action," the law firm said.

The case is Escue v. United Wholesale Mortgage LLC, U.S. District Court for the Eastern District of Michigan, No. 2:24-cv-10853.

For plaintiffs: John Zach and Marc Ayala of Boies Schiller Flexner; and Brandon Hubbard of Dickinson Wright

For defendants: Jeffrey Jones, Stephen Cowen and Rebekah Byers Kcehowski of Jones Day

Read more:

United Wholesale Mortgage defeats broker antitrust lawsuit
Mortgage lender United Wholesale sued by consumers alleging billions in excess fees
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Reporting by Mike Scarcella

Securities Law News
Oct. 15, 2024, 2:00 AM PDT

If It’s Wednesday, Susman Godfrey Is Placing Bets on Lawsuits

By Roy Strom and Tatyana Monnay

- Law firm’s democratic meetings decide which cases to invest in
- Up-or-down votes have cost American businesses billions in damages

Bloomberg Law News 2024-10-15T10:43:21062994378-04:00

If It’s Wednesday, Susman Godfrey Is Placing Bets on Lawsuits

By Roy Strom and Tatyana Monnay 2024-10-15T05:00:00000-04:00

- Law firm’s democratic meetings decide which cases to invest in
- Up-or-down votes have cost American businesses billions in damages

At noon on Wednesdays, lawyers filter into a Houston conference room for one of the more dramatic regular meetings inside an American law firm.

One at a time, Susman Godfrey partners pitch colleagues on the next big lawsuit the firm should invest in. The colleagues poke holes. They probe the legal theory, question damages, ponder the jurisdiction. Then up to 150 lawyers, including those on Zoom, vote on whether to take the case.

“I wouldn’t call it a murder board,” Vineet Bhatia, one of the firm’s two managing partners, said of the weekly meeting in an interview. “It’s not a cake walk either.”

The unique vetting process plays a central role in the elite boutique litigation firm’s skyrocketing revenue. The firm has a knack for taking on cases that generate intense publicity and eye-popping results. The up-or-down Wednesday votes cost some of America’s best-known businesses billions in collective damages.

The firm’s lawyers were behind the $787 million defamation settlement with Fox News and they’re the ones suing OpenAI on behalf of the New York Times. And it’s this firm that walked the National Football League to the brink, staring down a $4.7 billion verdict before it was recently overturned by a judge.

The weekly Wednesday conference—which involves lunch—is a practice that dates back roughly 45 years to the firm’s founding. Before Covid forced the meetings virtual, the voting was done in the room by hand. Now, it’s over a polling app in Zoom.

There is a lot on the line. By investing its own time and money, the firm takes the risk that it can pick more winners than losers and, in the process, make more money than it otherwise would by billing clients by the hour.

Susman Godfrey Knows How to Pick Winning Cases

The firm has secured hundreds of millions in awards over the last two years.

Defendant	Award	Award Type	Case Type	Date
National Association of Realtors	$418 million	Settlement	Antitrust	24-Mar
Samsung Electronics Co.	$341 million	Verdict	Breach of contract	24-Feb
Peter Nygard	$203 million	Special Referee	Defamation	23-Oct
Fox News	$787.5 million	Settlement	Defamation	23-Apr
AT&T Mobility and Nokia Corp. of America	$166.3 million	Verdict	Patent	23-Jan

Source: Susman Godfrey

Bloomberg Law

Successfully picking winners has made the firm's lawyers some of the highest paid in the country. Profits of nearly $7 million per partner in fiscal 2023 ranked Susman Godfrey fourth among the 100 largest law operations by revenue, according to American Lawyer data. The boutique topped the latest bonus scale set by Cravath, Swaine & Moore and doled out bonuses ranging from $140,000 to $360,000 to its associates.

The Houston-founded firm has had back-to-back record-setting years, vaulting its revenue into territory typically occupied by the major defense firms it goes up against. Last year, Susman brought in nearly $750 million in revenue, 69th most, according to the American Lawyer. It ranked 110th the previous year.

Last year's explosive growth was the result of major contingency wins, including the nine-figure Fox settlement with Dominion Voting Systems Inc. Bhatia said he expects the firm this year will outperform 2022, when revenue was $370 million. The firm's 2024 performance will depend on whether major cases are finalized in the fourth quarter, he said.

"The dollar amounts in cases are getting bigger," Bhatia said. "And if you're taking a model that's based on success fees and contingent fees, the fees are going to be larger if the cases are bigger."

Case of the Mondays

Lawyers come into the Wednesday meetings prepped on the decisions they'll be making. That's because partners on Mondays send out memos describing the cases they want to raise for a vote.

Those memos generate written questions from the firm's lawyers, often forcing partners to rethink the case before putting it up for the vote, said managing partner Kalpana Srinivasan.

"There is a lot that doesn't really even make it into the process either because it's not the kind of matter we take on or we think the recovery's too thin for our operation—or it's just not the right type of case for us," Srinivasan said.

By Wednesday, lawyers are homing in on the crux of the case. They ponder the motivation of the litigants, Bhatia said. Will the client be reasonable about settlement? Where will the appeals be heard? Does the lawsuit threaten the defendant's fundamental business model? That might motivate a defendant to "fight you to the death," he said.

"If they settle with you, can they continue to operate with their fundamental business model that generates all their revenue?" Bhatia said. "That's how I've come to think of these cases."

The Wednesday meetings are led by rotating panels that include five partners and an associate. Susman partner Stephen Shackelford, a lead lawyer for Dominion case, said a pitch of his was once axed after an associate asked a series of tough questions that swayed the opinion in the room. That associate later became a partner.

Even with the Dominion matter, which turned out to be a big winner, "the firm asked a lot of questions on a lot of aspects of the case," Shackelford said.

The questioning can be jarring for those presenting cases, according to one partner who requested anonymity to discuss the private sessions. "You meet a lot of big personalities, and sometimes those come through," the partner said.

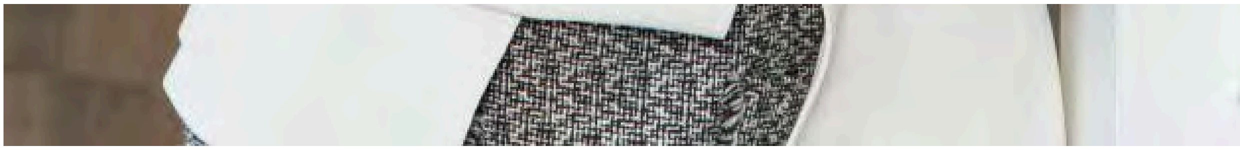
However, there are no hard feelings over having cases rejected. "I've never walked out of there angry," the partner said.

People Skills

The meetings require a culture that accepts lawyers' views will be tested under pressure. That's developed in part by including its youngest lawyers in the vetting process.

Associates aren't mere wallflowers in the Wednesday meetings.

Susman hires associates from the country's top law schools and requires they've served at least one federal clerkship before starting at the firm. The firm rarely hires lateral partners and doesn't have any plans to do so despite its recent explosive growth.



Kalpana Srinivasan
Photo: Susman Godfrey

The firm has no non-equity partner position, and it's promoted roughly 20 associates to partner over the last five years, Srinivasan said. Like many trial firms, it has far fewer associates per partner than major defense firms. The firm had 90 partners last year, according to AmLaw data, which represented nearly 45% of its lawyers.

"If you're a lawyer who starts here and becomes a partner here, you've been looking at how these cases get vetted for years, week after week," Srinivasan said. "That means the lawyers coming up through our system are better equipped when they meet with the client or they're looking at a case to say, 'This is the kind of thing we are willing to gamble on.'"

Jump to Conclusions

While the Wednesday meeting is a way for the firm to allocate its resources as a group, partners determine what their case load looks like. That's impacted by their own risk tolerance.

The firm's compensation model is based on the revenue a partner generates, and the work that partner does for cases they didn't generate, Bhatia said. That number can have big swings since contingent fee cases can take years to pay off. Some partners prefer to work on more contingency fee cases, while others opt for the more risk-averse billable hour matters, he said.

Vineet Bhatia
Photo: Susman Godfrey

"It's a risk-based culture," Bhatia said. "As a partner who's investing in a major case, you might have leaner years betting on the result that comes later."

Billable hour matters at the firm in recent years have generated between about 10% and 15% of firm revenue, Bhatia and Srinivasan said. Even when the firm works on defense-side matters, it tries to craft alternative fees that may give it some upside in how much it can reduce the estimated damages in a case or an award for ending the case quickly, the firm leaders said.

"We want to figure out what the client's trying to achieve, and we want to create some incentive for us to be aligned with what they're trying to do," Srinivasan said.

A Million Dollars to Do Nothing

An agreement between litigation funder Longford Capital and Susman became public in a lawsuit last year, showing how the funder had agreed to pay the firm monthly fees up to $6,915,000 to de-risk some of Susman's intellectual property disputes.

That agreement is an outlier for the firm, Bhatia said. It typically prefers that clients make agreements with funders, often to cover the hard expenses of the case. The firm is comfortable taking on the risk in return for a larger award in most cases, Bhatia said.

At many traditional defense firms, generating a huge contingency fee win can carry risk: partners can see it as a chance to leave the firm to do something new or fund an early retirement.

The firm has seen some partners retire around the age of 60, Bhatia said, but big wins at Susman haven't typically come with the threat of partner exits. He attributed part of it to the culture developed by founder Steve Susman, who died in 2020 after complications from a bicycle accident.

"He would always be looking to the next case," Bhatia said. "And people see that and they saw him work."

Srinivasan had a simpler explanation for why partners don't leave for something new after winning the case of a lifetime.

"They're waiting for the next case of their life," Srinivasan said. "I don't think it's just about the money. I do think there's a kind of a drive here."

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With Potential Whistleblowers Around Every Corner, Companies Under Pressure to Sharpen Compliance

law.com/corpcounsel/2024/10/14/with-potential-whistleblowers-around-every-corner-companies-under-pressure-to-sharpen-compliance

Chris O'Malley

At a time when federal regulators are tossing cash at whistleblowers like parade floats hurling candy at kids, legal chiefs need to ask more questions about potential risks and think about continuously improving their corporate compliance practices.

Those were among the takeaways from legal and compliance chiefs at the Association of Corporate Counsel annual meeting last week in Nashville, Tennessee.

