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Paramount-Skydance Merger Sets Up Fight to Lead Court Challenge

By Mike Leonard 2024-10-17T12:04:17Z000-04:00

- Lawsuit says Paramount investors shortchanged by \$1.6 billion
- Attorneys ready to duel over potentially lucrative litigation

A legal battle is brewing over the chance to lead high-stakes litigation challenging the planned \$8 billion merger between Paramount Global and [Skydance Media LLC](#).

So far only one lawsuit has taken direct aim the transaction, which would combine [Shari Redstone's](#) media empire and [David Ellison's](#) with a \$6 billion investment from his father, Oracle Corp. founder [Larry Ellison](#), the world's fourth-richest man as of Thursday. But the Paramount shareholder who won the race to the courthouse is now urging a judge to let his lawyers lead the litigation when it inevitably widens to include other investors, such as the pension fund that recently lost an early round in its bid for merger-related documents.

Wednesday's preemptive strike in Delaware's Chancery Court is hardly surprising given the potential payday for shareholder attorneys, who could take home hundreds of millions if they win the full \$1.65 billion in damages they're seeking, judging by recent precedents. An investor lawsuit that ended in a \$1 billion settlement with Dell Technologies Inc. yielded [nearly \\$270 million in legal fees](#), while the lawyers who succeeded in voiding [Elon Musk's](#) record \$56 billion Tesla Inc. compensation package [are seeking about \\$7 billion](#).

The suit by Paramount investor Scott Baker, [filed in July](#), called Redstone a "relentless controlling stockholder" who's forcing through an unfair deal to bail out her own "floundering" investment after strong-arming the reunification of CBS Corp. and Viacom by stacking both boards with loyalists. The CBS-Viacom deal, which created Paramount, led to protracted litigation in the same court.

Rhode Island's public employee retirement system technically [brought the first case](#) over the Skydance deal, a lawsuit seeking internal files from Paramount under a law giving investors broad access to corporate documents if they have credible but preliminary suspicions of self-dealing. But a magistrate [rejected the records demand](#) in early August—a decision that's set to be reviewed by a more senior judge in November.

‘Unnecessarily Delay’

Another group of public pension funds, meanwhile—including the California State Teachers’ Retirement System—wrote [a letter](#) to the presiding judge in Baker’s case asking her to slow-walk the proceedings until the funds can finish investigating the deal, including by seeking the types of files at issue in the Rhode Island litigation. “We expect other responsible stockholders will also want to use the tools at hand and gather more information,” the Sept. 24 letter said.

Wednesday’s [court filing](#) fired back at that request, saying it would “unnecessarily delay the progress and eventual resolution of this action” for an unknown length of time, likely “deep into 2025.” It’s clear any competing shareholder lawsuit is at best “many months away from being filed,” while the Rhode Island case “is mired in an appeal,” according to Baker’s attorneys.

The publicly available information about the merger is more than enough to base a lawsuit on, the filing said.

Baker is represented by Berger Montague PC. The CalSTRS group is represented by Bernstein Litowitz Berger & Grossmann LLP, Robbins Geller Rudman & Dowd LLP, Berman Tabacco, and Equity Litigation Group LLP. Rhode Island is represented by Prickett, Jones & Elliott PA and Kessler Topaz Meltzer & Check LLP.

Redstone is represented by Abrams & Bayliss LLP and Ropes & Gray LLP. Ellison is represented by Ross Aronstam & Moritz LLP. Other Paramount board members are represented by Richards, Layton & Finger PA and Cravath, Swaine & Moore LLP.

The case is [Baker v. Redstone](#) , Del. Ch., No. 2024-0790, motion filed 10/16/24 .

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Kiera Geraghty at kgeraghty@bloombergindustry.com

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Oct. 17, 2024, 2:00 AM PDT

Nvidia High Court Test Weighs Securities Suits as SEC Backstop

By Ben Miller

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- Government's bid to argue before justices signals priority
 - Ruling for Nvidia could raise threshold in private litigation

Bloomberg Law News 2024-10-17T10:17:42016639401-04:00**Nvidia High Court Test Weighs Securities Suits as SEC Backstop****By Ben Miller 2024-10-17T05:00:00000-04:00**

- Government's bid to argue before justices signals priority
- Ruling for Nvidia could raise threshold in private litigation

Nvidia Corp.'s argument before the US Supreme Court next month pits the software and computing giant not only against investors alleging securities fraud, but also against two federal agencies that have thrown their support behind the shareholder lawsuit.

The Securities and Exchange Commission and the Justice Department said in an amicus brief that the investors' complaint contained sufficient fraud allegations for the high court to uphold the US Court of Appeals for the Ninth Circuit reviving the proposed class action.

The justices this week granted Solicitor General Elizabeth Prelogar's request to weigh in at the case's Nov. 13 hearing. The government's bid signals the administration's interest in maintaining the steady flow of private securities actions as a complement to the SEC's own limited enforcement capacity, according to attorneys and law professors.

"The SEC, like any government agency, is resource-limited," said David Shargel, a partner at Bracewell LLP who has represented clients before the SEC and the DOJ. "Private actions alongside enforcement actions create a more comprehensive system of enforcement, but they also provide deterrence."

Investors' allegations that Nvidia and CEO Jensen Huang misled them about the company's dependence on crypto mining revenue before a 2018 market decline persuaded a Ninth Circuit panel that Huang made materially false statements with a requisite level of intent.

In its Supreme Court brief, Nvidia argued the complaint leans too heavily on an expert's "invented" data about the company's revenue, and that the Ninth Circuit decision "eviscerates the guardrails" Congress put in place under the 1995 Private Securities Litigation Reform Act to prevent excessive or abusive securities litigation.

An Nvidia spokesperson declined to comment.

Private Enforcement

The government's claim that private suits are necessary for investor protection isn't based on a systematic study of securities fraud class actions and their impact on official enforcement actions, said Adam Pritchard, a professor at University of Michigan Law School who focuses on securities class actions and SEC enforcement.

"This case is Ninth Circuit error correction," he said. "Here you have this specific provision in the PSLRA that is meant to weed out made-up lawsuits, and the Ninth Circuit has allowed a made-up expert opinion to be the basis for a lawsuit."

The SEC has long taken the position that investors who bring lawsuits provide a valuable supplement its own litigation capacity, even within the PSLRA's guardrails, lawyers say. SEC spokespeople didn't respond to requests for comment.

The agency brought 784 enforcement actions in fiscal 2023, including 501 stand-alone actions, according an SEC press release. Meanwhile, investors filed 228 proposed securities class actions last year, according to a National Economic Research Associates study.

"Private market actors have different information, different incentives," said Jill. E. Fisch, a professor at University of Pennsylvania's Carey Law School who teaches corporate and securities law. "There are also cases that are more complex, more burdensome requiring more expert testimony. So with limited resources the SEC can't necessarily pursue all of those cases, but sometimes private actors can."

The crypto-related disclosures and statements at the center of the Nvidia case are also a priority for the current administration. The SEC under Chair Gary Gensler has worked to develop expertise on crypto enforcement, but that doesn't make the agency the best candidate to bring every case involving questions around digital asset mining revenue.

"One of the concerns that the SG's office and administration has right now is defending regulation broadly, as the current administration has an interest in the regulatory state and various features of regulation," Fisch said. "It's dealing with a Supreme Court that has articulated some reservations about that."

Resource Considerations

The government throwing its support behind Nvidia investors is especially timely in the context of another high court case, *SEC v. Jarkesy*, which the justices decided in June. After that ruling, the agency must bring securities fraud enforcement actions seeking civil penalties to court—often a cumbersome process—rather than handling them with in-house administrative law judges.

"Federal court litigation is very resource-intensive, so this is coming on the heels of a Supreme Court case that is going to require the SEC to really think carefully about how it's using resources," said Haimavathi Marlier, a partner at Morrison Foerster LLP and co-chair of the firm's securities litigation, enforcement, and white collar defense group.

Former SEC officials who filed their own amicus brief supporting Nvidia acknowledged the agency's "limited resources" but argued that protecting scienter, or the necessary level of intent to show liability, was important to ensure that "meritless claims against good-faith actors" remain barred under the PSLRA.

A separate group of ex-SEC officials voiced support for the investor respondents in the case, arguing the agency has too much on its plate to go after all instances of securities fraud without private litigation as a backstop.

"With a limited budget, and roughly 4600 employees, the SEC is responsible for the oversight of roughly 40,000 entities, and also must review the disclosures of approximately 7800 reporting companies," they said in an Oct. 2 amicus brief. "Enforcement resources are stretched thin, and the SEC alone simply cannot ensure a level playing field for honest market participants."