After decades lawyering at some of the nation's largest health care companies, Barbara Barrett said she learned not to let a "Oh no, we're good" from a department leader deter her from asking more questions.

"Sometimes I have to say, 'Well, what about *this*? What about *that*?'" said Barrett, chief compliance officer of Reliant Care Management, urging in-house counsel to become thoroughly involved in risk and compliance matters.

Take artificial intelligence, for example. Does the marketing department use a lot of analytics that compliance has no access to? asked Courtney Brown, a partner at Gibson, Dunn & Crutcher specializing in white-collar investigations. Or does compliance even know about the existence of those AI analytics?

Regulators have put a finer point recently on what they're looking for in risk and compliance. For example, the Department of Justice is looking at whether a company's compliance program is well-designed, such as its policies and procedures and its training and investigation structures, Brown said.

The DOJ is also looking at whether the program is being applied "earnestly and in good faith," and whether it actually works in practice. That could include whether it is continuously being improved and tested or whether a company investigates misconduct and remediates it.

Likewise, the U.S. Securities and Exchange Commission has its own priorities in risk assessment effectiveness. Besides an emphasis on effective controls responsive to identifying risks and clear and timely disclosure to investors, the SEC likes to see a "holistic" approach to identifying risks.

That means asking whether a company is applying what it learns across the organization and whether it makes the mistake of classifying more systemic issues as isolated incidents.

Mitigating risk should involve a cross-organizational collaboration, said Rachel Hirsch, chief legal counsel for the American Israel Public Affairs Committee.

Even nonprofits have issues of concern that parallel those of for-profits, Hirsch noted, such as potential conflicts of interest in governance and protecting personal information.

There's also the challenge to manage reputational risks. In the case of nonprofits, for example, "We don't want people who have criminal backgrounds giving us money," she said.

Panelists shared a scoring system that can be used to analyze risk. On one side of the ledger management ranks the likelihood of risk. The other side allows one to rank the significance or impact on the organization if the risk occurred.

They recommended engaging the board of directors, focusing on the risk mitigation steps the company is willing to take, balancing mitigation efforts with the costs of accepting the risk. Part of that equation comes down to a financial determination as to whether risks are acceptable.

"It gives you a real readout on where your organization lies in the risk spectrum," Hirsch said.

Ultimately, however, "things are going to happen," Barrett said. And when they do, she recommends conducting a root cause analysis.

Rather than a Band-Aid solution, such an analysis can get to the heart of process failures and might even be deemed creditable in a government investigation that may arise.

Barrett gave the example of a nurse reporting to management that a doctor codes 90% at the highest level—generating higher fees—while most other doctors code at half that rate.

She recommends developing a clear statement of the problem and finding causes. In this case, for example, it could be that the doctor operates in a specialty area or receives lots of referrals. Or perhaps it reflects poor training of the coding process or a recent change in the process.

"You want to focus at this point on the problem and not the blame," Barrett said. "If people are worried about their jobs, the situation doesn't work as well."

It might be that compliance/legal will need to expand its investigation and pull in the appropriate team of experts and interview other employees, particularly if the problem is suspected to be systemic rather than isolated.

In Barrett's experience in the health care field, "Everyone feels like they need to write a statement," she said. The problem is that people may draw premature conclusions and contradict each other at the start of an investigation. "I tell people, 'Don't write anything

down. Just talk to me,'" she said.
Besides encouraging brainstorming inside the organization to find solutions, compliance needs employee buy-in to the solution for it to be effective. That often requires a communication plan or new training, she added.

As to whether a matter should be self-disclosed to regulators, that will require buy-in from the top leadership. In addition to legal performing its own review of the situation at hand, consider hiring outside counsel to conduct a predisclosure investigation, lawyers said.

Not only must the report be accurate but disclosed to the proper agency to potentially receive cooperation credit or a prosecution declination.

Among the downsides of self-reporting to regulators are the need to expend "considerable" resources to cooperate, including records dumps and access to interview employees, but also potentially the appointment of a monitor, investigation of unrelated conduct and reputational harm.

Law Firms Mentioned

Gibson, Dunn & Crutcher

Pumping the Magic Mushrooms

Published: Tue Oct 15 13:59:53 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

Mushroom pump

Most cannabis companies used to be gold mining companies. That's probably not true. It can't really be true. But man are there a lot of cannabis companies that used to be gold mining companies. Some of them were crypto companies too, or became crypto companies after being cannabis companies, or did Covid-19 testing or artificial intelligence. [1] There are not a lot of obvious synergies.

The point is not that the expertise and capital equipment that make you good at mining for gold would also make you good at manufacturing and selling cannabis products. The point is that there are some public companies lying around that no one is really using, shell companies, companies whose stock is registered with the US Securities and Exchange Commission and so can be sold to retail investors, but that do not have any actual operations. And what you do is, if you have a business with a trendy idea and not much revenue, you go out and do a reverse merger with one of those shell companies, which gets you a publicly traded stock without the expense and scrutiny of doing an initial public offering. And then you go around telling people about your trendy idea, and the stock goes up, and you sell some of the stock you got in the merger and get rich.

And then you go and build your cannabis empire and all the retail investors who bought the stock also get rich! It could happen. But, you know. This is the pretty standard way to do a pump-and-dump scam. You take over a defunct shell company, you rebrand it as whatever is hot right now, you pump the stock, you dump the stock, you go away for a few months, and then you do it again with the same shell company but a different rebranding.

Anyway it's not exactly gold and cannabis, but here's one of the great ticker/business-model combinations in the history of alleged pump-and-dumps:

> The Securities and Exchange Commission [Wednesday] charged Minerco Inc. (former over-the-counter ticker: MINE), Bobby Shumake Japhia, and Julius Makiri Jenge, for their roles in an alleged pump-and-dump scheme that defrauded investors out of approximately $8 million while generating millions of dollars in ill-gotten proceeds from sales of Minerco stock.

> According to the SEC's complaint, in the fall of 2019, Shumake, who was formerly known as Robert Samuel Shumake, Jr., secretly gained control of a large stock position in Minerco, an inactive penny stock company, and then arranged for Jenge to assume control of Minerco. The defendants then began pumping Minerco's stock price by promoting Minerco as the "first publicly traded company focused on the research, production, and distribution of psilocybin mushrooms." Psilocybin is the principal psychoactive component in "magic mushrooms," a plant-based hallucinogen.

I joke sometimes that I should teach financial literacy courses. In the advanced class, the final exam would have questions like: "There is a penny stock named Minerco, with the ticker MINE. What product(s) does it sell?" If you answered "gold" or "aluminum" or frankly at this point even "Bitcoin," you fail.

"Psilocybin" is a great answer. There are other good ones, though. Here's Minerco's annual report from 2015, when it was "a specialty beverage company which develops, produces, markets and distributes a diversified portfolio of forward-thinking, good-for-you consumer brands," including "VitaminFIZZ®, Vitamin Creamer®, COFFEE BOOST and The Herbal Collection™." Here is a prospectus from 2011, when it had recently pivoted from oil and gas drilling [2] to "the development, production and provision of clean, renewable energy solutions in Central America."

Also some cannabis. From the SEC complaint:

> In or around November 2020, Shumake sought advice from a Jamaican business-owner about how to develop operations in Jamaica. This discussion resulted in a joint venture between the companies memorialized in a letter of intent ("LOI") dated December 20, 2020. The LOI established that the parties intended to enter into negotiations for the Jamaican company to contribute to a collaborative project its provisional cannabis licenses and land for growing cannabis and mushrooms, in return for a strategic and financial contribution from Minerco. ...
>
> On January 4, 2021, Minerco issued a press release – paid for using Shumake's credit card – announcing a joint venture to grow, process, and extract psilocybin and cannabis for export to Canada and Europe. It falsely stated that the Jamaican company would "serve as psilocybin experts to grow and develop a unique strain of mushrooms specific to Jamaica," and that Minerco would "inherit" from the Jamaican company "multiple cannabis licenses to grow, process, extract cannabis." Neither was true: The Jamaican company had not agreed to provide psilocybin expertise or to transfer its cannabis licenses to Minerco as part of the joint venture. Indeed, the companies' LOI did not mention those things.

> The false statements had their intended effect. On the day of the press release, Minerco's stock price rose more than 15 percent and its volume increased by more than 100 percent.

It is all fairly standard pump-and-dump stuff but this was new to me:

> In a press release dated December 28, 2020, Minerco announced that it had "hired" an online valuation tool (the "OVT"), to create a business valuation. The press release stressed the third-party nature of the valuation, quoting Jenge as saying: "It is significant to have a third party evaluate our business strategy to determine if we are on the right track for our shareholders. This valuation will give definitive confidence as to the financial strength and viability of the psilocybin industry." …
>
> In reality, an OVT valuation is not an independent or third-party appraisal, and its results are nearly instantaneous – it is essentially a calculator, prompting the user to input data including historical revenues, projected revenues, and balance sheet figures in response to 37 questions, and then using embedded formulas to generate a business valuation in seconds.
>
> Given the OVT's nature, Minerco's and Shumake's statements that Minerco had "hired" the OVT to conduct a "third party" valuation company over "14 days" were a charade. Minerco hired the OVT to create a valuation only in the sense that a company hires Microsoft Excel to create a spreadsheet. … His ability to manipulate the OVT's inputs meant that he could essentially achieve whatever output valuation he desired. …
>
> Having self-generated a $1 billion valuation, on January 14, 2021, Minerco misleadingly posted on Twitter the message "Finally our [OVT] valuation is done," and included a graphic showing Minerco with a valuation over $1 billion. ...
>
> The OVT valuation charade paid dividends: Minerco's stock price increased by approximately 18%, from at $0.0014 at the close on January 14, 2021, to $0.00165 on January 15, 2021

Ahahaha "hires Microsoft Excel to create a spreadsheet." The idea is that the value of a company is the discounted present value of its future cash flows, and it is a reasonably mechanical process — one that can be done by a first-year analyst in Excel, or by an online tool [3] — to calculate that value, *if you have the future cash flows*. [4] Estimating the cash flows is where most of the actual valuation work happens. If you just write "we'll make $200 million a year" then it's pretty easy to get a billion-dollar valuation. Which is enough to move your stock price from … uh, from $0.0014 to $0.00165. Because honestly if you're an over-the-counter penny stock named Minerco that sells psilocybin, people are mostly in on the joke.