Reframing Securities Litigation

Nvidia's case stands to redefine the barrier to entry for individual investors to bring their claims against companies and named officers in federal court, potentially limiting the scope of alleged wrongdoing that the SEC could expect private litigation to encompass.

"The SEC and the DOJ have expressed a strong interest in this case because from their position, if the court adopts Nvidia's view, plaintiffs would need access to internal documents specifically in order to plead scienter and they would not be able to rely on expert opinion at the pleading stage," Marlier said.

A ruling in favor of the investor respondents may clear the way for other securities class actions to survive motions to dismiss, but the justices siding with Nvidia wouldn't necessarily cut off the flow of suits seeking to show securities fraud through misleading statements or disclosures, according to Shargel.

"For Nvidia and companies like it, any company that could be the target of a private securities action, the decision will determine whether private plaintiffs are going to have an easier time going forward meeting their pleading obligations," he said. "If the company wins, it's hard to say whether there will actually be a decrease in the number of lawsuits against companies. Plaintiffs will find a way."

The case is NVIDIA Corp. v. E. Ohman J:or Fonder AB , U.S., No. 23-970 .

To contact the reporter on this story: Ben Miller in New York City at bmiller2@bloombergindustry.com

To contact the editor responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com; Maria Chutchian at mchutchian@bloombergindustry.com

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Overstock investors rebuffed on appeal, and that's bad news for short sellers

 [reuters.com/legal/government/column-overstock-investors-rebuffed-appeal-thats-bad-news-short-sellers-2024-10-16](https://www.reuters.com/legal/government/column-overstock-investors-rebuffed-appeal-thats-bad-news-short-sellers-2024-10-16)

Alison Frankel

Traders work on the floor at the New York Stock Exchange (NYSE) in New York City, U.S., September 19, 2024. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

Oct 16 (Reuters) - Short sellers pursuing securities fraud claims in Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming got two kinds of bad news in a federal appellate decision , opens new tab issued on Monday in a case against online retailer Overstock. The Denver-based 10th U.S. Circuit Court of Appeals refused to revive a securities class action led by short seller Mangrove Partners, which alleged that Overstock misled investors about its sales prospects in early 2019 and then concocted a complicated scheme — more on that later — to squeeze short sellers and drive up its share price. One of the goals of the scheme, according to Mangrove, was to allow Overstock's founder and former CEO Patrick Byrne to maximize his profits when he exited the company and sold off his stake after the revelation of his romantic relationship with a Russian spy.

The 10th Circuit ruled, first of all, that Mangrove's case must be dismissed because the short seller was not entitled to invoke the fraud-on-the-market presumption of reliance on Overstock's allegedly false statements. The court's reasoning: As a short seller, Mangrove bought Overstock shares in order to meet its contractual obligations to cover its short position, not because it was misled by the company's allegedly fraudulent representations about revenues.

The presumption of reliance, as you know, is the bedrock of shareholder class actions. It's based on the idea that fraud taints the entire market for broadly-traded shares, impacting every investor that buys or sells until the fraud is revealed.

Companies defending shareholder class actions can rebut the presumption by, for instance, arguing in briefs opposing class certification or seeking summary judgment that misstatements did not impact their share price. But generally speaking, securities fraud plaintiffs do not have to worry about reliance in the preliminary stages of their cases.

That's no longer a given for short sellers litigating in the 10th Circuit after the Overstock case. Judges Joel Carson, Carlos Lucero and Veronica Rossman concluded in an opinion written by Carson that Mangrove failed to allege reliance because it admitted in its pleadings that it was forced to buy Overstock shares to cover its short position.

Mangrove “cannot have it both ways,” Carson wrote. “If [Mangrove] bought its shares to avoid breaching its lending contracts, it cannot also have bought its shares because of [Overstock’s] alleged misstatements.”

The 10th Circuit said in footnotes that it was not adopting a blanket rule barring short sellers from invoking the presumption of reliance, citing an amicus brief [\[1\]](#), opens new tab by several state pension funds that warned such precedent would create problems for institutional investors.

But you can be sure that defendants facing fraud claims by short sellers in courts within the 10th Circuit will point to this decision to argue that because shorts have different motivations than ordinary investors — particularly when they are being squeezed to cover their positions — short sellers cannot count on the presumption of reliance. The ruling could also be a factor for courts picking investors to lead shareholder class actions and for judges weighing whether to certify classes.

But that’s not the only part of the decision that should trouble short sellers. The 10th Circuit also agreed with a Utah trial judge’s ruling [\[2\]](#), opens new tab that Overstock did not engage in market manipulation because the company fully disclosed its short-squeezing tactics. The alleged manipulation involved Overstock’s announcement of a plan to issue a blockchain-based dividend that would not be registered with the U.S. Securities and Exchange Commission. I’m simplifying, but because Overstock said the digital dividend would be an unregistered security, shareholders would not be able to trade the dividend for six months.

That prohibition put a squeeze on short-sellers, who had to buy shares to cover their positions before being locked into liability for the untradeable digital dividend.

The market quickly figured out the implications of the unregistered dividend plan. Byrne himself said in public blog posts that the maneuver was specifically intended to squeeze Overstock short-sellers he’d been battling for years.

The tactic, moreover, worked: The company’s share price shot up as shorts bought stock to cover their bets, before falling again when market-makers said shorts could use cash to hedge their positions. Byrne allegedly made \$90 million from selling his shares in the midst of the short squeeze. (The SEC investigated Byrne’s trades but informed him [\[3\]](#), opens new tab in August 2024 that it would take no action. His lawyer, Robert Driscoll of Dickinson Wright, declined to provide a statement on the 10th Circuit case.)

A distinguished group of securities law professors [\[4\]](#), opens new tab and two investor-minded public interest groups [\[5\]](#), opens new tab joined Mangrove [\[6\]](#), opens new tab in urging the 10th Circuit to rule that investors adequately alleged market manipulation. But the 10th Circuit said market manipulation demands an allegation of deceit — and Mangrove hadn’t shown that Overstock’s digital dividend plan fooled the market.

“The market received notice that short sellers might buy Overstock stock to cover their positions before the dividend's record date,” the appeals court said. “Buyers and sellers possessed sufficient information to form judgments about how Overstock's dividend would impact Overstock's share price.”

The key issue, according to the 10th Circuit, was timing. Regardless of what Mangrove knew when it opened its short position on Overstock, the appeals court said, by the time the fund bought Overstock shares to cover the short, the market understood the company's digital dividend strategy to squeeze short sellers.

Overstock, wrote Carson, did not send “a false signal to the market,” so it cannot be liable for market manipulation.

I emailed Mangrove counsel Michael Eisenkraft of Cohen Milstein Sellers & Toll, who argued the appeal for investors back in February 2023. He didn't get back to me. Overstock lead counsel John Dwyer said in an email message that he is out of the office and unavailable. Overstock, which is now part of retail conglomerate Beyond (BYON.N) [opens new tab](#), did not respond to an email query.

Class actions stemming from short squeezes are a relatively small subset of securities class actions. And the 10th Circuit is certainly not a hotbed of investor class actions. But I have a feeling the Overstock decision is going to turn up in unexpected places.

Read more:

Overstock to issue stock to be traded on blockchain platform

Overstock.com CEO Patrick Byrne resigns after revealing involvement in FBI-Russia probe

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Reporting By Alison Frankel

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Alison Frankel

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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,

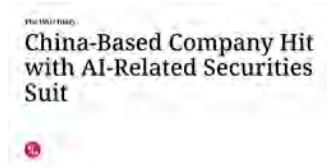
she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

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China-Based Company Hit with AI-Related Securities Suit

K [dandodiary.com/2024/10/articles/artificial-intelligence/china-based-company-hit-with-ai-related-securities-suit](https://www.dandodiary.com/2024/10/articles/artificial-intelligence/china-based-company-hit-with-ai-related-securities-suit/)

October 16, 2024



By Kevin LaCroix on October 16, 2024

Posted in Artificial Intelligence



Among the most distinctive and important securities class action lawsuit filing trends this year has been the influx of new lawsuit based on alleged AI-related misrepresentations. In the latest example, on October 15, 2024, a plaintiff shareholder filed a securities class

action lawsuit against China-based AI and robotics company, Xiao-I, in which the shareholder alleged financial reporting issues and also that the company overstated its AI capabilities. A copy of the October complaint against the company can be found [here](#).

Background

Xiao-I is organized under the laws of the Cayman Islands with its headquarters in China. Xioa-I operates through subsidiaries. Its Shanghai Xaio-I Robot Technology Co. Ltd. (Shanghai Xiao) comprises the company's AI business. Xiao-I completed an IPO in the U.S. on March 9, 2023, after which its shares were publicly traded on Nasdaq. In its IPO documents, the company self-identified its Shanghai Xiao subsidiary an industry leader in AI technologies and robotics research and development.