Tether trade finance

Man, Tether is just the best business in the world. Tether is:

1. an unregulated bank (it takes tens of billions of dollars of demand deposits, but is not subject to bank capital regulation),
2. with extremely cheap capital (it pays no interest on all those deposits, has no branches, etc.), and
3. whose deposits — its stablecoin, USDT — are transferable on the blockchain without going through the normal US banking system. If I want to send you dollars, normally that means asking my bank to move dollars to your bank. But if I want to send you USDT, I can just do that directly on various crypto blockchains, without involving any bank (or even Tether itself).

Consider the first two points. Imagine that you were an unregulated bank with billions of dollars of deposits that cost you nothing. What would you do with the money? There are, I think, two plausible, opposite answers:

1. You are an unregulated bank, which means that you can invest your deposits in stuff that banks can't do: You can take risks that regulated banks wouldn't take, which you would expect to earn you a higher return than banks can get. You can do more than the banks can to earn money.
2. You have very cheap deposits, which means that you can just plunk all of them into short-dated Treasury bills, collect like 4.5% interest, spend nothing and make billions of dollars in profit with absolutely no market or credit risk. You can do *less* than the banks do to earn money.

Which would you do? I mean, to me, the answer is obvious; earning billions of dollars with no costs and no risks seems obviously better than earning more dollars with more risk. But, uh, I didn't start Tether, you know? The people who run Tether like to live more dangerously than I do.

Bloomberg's Archie Hunter and Olga Kharif report:

> Tether Holdings Ltd is exploring lending to commodities trading companies as it looks at ways to deploy its billions of dollars in profits, a move that could shake up an industry typically reliant on traditional banks for credit.
>
> The crypto company — which is the issuer of the world's largest stablecoin, USDT — has discussed US dollar lending opportunities with several firms across the credit-hungry sector, according to people familiar with the matter who asked not to be identified discussing private conversations. …

> Tether's pitch is particularly attractive because its funding would not be subject to the same stringent regulatory conditions as traditional lenders, potentially speeding up payments and trades, some of the people said.

If I had billions of dollars in risk-free, essentially no-cost profits, I would not go around to industry conferences looking for ways to deploy them, but, again, Tether and I are very different people.

There is another obvious angle in commodity financing for Tether:

> Tether's meetings with traders have also included conversations about how its stablecoin, which has already gained traction as a way for traders and producers to avoid the dollar in countries like Venezuela and Russia that are subject to myriad US sanctions, might be used in more mainstream commodity trades, the people said. ...
>
> The [Ukraine] war has also highlighted the commodity sector's reliance on the dollar, providing a tool for the US government to target natural resource exports with sanctions, which in turn has created an incentive for unregulated financing and the use of stablecoins to facilitate trade.
>
> Enter USDT: At least two top Russian metals producers have turned to the stablecoin to settle cross border transactions with clients and suppliers, Bloomberg News reported previously. And Venezuela's state-run oil firm PDVSA has been using the token to accept payments for oil shipments, according to the Wall Street Journal.

If you trade commodities, you probably mostly deal in dollars, and dealing in dollars means going through the regulated US financial system, and the regulated US financial system, these days, is rather hostile to certain sorts of commodities dealings. (The ones involving Russia or Venezuela.) If someone came to you with "dollars, but not through the US financial system," you might find that appealing. If they also offered cheap financing, even better.

I make fun of Tether a lot around here, but it is an interesting play. The essential situation is that global trade is mostly conducted in dollars, but the US government has increasingly made use of that fact for its own geopolitical purposes, using the dollar's centrality to deter and punish its enemies. Bloomberg's Saleha Mohsin has the definitive book on the subject, *Paper Soldiers: How the Weaponization of the Dollar Changed the World Order.*

People sometimes complain or worry about this, and the complaints and worries often take the form "if the US government keeps weaponizing the dollar, then eventually it is going to be overthrown as the currency of global trade and replaced by the yuan or whatever." But another possible bet is "if the US government keeps weaponizing the dollar, someone will invent a *better dollar*, something that is fully interchangeable with the dollar but that is not subject to US government policy." What if it's

Tether?

Basis risk

There are two ways to buy insurance against hurricanes. One is: "If a hurricane hits my house, you will pay to rebuild it." Another is: "If a hurricane with wind speeds higher than X comes within Y miles of my house, you will pay me $100,000." The first kind is obviously better, for you, as insurance: It insures against your actual risk of loss.

The second kind, though, is *simpler*, so it might be easier to buy. The person *selling* you the insurance, in the second case, doesn't need to know that much about you. She doesn't need to figure out how much your house is worth, or worry about how hurricane-resistant it is. After a storm, she doesn't need to send anyone out to assess the damage, or negotiate with contractors over the cost of rebuilding. She is just underwriting the likelihood of a particular kind of storm, completely abstracted from your own situation.

You might assume that the first kind of insurance would be more common in rich areas with good legal institutions, legible property markets and competitive contracting businesses, while the second kind would be easier to roll out in poorer, less developed places. Bloomberg's Gautam Naik, Jim Wyss and Greg Ritchie write about catastrophe bonds insuring against hurricanes in Florida (the first kind) and Jamaica (the second):

> Of the 300 outstanding bonds in the market, about 70% insure against US storms — and a big chunk of those cover hurricane risk in Florida. Payments are usually made when certain thresholds of real-world losses are met after assessors are deployed on the ground to survey the damage. While it can take months for those payouts to occur, stricken places like Fort Myers, Florida — walloped by both Milton and Helene — can quickly tap emergency state and federal funds while waiting for the money to materialize.
>
> The equivalent bonds used by developing nations are designed differently and can be less forgiving. Jamaica has a small amount of infrastructure covered by insurance and therefore uses an instrument that pays out only if a storm hits a predetermined air pressure reading. Such mechanisms, known as parametric triggers, unlock money very quickly, without waiting for damage assessments. But the setup can also yield harsh results.
>
> Jamaica was unlucky. Beryl missed the trigger laid out in its cat bond by the thinnest of margins — just nine millibars – a discovery made in part thanks to the data captured by Pituch's plane. US and European investors who bought the bond are set to book returns of about 12% this year. Jamaicans will get nothing. …

> Insurers and governments in the wealthy world tend to dislike the binary nature of parametric cat bonds and mostly stay away from them. Yet the promise of speedy payouts has persuaded the World Bank and Western governments to push them for the developing world, even as the risk-reward curve shifts in favor of investors in London, New York and Zurich.

"Pay me $X if the air pressure hits Y millibars" is a *reasonably good* proxy for "pay me the cost of rebuilding my house if there's a hurricane," but it will not always get the same results, and sometimes in the worst possible way: When a hurricane causes millions of dollars of damage without quite hitting the air-pressure trigger, you will regret doing the bonds.

On the other hand obviously I would read a story about a developing country that issued parametric cat bonds, hit the trigger *without* sustaining any damage, and got a giant cash windfall. I suspect those stories are rarer.

Nuclear financing

The basic problem with nuclear power in the US is that building new reactors — especially next-generation smaller reactors — is expensive and uncertain: You need a lot of financing for a long time to build the reactor, and then who knows if you'll be able to sell the power at prices that recoup your costs? The Wall Street Journal writes about the "questions that have bedeviled smaller-reactor designs":

> What customer would pay the higher price for a first-of-a-kind project? And who would order enough to get an assembly line started? The concept, which remains to be proven, is that building the same thing over and over in a factory would drive down costs.

The answer to these questions is extremely obvious, *now.* It wasn't two years ago. The answer is "AI companies":

> Google will back the construction of seven small nuclear-power reactors in the U.S., a first-of-its-kind deal that aims to help feed the tech company's growing appetite for electricity to power AI and jump-start a U.S. nuclear revival.
>
> Under the deal's terms, Google committed to buying power generated by seven reactors to be built by nuclear-energy startup Kairos Power. The agreement targets adding 500 megawatts of nuclear power starting at the end of the decade, the companies said Monday. ...
>
> Kairos plans to deliver the reactors between around 2030 and 2035. Financial terms

> weren't disclosed, but the companies entered into a power-purchase agreement, similar to those used between corporate buyers and wind- and solar-energy developers.

There is a sort of financing arbitrage here. It is pretty easy to get excited about artificial intelligence: There are, right now, cool consumer-facing chatbots and all sorts of useful business applications. There are charismatic billionaire founders — Elon Musk, Sam Altman — going around warning/bragging that AI will completely upend life as we know it. It is easy for investors to get excited about the potential for AI, so AI startups can raise billions of dollars of venture capital, and big tech companies can invest billions in AI projects with the support of their shareholders.

Meanwhile nuclear power plants are sort of boring infrastructure, consumers don't interact with them directly, their payoff is years in the future and it's hard to get VC financing for them. But the flood of investment into AI makes them financeable: The market is pretty confident that the AI boom is real and lasting and will require billions of dollars for new power plants, so the money for the AI boom can be channeled into the power plants.

Also, when I read about this sort of financing arrangement — building a plant based on an agreement with a big customer to buy its output years into the future — I immediately think about my favorite company, Venture Global LNG, which got financing for a liquefied natural gas plant by signing contracts to sell its output to big energy companies as soon as it entered into "commercial operations." The plant is now producing LNG, and Venture Global is selling the LNG on the spot market at prices much higher than it agreed to in those contracts. The customers are complaining, but Venture Global's response is that it is not yet in commercial operation — I joke that they haven't painted one last rivet, so the plant isn't finished yet — so the contracts haven't kicked in yet. Part of me hopes that by 2030 there's so much AI-driven demand for electricity that Kairos can get better prices than it agreed to with Google, and can find a way to take advantage of them.

Sportsbooks

The story of latency arbitrage in stock markets conventionally starts with the Rothschilds' couriers supposedly bringing them news of the Battle of Waterloo before anyone else learned the outcome, and ends up in modern times with, you know, electronic trading firms bidding for space on cellular towers to shave microseconds off the time it takes to transmit information between futures-exchange datacenters in Chicago and stock-exchange datacenters in New Jersey. [5] The basic idea — "I could make money if I got the news faster than anyone else" — is simple and intuitive, but it has become more competitive and technical over time, and "faster than anyone else" is now measured in microseconds rather than hours or days.