As a result of its corporate structure, the company transfers cash and other assets between itself and its subsidiaries, including Shanghai Xiao. However, its ability to do so is limited as a result of certain of its Chinese shareholders' non-compliance with applicably Chinese foreign exchange rules (particularly a rule set out in "Circular 37").

As a listed company, Xiao-I is subject to the Nasdaq listing requirements, including the requirement to maintain a minimum closing bid price of \$1.00 per share, as well as the requirement to comply with GAAP. In July 2023, the SEC issued a letter to the company citing the company's purported failure to comply with GAAP in its 2022 annual report, and the failure to include complete disclosure regarding its Chinese shareholders' non-compliance with Circular 37.

In September 2023 and October 2023 press releases, the company reported its financial results, among other things disclosing that its operating expenses had increased 355% and its R&D expenses had increased 708%. In its October press release, the company explained these increases, saying that OpenAI's November 2022 launch of ChatGPT had forced the company to increase its investments in research and development. In its April 2024 financial results press release, the company announced further increases in its expenses and R&D costs. On July 15, 2024, the company disclosed that it had received a notice from Nasdaq that it was out of compliance with the minimum bid requirement. According to the complaint at the time of each of these various disclosures, the company's share price declined.

The Lawsuit

On October 15, 2024, a plaintiff shareholder filed a securities class action lawsuit in the Southern District of New York against the company, certain of its executives, and its offering underwriter. The complaint purports to be filed on behalf of a class of persons consisting of persons who purchased shares traceable to the company's March 9, 2023, IPO or who purchased shares on the open market between March 9, 2023 and July 12, 2024.

The complaint alleges that in the IPO offering documents and during the class period, the defendants made false or misleading statements or failed to disclose that "(i) Defendants had downplayed the true scope and severity of risks that Xiao-I faced due to certain of its Chinese shareholders' non-compliance with Circular 37 Registration, including the Company's inability to use Offering proceeds for intended business purposes; (ii) Xiao-I failed to comply with GAAP in preparing its financial statements; (iii) Defendants overstated Xiao-I's efforts to remediate material weaknesses in the Company's financial controls; (iv) Xiao-I was forced to incur significant R&D expenses to effectively compete in the AI industry; (v) Xiao-I downplayed the significant negative impact that such expenses would have on the Company's business and financial results; (vi) accordingly, Xiao-I overstated its AI capabilities, R&D resources, and overall ability to compete in the AI market; (viii) as a result of all the foregoing, there was a substantial likelihood that Xiao-I would fail to comply with the NASDAQ's Minimum Bid Price Requirement; and (viii) as a result, the Offering Documents and Defendants' public statements throughout the Class Period were materially false and/or misleading and failed to state information required to be stated therein."

The plaintiff alleges that the defendants violated the Securities Act of 1933 and the Securities Exchange Act of 1934. The complaint seeks to recover damages on behalf of the plaintiff class.

Discussion

There is no doubt that this lawsuit is about more than just the AI allegations. The financial reporting and accounting allegations would support a lawsuit against the defendants, even in the absence of the AI-related allegations. Nevertheless, the AI allegations are an important part of this lawsuit as filed. And there is no doubt that this lawsuit is AI-related; the complaint specifically and expressly alleges that the company “overstated its AI capabilities, R&D resources, and overall ability to compete in the AI market.”

While I have no trouble classifying this lawsuit as AI-related, the AI allegations are of a peculiar sort. Boiled down to their essence, the AI allegations are based on the increased spending the company was compelled to undertake as a result of new and unexpected competition. These kinds of “meeting competition” developments are not typical kinds of securities fraud allegations.

But whether or not the allegations fit general patterns, there is no doubt that this new lawsuit joins the ranks of the other AI-related lawsuits filed so far this year. According to the Stanford Law School Securities Class Action Clearinghouse, prior to the filing of this lawsuit, there were twelve AI-related securities suit filings so far this year, meaning that with the addition of this new lawsuit, there have now been thirteen AI-related suits this year. It is apparent that when the time comes to tally up all of the securities suit filings this year, the AI-related filings will have been an important contributor.