Similarly in sports betting. Bloomberg's Samanth Subramanian has a story about "the companies that set sports gambling odds," which is full of lovely anecdotes about latency arbitrage that will be familiar to anyone who follows equity market structure. Starting with the crudest possible version of "getting fundamental news first":

> The former Ladbrokes staffer remembers an episode in which one gambler kept beating the house on Real Madrid games. "He was always betting that a goal would be scored just ahead of it actually happening," the staffer says. "At first we thought, 'God, he's a genius!' Then it turned out he was sitting in the press box in Madrid, placing bets, while we were trading off a television feed that had a 20- or 30-second delay."

And moving on to "picking off market makers' stale quotes":

> [Carsten] Koerl came up with the idea for betandwin over one long night in 1996. It took him the next three years to code it. Barely a year after it started operations, it went public, and Koerl moved on. As he was on his way out, he was contacted by a couple of software engineers in Norway. They'd devised an algorithm to scrape the odds off the rudimentary websites of various bookmakers, and they thought they could make a bundle by laying bets that arbitraged the differences. Was Koerl interested in financially backing the idea?

And then "paying for direct data feeds from monopoly providers":

> In some sports, it became possible to purchase data from the associations or the leagues themselves. Tennis led the way, offering a feed that came right from the chair umpire's own system. In pro hockey, the least popular of North America's traditional Big Four sports, bidding for the NHL's 10-year betting data rights reportedly passed $250 million in 2021. Sportradar won that auction, gaining exclusive access to metrics such as skating speed and shot velocity, measured by sensors in pucks and on player jerseys. In 2022, Sportradar agreed to pay the NBA $1 billion in cash and equity for eight years' worth of data.

And ending up with "everyone complaining about the high-frequency trading arms race":

> The payments for official data have climbed so far that Simon Trim, an adviser to the sports data firm 10star, wonders if they've almost ruinously flattened the market. Trim holds that bookmakers' odds have become too similar, because everyone draws either their odds or the underlying data from the same large sources. The big companies, Trim says, have an incentive to align the odds they supply with everyone else's, so as to erase even the slightest risk of bettors arbitraging variations in prices. "Ten or 15 years ago, there wasn't this high cost of official data rights," he says. "There wasn't the cost of technology." As various bookmakers' odds have converged, margins have declined, and

> sportsbooks have had to differentiate themselves mainly with “destructive levels of marketing spend to draw new customers,” Trim says. “If I’m being honest, a lot of sportsbooks are suffering, because their business model doesn’t work anymore.”

I love that casual sports fans care about who wins the game, and casual stock market investors care about whether the Dow is up or down, but professionals in sports and stocks just get together and grouse about the cost of direct data feeds.

Things happen

Boeing to Raise as Much as $25 Billion to Avert Cash Crunch. Goldman Stock Traders Head to Record, Fuel 45% Profit Jump. Citi Notches Gains Across Board as Trading Outdoes Expectations. BofA Investment Bankers, Traders Help Earnings Top Estimates. JPMorgan Kicks Off Post-Earnings Borrowing Binge for Big Banks. The Ultimate Southwest Insider Tasked With Reinventing the Airline. Activist Investor Doubles Down on Calls for Executive Changes at BP. Global public debt to pass $100tn this year, says IMF. High Home Prices Force Builders to Offer Mortgage Buydowns—and More. US Weighs Capping Exports of AI Chips From Nvidia and AMD to Some Countries. China Moves to Tax the Ultra-Rich for Overseas Investment Gains. Australia to ban ‘dodgy’ dynamic pricing after Green Day furore. “The Park Slope Food Co-op … the largest, busiest and most argument-inducing single-store food cooperative in the United States.” Tesla Optimus Bots Were Remotely Operated at Cybercab Event.

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1. We talked once about a company that sequentially did software, renewable energy, oil trading and vape stores. Also, not really related, but we talked once about a special purpose acquisition company that was formed to do cannabis deals and ended up merging with a plasma space rocket company. Some of the same vibes. Also we talked about both of those because of SEC enforcement actions.

2. Do people say “oil and gas mining”? I’ve never heard that, but as far as I can tell it was incorporated as Minerco to do oil and gas drilling.

3. From the Minerco press release, it seems the tool was Equidam. Here's its website. It seems to be designed for investors and entrepreneurs to (1) agree on some forecasts and then (2) use those to produce a valuation. But if you just make up the forecasts you can get any valuation you want.

4. As a former mergers and acquisitions lawyer, I would like to point out that a fairness opinion from a big investment bank works kind of the same way? A standard fairness opinion will be like "sure selling your company for $1 billion is reasonable," but it will say that the bank relied on the company's reported historical financial data and its management's forecasts of future earnings to reach that conclusion. The bank does not explicitly endorse those forecasts, and the opinion is not really a "valuation" or an "appraisal." It takes the inputs and produces an output, but the inputs come from the company. They get diligenced a bit more though.

5. Or pick your favorite example. This one is described in Donald MacKenzie's book Trading at the Speed of Light.

Paxton's Probes in Flux After Texas Court Yanks Powerful Tool

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- Paxton can still compel records, but only if a judge approves
- Unclear how ruling impacts case involving migrant shelter

A century-old investigative tool, employed aggressively by Texas Attorney General Ken Paxton (R), was cut by a federal court last week, leaving the state's top lawyer to rely on a gentler method of compelling information from businesses and organizations.

Texas's Request to Examine statute is unconstitutional because it requires immediate production of records under the threat of criminal prosecution and forbids the served party from first going to a judge for review, Magistrate Judge Mark Lane of the US District Court for the Western District of Texas ruled. Paxton has used the tool several times in recent years, often in politically-motivated probes.

Although it was an extraordinary decision to cancel Paxton's sweeping investigative powers, Lane called it "easy" because the lack of pre-compliance review in Texas's law violates a 2015 Supreme Court decision.

But giving Lane the opportunity to weigh in on the statute at all was the result of Paxton's decision to push the law's bounds by forcing it upon a business that operates primarily in another state.

Lane's ruling came in the case of Spirit AeroSystems Inc., a Kansas-based manufacturer for Boeing 737 jets. The company went to court to fight an examination request Paxton's office issued in March. Paxton was seeking records to support a private class action in the Southern District of New York by Spirit shareholders who say the company misrepresented the quality of its products.

Gregg Sofer of Husch Blackwell said Paxton may have reached too far in probing Spirit AeroSystems, a non-Texas entity which has a minimal presence in the state with under 100 employees and one small plant.

"When you're very aggressive in the way you use your powers, you risk this exact kind of thing happening where the court will look at the statute itself over its application," Sofer said. "That's generally why people who have these powers don't use it unreasonably. You risk the entire system they're under."

Another Way

Request to Examine is one of two tools Paxton often invokes in his aggressive pursuit of businesses and organizations he suspects may be breaking state laws. The other is Civil Investigative Demand, which remains enforceable after Lane's ruling because it lets a respondent seek pre-compliance review from a judge before producing the requested documents.

Paxton relied on a Civil Investigative Demand to seek records from PFLAG Inc., a nonprofit that supports LGBTQ+ people and their families. Paxton's lawyers say they suspect the organization has knowledge of insurance fraud whereby medical professionals purposely mislabel a procedure to skirt Texas's ban against child gender transition treatments. The organization denies such knowledge.

But the situation with PFLAG shows why Civil Investigative Demand is less advantageous for Paxton. It was challenged in court, and a Texas state court judge blocked the investigation in March. Paxton's office is appealing.

Bill Mateja of Sheppard Mullin said he closely followed the case in Lane's courtroom. Mateja said that a Civil Investigative Demand is a sensible approach because it allows for a judge to decide what if any records Paxton should get.

Conversely, the hand-it-over-now edict in a Request to Examine "can be used to beat up on people and businesses that don't have the sophistication, that don't have the ability to fight back like Spirit did."

Mateja, who once defended a company hit with a Request to Examine from Paxton, said he disagrees with what he believes are tactics from Paxton to "browbeat" respondents "into submission."

"My take is Judge Lane clearly saw through the AG's leap of faith argument, that if you let us use these draconian requests to examine we pinky promise not to abuse them," Mateja said.

Mateja, who is friendly with Paxton and represented him against felony state securities fraud charges, added: "Every party that receives a request for documents should have an opportunity to let a judge review whether the request is reasonable. No party should be forced to produce records under penalty of going to jail."

Pending Requests

Paxton has cited the Request to Examine tool to obtain evidence in a number of politically-driven investigations. Among parties served in recent years are two children's hospitals he says potentially performed unlawful gender transition procedures.

Paxton also went after three immigration organizations that receive funds from the Texas Bar Foundation Fund. The groups, American Gateways, Tahirih Justice Center, and Equal Justice Center, were targeted over whether they've used the funds "to exacerbate the current crisis at the border," according to a December 2022 press release from Paxton's office.

But the most notable case involving a Paxton Request to Examine is before the Texas Supreme Court early next year.

Annunciation House Inc., an El Paso nonprofit that operates a migrant shelter, received a request from Paxton's lawyers in February. The organization was given a day to produce the records. It refused, prompting Paxton to ask a court to strip the nonprofit of its ability to do business in Texas.

Pope Francis called the probe "madness," in a "60 Minutes" interview. A trial court judge called it "outrageous and intolerable," and ruled for Annunciation House. Paxton appealed to the Texas Supreme Court, which set oral arguments for January.

"We're awaiting Judge Lane's ruling and we will review it to see what it says," said Annunciation House's lawyer, Amy Warr of Alexander Dubose Jefferson.

Lane is expected to issue a written ruling in the coming weeks.

The Annunciation House case came up often in Lane's courtroom last week. Ryan Baasch, a lawyer for Paxton, said the office pushed for the quick production of records over concerns that the nonprofit would destroy evidence.

Baasch conceded that the 100-plus-year-old law being challenged was written for another time. But he said the office has never sought criminal charges against a non-compliant organization and that it didn't do so here, either. He said Paxton's lawyers often work with respondents on a reasonable timetable for turning over records and gave Spirit 20 days to comply.

Paxton's office didn't respond to a request for comment on whether it will appeal Lane's ruling or a request for a list of all organizations or businesses it has served with a Request to Examine since 2022.