SEC Files Another AI-Related Enforcement Action: As I noted in a post late last week, the SEC has been active in pursuing AI-related enforcement actions. The SEC is at it again this week. On Monday, the agency filed an enforcement action against Destiny Robotics Corp., a robotics and artificial intelligence start-up, alleging that the company and its founder, Megi Kavtaradze, misled investors concerning the company’s ability to develop an AI-infused hologram and a robot to help families with childcare and other tasks. The company allegedly claimed that it was “making the world’s first humanoid robot and hologram assistance for household use,” supposedly “capable of forming ‘deep and meaningful relationships with humans.” The company claimed that it was using “cutting edge technology and AI.” The SEC alleged that none of this was true and that the companies’ products fell far short of representations. The company allegedly raised about \$141,000 from investors, but the project and eventually the company were abandoned. The SEC’s complaint in the action can be found [here](#).

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Acadia Healthcare Investor Sues Over Patient Retention Report

By Martina Barash 2024-10-17T07:33:22000-04:00

- **COURT:** M.D. Tenn.
- **TRACK DOCKET:** [No. 3:24-cv-01238](#)

Psychiatric hospital chain [Acadia Healthcare Co.](#) failed to disclose that it routinely held patients against their will, without medical necessity, before a news report made the practice public, an investor alleges.

The company's stock price dropped Sept. 3 on that news, and dropped again when Acadia said it had received subpoenas and requests for information from federal prosecutors Sept. 27, Anurag Kachrodia says. He filed his proposed class action Wednesday in the US District Court for the Middle District of Tennessee.

The share price fell 4.5%, closing at \$78.21 per share on Sept. 3, and 6.4%, closing at \$63.28 on Sept. 27.

There are hundreds or thousands of members of the proposed class, the complaint estimates.

Kachrodia seeks damages on his securities fraud claims.

Acadia didn't immediately respond to a voice message seeking comment.

Bramlett Law Offices and Rosen Law Firm PA represent Kachrodia.

The case is [Kachrodia v. Acadia Healthcare Co.](#), M.D. Tenn., No. 3:24-cv-01238, complaint 10/16/24.

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

Related Documents

[Complaint](#)

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[Judge Aleta A. Trauger](#)

[Acadia Healthcare Co.](#)

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Amgen's \$11 Billion Transfer Pricing Dispute Draws Investor Suit

By Mike Leonard 2024-10-17T07:23:11000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1063](#)

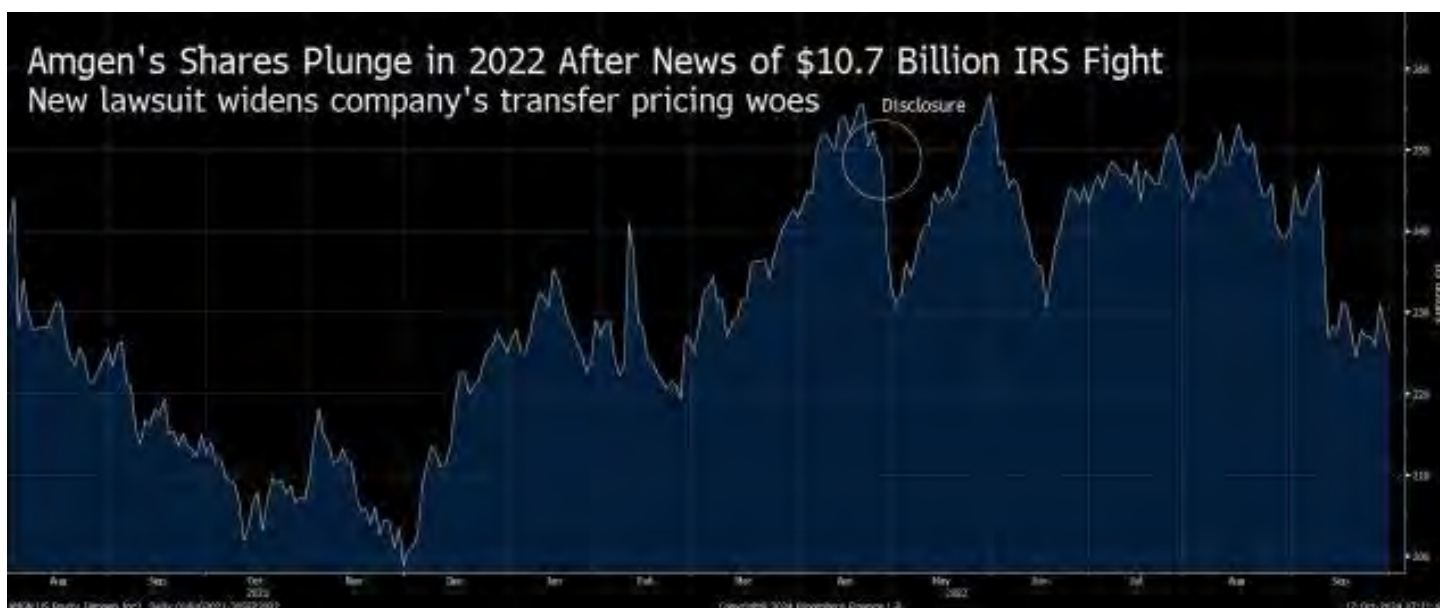
An investor is suing Amgen Inc.'s leaders over the company's \$10.7 billion fight with the IRS, which has said the biopharmaceutical giant dodged a huge tax bill by shifting profits to a subsidiary.