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Securities Law News
Oct. 15, 2024, 1:30 AM PDT

SEC's Dropped Auditing Charges Shows Damage of Jarkesy Decision

Documents

SEC v. Jarkesy

- *Hofstra professor examines impact of Supreme Court ruling*
- *Limits on SEC probes could affect investors, audit profession*

Bloomberg Law News 2024-10-15T10:44:17887968109-04:00

SEC's Dropped Auditing Charges Shows Damage of Jarkesy Decision

By Jack Castonguay2024-10-15T04:30:01000-04:00

- *Hofstra professor examines impact of Supreme Court ruling*
- *Limits on SEC probes could affect investors, audit profession*

The Securities and Exchange Commission's recent decision to drop misconduct charges against a handful of auditors proves the *SEC v. Jarkesy* ruling threatens the agency's ability to protect the investing public and to police auditors and public accounting firms that violate their duty of care.

The message from the US Supreme Court justices was clear: If you violate the law as an auditor, the SEC is limited in how it can hold you accountable. Yes, laws such as the Sarbanes-Oxley Act are still on the books setting standards for financial recordkeeping and reporting. And in an ideal world, auditors would follow the law without the threat of enforcement, and the need for sanctions, fines, and prohibitions on practicing before the SEC would be superfluous.

But if you look at the failings of BF Borgers this year and the parade of fines among the Big Four and other large accounting firms in the past few years, it's clear we aren't in an ideal world.

While the SEC can still bring civil charges against the most egregious offenders in federal court, many other lower-profile violations—such as failing to maintain independence or report material misstatements—may go uncharged and unpunished. This new era will make it harder to determine good audits from bad ones, because auditors that fail to properly follow auditing standards more likely will be able to keep auditing public clients (absent the SEC taking them to a jury trial).

Audit firms also will still be subject to inspections by the Public Company Accounting Oversight Board, but those will occur at the overall firm level and not at the individual audit partner or auditor level.

The result? Audit quality will suffer. Investors will suffer. And the profession's reputation will suffer, as the lines between good and bad auditors will be less identifiable.

And yet, the auditors who are most likely to violate the law and regulations will benefit from the reduced enforcement. At a time when we should be putting more confidence into financial markets and institutions, *Jarkesy* opens the possibility that investors will have less information about auditors and less trust that regulators are able to hold bad actors accountable.

If investors lose confidence that auditors will act in the best interest of investors and not their own self-interest or the client's financial interest, the audit opinion's value and the value of our profession become essentially worthless. *Jarkesy* removed a major stick to encourage auditors to keep the interest of the public above all else.

Coupled with the decision in *Loper Bright v. Raimondo* , in which the US Supreme Court overturned the *Chevron* doctrine that required lower courts to defer to agencies' reasonable interpretation of statutes, the larger assault on expertise and intellectualism points to a troubling trend.

Whether it's the SEC's ability to regulate financial statement fraud and auditor misconduct or the Environmental Protection Agency's ability to regulate greenhouse gases, the Supreme Court has taken more of the rulemaking, rule interpretation, and rule enforcement away from experts and agency judges who are best-positioned to understand and apply them. Expertise and institutional knowledge have been devalued.

Many audit failures and financial statement frauds are complex and require a deep knowledge of accounting, auditing standards, financial reporting, and securities law. Pre-*Jarkesy*, the SEC's expert in-house judges could address these complexities directly. Now, a judge or jury in a civil trial with no experience or expertise in these areas will be the ones making the final determination for civil actions. (Jury trials were already required in criminal complaints.)

Because institutional expertise has been removed from the equation, some auditors may see how far they can push the SEC without the agency holding them accountable in a civil jury trial. This would require the agency expend more resources in time and money than they had to with in-house judges.

The good auditors, which represent the overwhelming majority of those in the profession, will continue to follow the SEC's rules and regulations with or without the threat of enforcement through in-house judges that existed prior to *Jarkesy.* These professional and ethical auditors would follow their relevant laws and regulations even if there were no enforcement provisions.

But the rare few auditors that are prone to cutting corners, that put their own financial interests above those of the public, or that fail to meet the minimum standards the profession demands, are now more likely to know the SEC is severely limited. And because of *Jarkesy*, they just might get away with it.

The case is SEC v. Jarkesy , 2024 BL 219548, U.S., 22-859., 6/27/24 .

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Musk’s Vow to Make Lots of Robotaxis Conflicts With US Rules

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- Current policy caps deployment of cars lacking driver controls
- Regulatory hurdles largely sidestepped during Cybercab reveal

By Keith Laing

(Bloomberg) --
Elon Musk promised to pump out robotaxis in high numbers when Tesla Inc. unveiled prototypes of its Cybercab last week.

There’s a big problem with that: US rules won’t allow it.

Automakers must secure permission from the National Highway Traffic Safety Administration before putting cars on the road that lack a steering wheel or other controls required by US auto safety rules. If Tesla were to overcome that hurdle — which is by no means guaranteed — it could only put a few thousand robotaxis on the road in a given year, effectively rendering its slick self-driving taxi little more than a niche product.

“Unless Congress increases this limit, as several failed bills would have done, exemptions aren’t a viable route for a mass manufacturer,” said Bryant Walker Smith, a University of South Carolina law professor and autonomous vehicle expert.

Regulatory hurdles were one of multiple issues Musk sidestepped during his much-anticipated unveiling of the robotaxi, billed as a pillar of the Tesla chief executive officer’s push into robotics and artificial intelligence.

Read More: Tesla Shares Sink After Musk’s Robotaxi Unveiling Disappoints

NHTSA has long permitted manufacturers to deploy 2,500 vehicles per year under a granted exemption, a tiny total for a company that sold nearly half a million cars last quarter alone. Such a low number also contrasts with what Musk told investors last week, when he said Tesla would “make this vehicle in very-high volume.”

Musk last week said Tesla would first allow Model Y and Model 3 drivers in Texas and California to use their car’s suite of automated driving aids without supervision starting next year. The CEO then said the company expected to start producing Cybercabs in 2026, while cautioning that he tends to be “a little optimistic with timeframes.”

The product launch didn't address how Tesla will make the leap from selling advanced driver-assistance features to fully autonomous vehicles, and whether Tesla would operate its own fleet of Cybercabs.

Going that route presents an uncertain path. General Motors Co. in early 2022 petitioned NHTSA for an exemption to field a driverless shuttle without a steering wheel and other human-centric features through its Cruise self-driving unit. The automaker ultimately pulled the plug in July after the agency didn't act on the request for more than two years.

Read More: Why Musk Might Have a Hard Time Selling Cybercabs: Hyperdrive

As of Friday, Tesla hadn't requested an exemption for the Cybercab, NHTSA said at the time. The agency to date has granted only one such application, in 2020, when it allowed startup Nuro to deploy low-speed, autonomous delivery vehicles designed to carry goods rather than people.

States, which have authority over the operation of vehicles on their roads, may present their own hurdles. For example, Tesla hasn't applied for a driverless testing or deployment permit required in California, the company's original home and where self-driving startups such as Alphabet Inc.'s Waymo and GM's Cruise unit have fielded robotaxis.

Although Tesla since 2015 has held a permit to test autonomous technology with a human safety driver present, it hasn't reported using it since 2019, a spokesman for the California Department of Motor Vehicles said.

"I think the bigger question are the state permits," said Mary "Missy" Cummings, a George Mason University engineering professor and former NHTSA adviser who has been critical of Tesla's driver-assist features known as Autopilot. Until Tesla provides the state with testing data, "they are years away from obtaining the necessary permits in California."

Other states have a more permissive approach. Texas, now home to Tesla's headquarters, has no unique permitting or registration requirements for autonomous vehicles, according to the state's motor vehicle department.

Smith, the law professor, said Tesla's bigger challenge is a technical one: fielding safe self-driving technology. The company "has been claiming for a decade" to be close to delivering cars that are fully capable of driving themselves that it has yet to deliver, he said.

"Any imminent regulatory hurdles are because Tesla does not have and cannot show a reasonably safe automated driving system," he said.
--With assistance from Dana Hull.

To contact the reporter on this story:

Supreme Court's 2024 business questions hinge on statutory interpretation

Shay Dvoretzky, Emily Kennedy

The U.S. Supreme Court in Washington, U.S., October 8, 2024. REUTERS/Annabelle Gordon/File Photo Purchase Licensing Rights

October 14, 2024 - The Supreme Court's 2024 Term is teed up to be another significant one for businesses. Last Term, the Justices issued consequential decisions on a wide range of topics affecting companies, including administrative law, arbitration, labor and employment, bankruptcy, and the First Amendment's application to websites hosting third-party content.

In particular, the Court's decisions overruling Chevron deference, opening the door to Administrative Procedure Act challenges to agency actions previously considered settled, and restricting the Securities and Exchange Commission's use of in-house courts will reverberate through the lower courts for decades to come.

But the 2024 Term promises to be impactful for businesses, as well. The docket so far includes a host of questions arising in key areas of the law like securities fraud, trademark infringement, civil procedure, and administrative law.

The Court will also confront substantial questions affecting securities fraud actions. In Facebook v. Amalgamated Bank, the Court will consider whether public companies need to disclose risks that have materialized in the past but present no known present or future harm. And in NVIDIA Corporation v. Ohman, the Justices will clarify the pleading standards governing securities-fraud claims that rely on internal company documents — that the plaintiffs haven't actually seen — to show a company's knowledge or intent.

One common thread running through this Term's business cases is statutory interpretation: The Justices will consider the scope of several key statutes that broadly affect companies.

In Wisconsin Bell v. United States ex rel. Heath, the Justices will grapple with what constitutes a "claim" under the False Claims Act (FCA). Designed to safeguard government funds, the FCA imposes civil liability for false or fraudulent claims against the United States or its agents. It is a potent tool, with settlements and judgments under the FCA having exceeded $2 billion in 2023.

Wisconsin Bell arises in the somewhat niche context of the so-called E-rate program, which was established by the Federal Communications Commission to provide discounted services to eligible libraries and schools. But the Court's resolution of Wisconsin Bell could have broader implications for FCA liability.

Administered by a private nonprofit corporation, the E-rate program is funded by statutorily required contributions from private telecommunications providers. Todd Heath sued Wisconsin Bell, claiming that the company violated the FCA by charging schools and libraries too much under the E-rate program, rendering each reimbursement request a false claim.

Wisconsin Bell moved to dismiss the suit, arguing that the alleged submissions didn't qualify as "claims" under the FCA because they didn't involve government funds (since the E-rate program is funded by contributions from private companies) or requests to government agents (since the program is administered by a private entity). The 7th U.S. Circuit Court of Appeals disagreed, and Wisconsin Bell persuaded the Court to grant cert.