The shareholder lawsuit filed under seal widens the fallout from Amgen's transfer pricing policies, which drew the scrutiny of regulators who found, after an extensive audit, that the company wrongfully allocated billions to a subsidiary in Puerto Rico, reducing its effective tax rate to 12.5%—well below the drug industry average.

The government's bid to recoup nearly \$9 billion in back taxes and \$2 billion in penalties is among the most eye-popping examples of a [broader crackdown](#) on multinational conglomerates for gamesmanship involving transactions that transfer assets between corporate affiliates. The enforcement push has targeted household names including Airbnb Inc. and Microsoft Corp., which allegedly [owes \\$28.9 billion](#).

Amgen didn't immediately respond to a request for comment Thursday. The billions sought by the IRS reflect more than a year's worth of profits for the Thousand Oaks, Calif.-based company.

The new suit, filed late Wednesday in Delaware, comes about two weeks after a federal judge [let a group of pension funds move forward](#) with securities fraud claims against Amgen and two executives. That case, a proposed class action, concerns a 2022 plunge in the company's share price that followed revelations about the magnitude of its dispute with the IRS, which Amgen had previously disclosed in vaguer terms.



The allegations raise “a strong inference that the omission of the company’s potential multi-billion-dollar liability was reckless under the circumstances,” the judge [said Sept. 30](#). He echoed an analogy previously used by the US Supreme Court, likening the company’s “opaque” descriptions of the tax dispute to “a child telling his parents that he had ‘dessert’ when in fact he had eaten the ‘whole cake.’”

The lawsuit, filed by an individual investor in Delaware’s Chancery Court, involves shareholder derivative claims, which technically seek damages on a company’s behalf. It’s common for securities cases to spawn derivative suits that blame corporate leaders for damaging the reputation of a business and exposing it to liability.

Although the court complaint wasn’t yet publicly available Thursday, a [supplemental filing](#) says it involves fiduciary breach claims against current and former members of Amgen’s board and management. The lawsuit will likely be unsealed next week under court rules allowing five days to redact confidential information.

The investor who filed the new complaint, David Hamilton, is represented by deLeeuw Law LLC.

The case is [Hamilton v. Bradway](#) , Del. Ch., No. 2024-1063, complaint filed under seal 10/16/24 .

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

Federal court dismisses Hawaiian Electric securities lawsuit over Maui wildfires

DJ [dailyjournal.com/articles/381450-federal-court-dismisses-hawaiian-electric-securities-lawsuit-over-maui-wildfires](https://www.dailyjournal.com/articles/381450-federal-court-dismisses-hawaiian-electric-securities-lawsuit-over-maui-wildfires)

A federal judge in San Francisco dismissed a putative securities class action against Hawaiian Electric Industries Inc. and several of its current and former executives over last year's wildfire that devastated the town of Lahaina on Maui.

The plaintiffs claimed that the company and its executives provided misleading information to investors regarding the company's wildfire risk mitigation strategies.

U.S. District Judge Jacqueline S. Corley determined that the utility could not be held liable for statements made by its subsidiaries. She also said the plaintiffs had failed to meet the pleading requirements mandated by the Private Securities Litigation Reform Act.

Corley concluded that the plaintiffs did not establish that an inference of fraud was more plausible than alternative explanations.

The judge wrote that the evidence presented could equally support the conclusion that "the Lahaina Wildfire happened despite [the company's] best efforts to prevent it and without defendants trying to hide the risk" of wildfires.

Corley also wrote that plaintiffs failed to establish an alleged motive.