While the Justices' decision in this case obviously will impact companies participating in the E-rate program, the Court's construction of "claims" under the FCA could have ramifications for FCA liability more generally. A host of government programs are funded by private money, and the Justices' decision could implicate whether those programs involve "claims" covered by the FCA.

The ruling also may affect whether fraud at self-funded agencies (the U.S. Post Office, for example) can be remedied under the FCA. The decision may even have repercussions for prosecuting Medicare fraud, the largest sector of FCA recoveries.

In another case significant for businesses, the Court will consider the scope of RICO's civil treble-damages provision — specifically, whether economic damages arising from personal injuries are injuries to "business or property."

Medical Marijuana, Inc. v. Horn arises from Daniel Horn's consumption of a cannabis-derived product that Medical Marijuana marketed as "THC-free" (meaning free of tetrahydrocannabinol, the active chemical in marijuana). Horn subsequently failed a drug test, which detected the presence of THC, and lost his job as a commercial truck driver. He sued Medical Marijuana, claiming that the company's false advertising constituted mail and wire fraud — a violation of RICO (Racketeer Influenced and Corrupt Organizations Act) — and that his resulting termination was an injury to his business or property.

The 2nd U.S. Circuit Court of Appeals agreed, holding that an economic harm resulting from personal injuries suffices for civil RICO liability.

The Justices agreed to take up the case, which they will hear on Oct. 15. Their decision could have ramifications for businesses in civil RICO suits by potentially expanding the scope of the statute's prohibitions to reach personal injury cases involving pecuniary harm.

The Court will also consider the scope of another consequential statute for businesses: the Fair Labor Standards Act (FLSA). In E.M.D. Sales, Inc. v. Carrera, the Justices will decide what burden of proof an employer must satisfy to demonstrate that it is exempt from the FLSA's general requirement that it pay employees overtime for working more than 40 hours per week.

Three sales representatives of E.M.D. Sales, which distributes Latin American, Caribbean, and Asian foods to grocery stores in the Washington, D.C., area, contended they were entitled to overtime because they worked 60 hours per week. But E.M.D. Sales claimed that the workers were exempt from the FLSA's overtime requirement as "outside salesmen."

The Justices agreed to decide what burden a company must meet to show that the FLSA exemption applies: "clear and convincing evidence," or a less demanding preponderance of the evidence. The 4th U.S. Circuit Court of Appeals adopted the more stringent "clear and convincing evidence" standard, and the Justices granted cert, but only after soliciting the United States' views.

While the Solicitor General's brief urged the Justices to take up the case, it also argued that the 4th Circuit's decision was so misguided to warrant summary reversal. Although the Justices did not abide by the so-called "sum rev" recommendation, they did agree to hear the case, and the government's confidence that the 4th Circuit was wrong may bode well for the company. Regardless of how the Justices rule, their decision is one to watch because of its ramifications for businesses defending against FLSA claims.

Finally, virtually every Term has at least one administrative law question. The 2024 Term is no exception.

On Oct. 4, the Justices granted cert in Nuclear Regulatory Commission (NRC) v. Texas to consider the NRC's authority to issue licenses to private parties for temporary nuclear-waste storage. Resolving this case will likely require the Court to revisit its 2022 decision in West Virginia v. EPA, which embraced the so-called major questions doctrine and held that an agency lacks authority to make decisions on "major questions" of extraordinary economic and political significance unless Congress "clearly" grants it that power. NRC asks whether "[d]isposal of nuclear waste is an issue of great 'economic and political significance'" and, if so, whether the Energy Act and the Nuclear Waste Policy Act delegate decisionmaking authority on the matter to the NRC.

Another administrative law case, FDA v. Wages and White Lion Investments involves a challenge to the Food and Drug Administration's denial of applications to market new e-cigarette products. The FDA found that the companies seeking approval failed to show that marketing the products would be "appropriate for the protection of the public health" — a statutory requirement for authorization. 21 U.S.C. § 387j(c)(2)(A), opens new tab.

But the en banc 5th U.S. Circuit Court of Appeals — splitting from seven other circuits — ruled that the FDA's decision was arbitrary and capricious, in part because the agency had shifted its position on what types of evidence would satisfy the authorization requirements.

The case may provide an opportunity for the Justices to apply last Term's administrative law decisions as they grapple with agency procedures, who gets to decide what is "appropriate for the protection of the public health" (agencies or Congress), and how those decisions should be made. Depending on how the Justices rule, their decision could open up new avenues for challenging agency action.

Business cases often allow room for the Justices to find common ground without sacrificing their individual ideologies or worldviews, especially compared to other questions on the docket (such as this Term's cases about minors' access to gender-affirming therapies or the regulation of ghost guns). And with so many of this Term's corporate questions focused on statutory interpretation — an exercise where all of the Justices espouse textualism — we wouldn't be surprised to see the 2024 Term's business cases generate narrow decisions with particularly high levels of consensus.

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Securities Law News

Oct. 15, 2024, 2:00 AM PDT

Trump's Truth Social Among Trio of Flailing Anti-ESG Startups

By David Hood

- Trump Media, PublicSquare, and Rumble are still unprofitable
- Universe of potential investors and customers is limited

Bloomberg Law News 2024-10-15T09:59:09454726136-04:00

Trump’s Truth Social Among Trio of Flailing Anti-ESG Startups

By David Hood 2024-10-15T05:00:02000-04:00

- Trump Media, PublicSquare, and Rumble are still unprofitable
- Universe of potential investors and customers is limited

Former President Donald Trump’s social media company, video platform Rumble Inc., and online marketplace PublicSquare Inc. share similar business strategies, chief among them a strategy to leverage their ideological bent to gain an edge over well-established competitors.

So far, that approach hasn’t panned out, putting the large pool of individual investors backing the companies at significant financial risk. All three companies have been chronically unprofitable and their stock values have plummeted.

Trump Media & Technology Group, established in 2022 as an alternative to X (formerly Twitter) hasn’t achieved profitability since it went public earlier this year as the parent company of the Truth Social platform—and its share prices have fluctuated wildly on the prospects of Trump’s reelection campaign. Rumble, an upstart rival to YouTube, has seen its share price fall 67.5% from its all-time high. And PublicSquare, which went public last summer as a conservative-focused alternative to Amazon.com, has also failed to return profits to shareholders and has seen its stock price drop almost 91% from its all-time high.

The entrance of values-driven companies to public markets is a relatively new phenomenon—in these three cases arising from the backlash against environmental, social, and governance principles.

Their similar financial struggles, some analysts and economists say, come down to the very characteristic the companies' founders envisioned would set them apart: the values at their core, which limit their potential pool of customers and investors.

"The fact is, they're trying to compete with very large existing platforms," said Tensie Whelan, professor at New York University's Stern Business School. "You have platforms going up against incumbents, platforms that have a lot of resources and money behind them—and I think you have a limited audience for it."

Fast Facts

Company name	Based	CEO	IPO Day	Alternative to
PublicSquare	West Palm Beach, Florida	Michael Seifert	July 20, 2023	Amazon.com
Rumble	Longboat Key, Florida	Chris Pavlovski	Sept. 19, 2022	YouTube
Trump Media	Sarasota, Florida	Devin Nunes	March 26, 2024	X (Twitter)

Bloomberg Law

Splashy Debut

All three of the conservative values-driven companies went public by merging with firms called special purpose acquisition companies, or SPACs, instead of the time- and paperwork-intensive traditional route for an initial public offering. This created unique issues for investors because they had less time and data at their disposal to vet the companies.

SPACs are shell companies that go public with the sole purpose of finding a promising private business to acquire. That acquired company then gets a shortcut to a listing on Nasdaq or the New York Stock Exchange.

Enthusiasm for SPAC deals plummeted in 2021 amid regulator scrutiny of the market and poor returns from many of the companies that went public during the boom. Companies that took this route to a listing can be breeding grounds for mismanagement, fraud, and losses.

Going public this way exposes retail investors—a term meaning individual investors—to significant risks in the emerging market of fee-free platforms and easy-to-use apps, coupled with limited financial data.

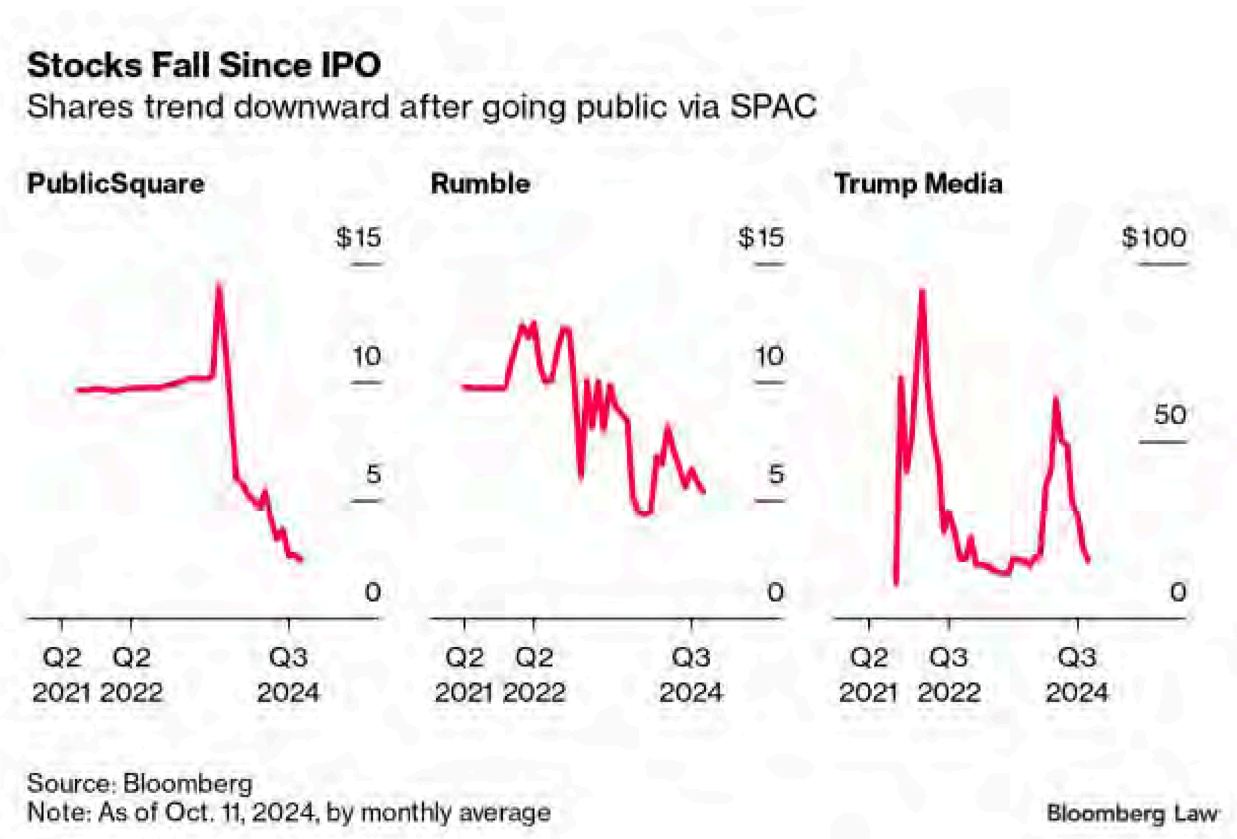
Trump Media, Rumble and PublicSquare rely heavily on this type of investor, as opposed to institutional investors. Retail investors own nearly 85% of shares issued by Trump Media. About 55% of shares issued by Rumble are owned by retail investors and they account for nearly 47% of PublicSquare's shares, according to Bloomberg data. In comparison, individual investors own 14% of Amazon.com's shares and institutional investors own nearly 63%.

There are three kinds of retail investors who buy shares into these companies, said Whelan, who's also the founding director of the NYU's Center for Sustainable Business. One bucket includes those who know what they're getting into. The second is made up of folks who invest based on their ideologies and not on potential returns.

"There's probably a third category who does believe they're going to get good returns out of it for ideological reasons, I guess, and they may not be sophisticated investors," Whelan said. "They're most likely going to be in for a surprise."

The trio of conservative brands, led by Trump Media, was probably overvalued initially, due to "excessive enthusiasm" from Trump's core MAGA voters, said Kelly Shue, finance professor at Yale's School of Management. But excitement over the anti-ESG, alternative-to-the-giant company, rather than business fundamentals of cash flow, only has so much runway, she added.

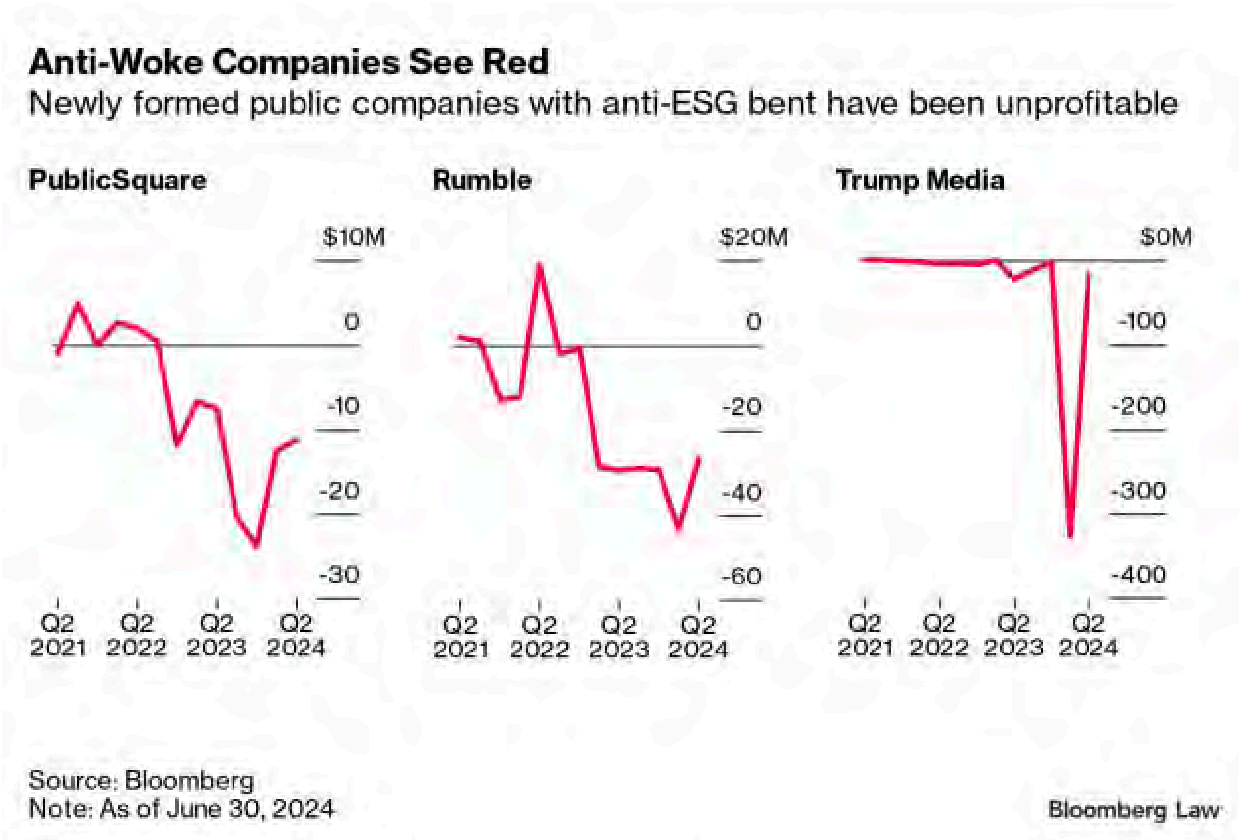
"It seems to have come down as a correction for that excessive amount of exuberance over the past year," Shue said.



Troubled Bottom Line

While tempting to point to the falling share prices of each company since going public as a sign of trouble, investors typically look at net income, or operating profits, as a better gauge of corporate financial health.

All three companies reported losses for nearly every quarter that data is publicly available, before and after going public.



To be sure, a net loss is not a death knell. Some companies operate at losses for years and investors stick around if management can show a strategy for growing the business. For PublicSquare, Rumble, and Trump Media, hopes for growth hinge on enthusiasm for the anti-woke movement.

“The culture and mission of Rumble is one with rooted, unchanging, goalposts at a time when many other businesses are reevaluating their prior stances on ESG,” said Shannon Devine, who handles investor relations for Rumble, in a statement to Bloomberg Law. “Rumble is strong today and has a bright future because we are powered by the free exchange of ideas and the basic human right to self-expression.”

Devine said the company’s revenues are “increasing sequentially,” starting in the second quarter of 2024. However, revenues—typically expressed by sales—only offer a sliver of a company’s overall business health. Investors are optimistic that startups will turn a profit—eventually.

Devine also leads investor relations for Trump Media, but did not respond to a request for comment on that company’s profitability. PublicSquare CEO Michael Seifert also did not respond to a request for comment.

Donald Trump Jr., an early investor in PublicSquare and eldest son of the former president, said during a shareholder call in July 2023 that the market for the company could be as much as 175 million customers. It averaged more than 220,000 monthly users in the first quarter of 2024, the company said in its first-quarter regulatory filing. Amazon.com, comparably, has roughly 300 million customers annually and claims more than one-third market share for US retail online sales, according to Capital One Shopping Research.

“Woke corporations can’t even think about doing it—it doesn’t fit their ESG requirements, and I think it just creates an incredible opportunity to do something amazing for patriots across this country,” Trump Jr. said.

It’s been increasingly difficult to show any other factors besides the companies’ values that would spur growth, however, observers noted. PublicSquare’s Seifert reported $6 million in revenue in the second quarter of 2024, but ISS sell-side analyst Casey Lea rated the company as “Sell” in June, citing “diminishing profitability” as a red flag. And that’s reflected in the companies’ share prices, a gauge of investor sentiment in the company.

“Investors are very clear-headed about these things: they focus on net income and cash flow,” said Gita Rao, senior finance lecturer at MIT’s Sloan School of Management. “Ideology is all very fine, but, people don’t want to be in companies that have an ideology where they’re going to be losing money.”

Nicola M. White in Washington also contributed to this story.

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Trump Media Gets a Sky-High Valuation as Bettors Play Election

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- Shares have doubled as betting markets start favoring Trump
- ‘Meme stock that is solely valued on Trump winning’: Tuttle

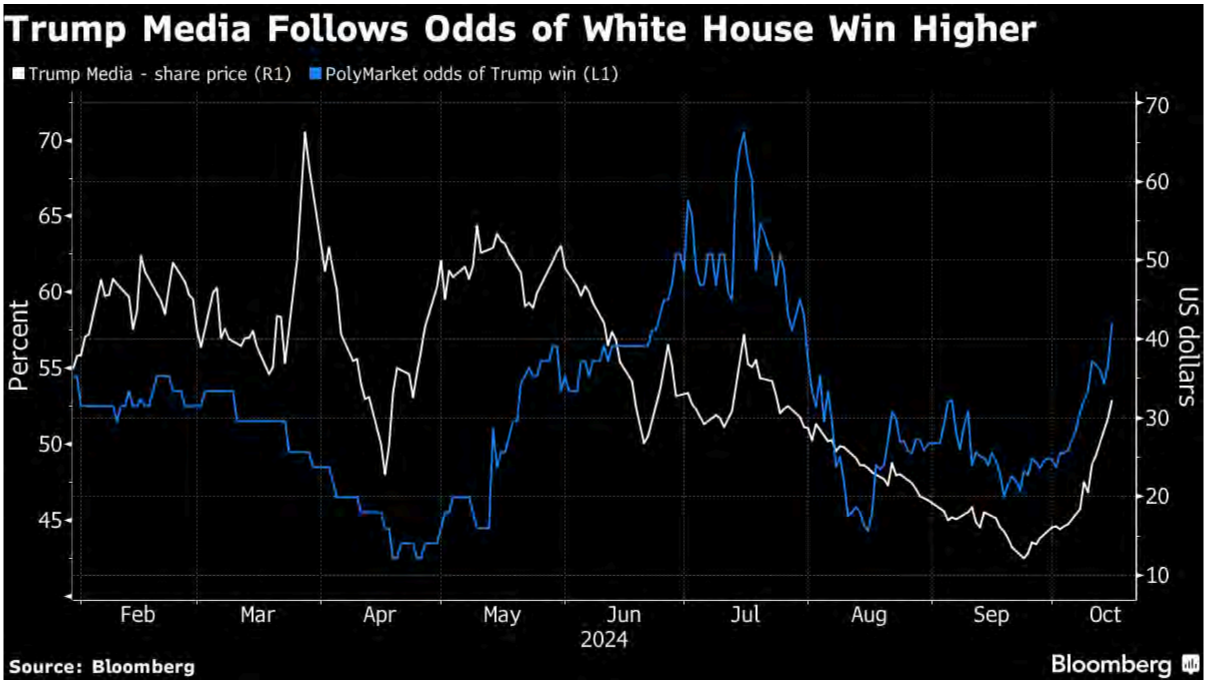
By Bailey Lipschultz

(Bloomberg) --
Donald Trump’s media startup has taken investors on a wild ride, with the company shedding more than $7 billion in value from its May high to its September bottom, and then regained $4 billion in less than one month.

Nothing fundamental is driving the rally, as Trump Media & Technology Group Corp. reported just $1.6 million in sales through the first six months. And third-party tracking data show that its Truth Social platform hasn’t topped one million daily active users in the past year.

Rather, it appears to be an election gambling proxy, loosely correlated with moves in betting markets. On Sept. 23, Trump was down by three points on PolyMarket and 11 points on PredictIt, but he’s now up by 16 points on PolyMarket and five points on PredictIt. The shares have more than doubled over the same time frame.

“It’s a meme stock that is solely valued on Trump winning, because if he doesn’t win it should be worth $0,” said Matt Tuttle, CEO of Tuttle Capital Management in Riverside, Connecticut. “I just bought puts under the assumption that it’s well overdue for a pullback.”



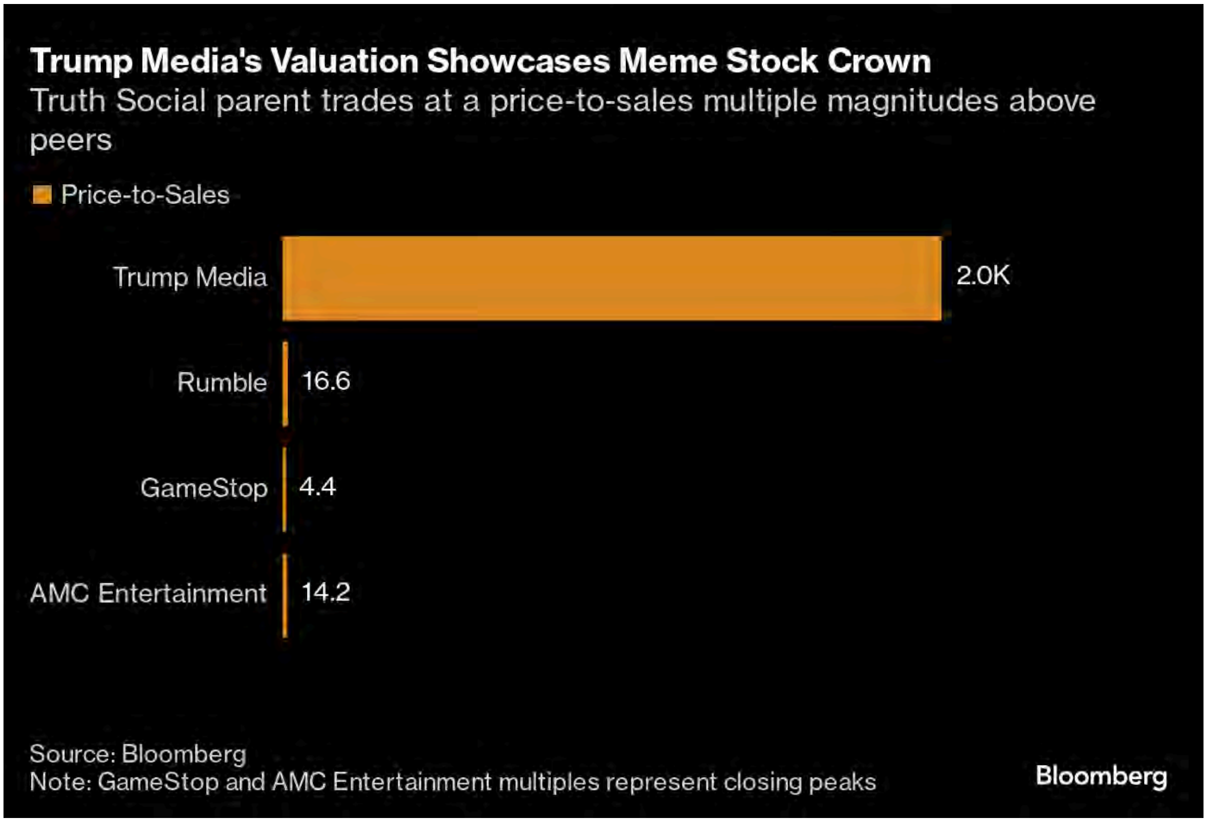
Tuttle has a point. Trump Media, which owns the X-lookalike social media platform Truth Social, has traded more like a meme stock than a company valued on its fundamentals. In the two months since reporting second-quarter results, it has swung between $11.75 and $33.85.

“If they don’t have the users to make more than $1.6 million in ad marketing, where is it going to come from?” asked Dave Peinsipp, co-chair of Cooley’s global capital markets practice. “This is among the questionable things that don’t really make a lot of sense on the valuation.”

Lofty Multiple

The company’s lofty market valuation, which puts the former president’s stake at roughly $3.7 billion, is based on an extreme price-to-sales ratio over 2,000. By comparison, Rumble Inc., a right-wing video site backed by Trump’s running mate, JD Vance, has a multiple of nearly 17.

It’s also blowing away the performance of traditional meme stocks. GameStop Corp., the video-game retailer that drew legions of individual investors to back it, peaked at a price-to-sales multiple of about four in 2021. And AMC Entertainment Holdings Inc.’s peak was roughly 14, data compiled by Bloomberg show.



Although Trump Media shares have jumped above $30 from $11.75 just three weeks ago, they remain down 44% from their first close as a standalone company in March. Looking back to 2021 and the initial mania in when its deal to go public was unveiled, powering the SPAC shares to an intraday peak of $175, it has lost more than 80%.

"Will there be any value in the stock if Donald Trump is not president or will there be a huge jump for the stock if he is?" asked Peinsipp. "It's a completely unique case study from what we traditionally see."

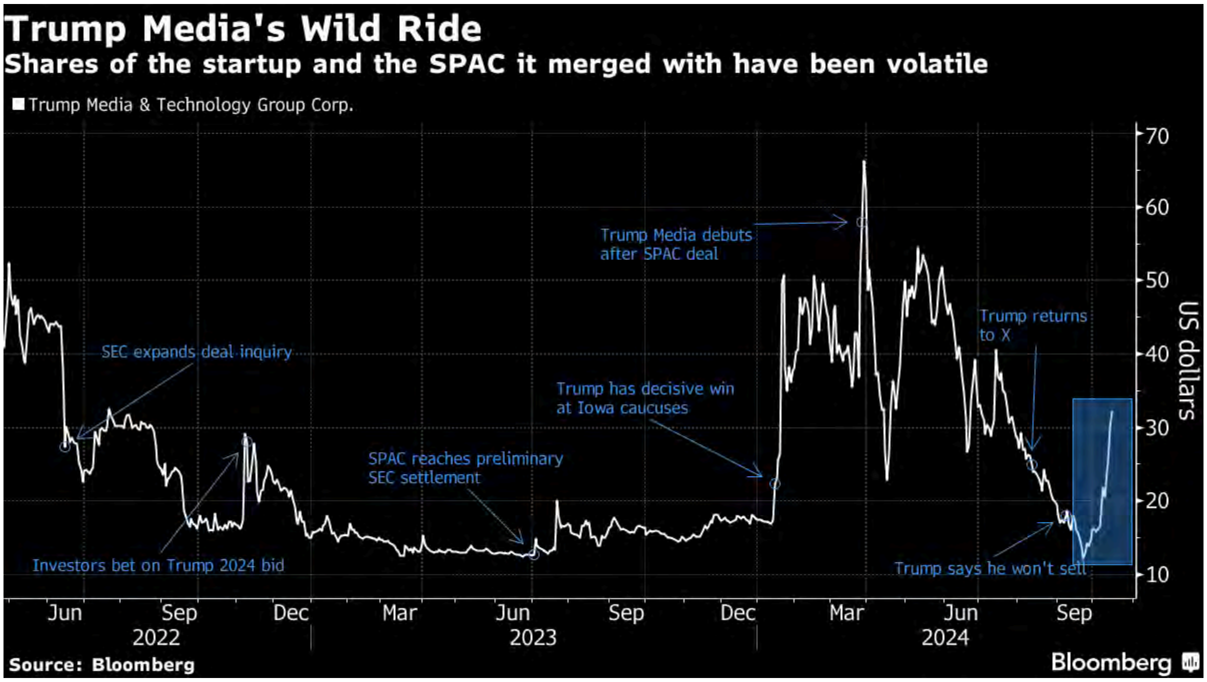
Trump has stuck by a promise to not sell shares through at least last Friday, the earliest day such a move would have been disclosed, and retains his nearly 115 million share stake. Meanwhile, the former contestants on Trump's TV show *The Apprentice* who co-founded the company quickly sold the vast majority within a week of being able to sell.

Read more: Trump Media Co-Founders Moved Quickly to Cash In Their Stake

Judging Performance

One of the challenges for investors is assessing how the business actually is doing. Trump Media has said it may never disclose performance metrics like average users or revenue per user — things that most other publicly-listed companies regularly provide.

“Trump Media ended last quarter with $344 million in cash and cash equivalents and zero debt while launching an in-app streaming platform on our custom-built content delivery network,” a company spokesperson told Bloomberg in a late September email. “With further innovations planned soon, TMTG is optimistic about our growth strategy.”



The app has failed to top one million daily active users in the past years, less than 1% of the traffic Elon Musk’s X gets, and were just under 400,000 for September, data compiled by the research firm Apptopia show. By comparison, Pinterest reported global monthly active users of 522 million in the second quarter, while Snap’s figure was more than 850 million. And X had nearly 145 million daily active users in September, Apptopia data show.

Another area Truth Social also is lagging is user engagement, with users only averaging 4.8 minutes per day on the app in September, according to Apptopia data. On Rumble, the average time spent by users per day was above 50 minutes from July through September.

“This is clearly a business that cannot support the price even after the decline, there’s nothing that justifies the price,” said Brian Quinn, a law professor at Boston College. “This is not a business worth $6 billion.”
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