"Plaintiffs do not allege why Individual Defendants concealed information regarding the company's wildfire mitigation efforts and do not allege any Individual Defendant benefited from the alleged fraud by selling stock at an inflated price," she wrote.

She also rejected plaintiffs' theory that HEI controlled two subsidiaries that made statements about the fire.

"These allegations are insufficient to plausibly support an inference HEI 'actually participated in and had authority over' statements made by" its subsidiaries, Corley wrote. *Bhagal v. Hawaiian Electric Industries Inc. et al.*, 23-CV-04332-JSC, (N.D. Cal., filed Aug. 24, 2023).

HEI is represented by Mark R.S. Foster, a partner at Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates in Palo Alto. He was unavailable for comment. Jennifer Pafiti, a partner at Pomerantz LLP in Los Angeles, represents the plaintiffs. She also could not be reached for comment.

The Lahaina wildfires on Maui in August 2023 killed more than 100 people and destroyed hundreds of homes in one of the most destructive blazes in the United States during the past decade.

In August, a \$4 billion settlement was announced to compensate wildfire victims. HEI committed to paying around \$2 billion of this amount, as its equipment is suspected to have ignited the fire. The settlement is pending court approval.

#381450

Douglas Saunders Sr.

Law firm business and community news
douglas_saunders@dailyjournal.com

Securities Case Over Hawaiian Electric Company's Wildfire Readiness Dismissed

[law.com/therecorder/2024/10/16/securities-case-over-hawaiian-electric-companys-wildfire-readiness-dismissed](https://www.law.com/therecorder/2024/10/16/securities-case-over-hawaiian-electric-companys-wildfire-readiness-dismissed)

Ellen Bardash



A federal judge in California has dismissed a securities class action claim against Hawaiian Electric Industries Inc. and its subsidiaries, concluding a shareholder plaintiff hadn't shown the utility provider knowingly misrepresented its preparedness for last year's wildfire in Lahaina, Hawaii.

U.S. District Judge Jacqueline Scott Corley of the Northern District of California wrote in her Oct. 15 opinion that it hadn't been proven at the motion-to-dismiss stage that Skadden-represented Hawaiian Electric overstated its infrastructure-related precautions, those recommended by experts or the extent of its subsidiary oversight. She gave shareholders until Nov. 12 to amend their complaint.

Pomerantz is lead counsel for the shareholders, who filed complaints in the Northern District of California after an August 2023 wildfire in Lahaina that resulted in the deaths of at least 101 people and destroyed the Maui town.

Hawaiian Electric Industries is the parent company of Hawaiian Electric Company Inc., which owns Hawaiian Electric Light Company Inc. and Maui Electric Co. Corley ruled statements from Hawaiian Electric Industries' subsidiaries can't be attributable to the parent company based on the arguments made.

The YouTube videos, press releases and sustainability reports that contain the statements challenged by shareholders all feature Hawaiian Electric Company logos or other branding with nothing to suggest Hawaiian Electric Industries was ultimately in control of them, Corley wrote.

Corley also found the allegedly misleading statements either couldn't be proven untrue or were too vague and general to support securities fraud claims.

The decision stated the issue of scienter leaned in Hawaiian Electric's favor because shareholders hadn't put forward a motive, failing to show how the corporation or its management would have benefitted from misrepresenting or omitting information about wildfire precautions.

"Plaintiffs do not allege why individual defendants concealed information regarding the company's wildfire mitigation efforts and do not allege any individual defendant benefited from the alleged fraud by selling stock at an inflated price," Corley wrote.

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Oct. 16, 2024, 4:37 AM PDT; Updated: Oct. 16, 2024, 9:23 AM PDT

Hawaiian Electric Fends Off Investor Suit Over Lahaina Fire (1)

By Martina Barash

- Falsity of statements, intent not sufficiently alleged
- Shareholders will be able to replead proposed class claims

Bloomberg Law News 2024-10-17T10:25:07Z16726672-04:00

Hawaiian Electric Fends Off Investor Suit Over Lahaina Fire (1)

By Martina Barash 2024-10-16T07:37:14Z000-04:00

- Falsity of statements, intent not sufficiently alleged
- Shareholders will be able to replead proposed class claims

Hawaiian Electric Industries Inc. investors can't proceed with a securities fraud suit alleging the utility misrepresented its wildfire risk management in advance of the August 2023 Lahaina fire, a federal court ruled.

The investors failed to adequately allege the company and its leaders made false statements about power line insulation, utility pole maintenance, vegetation trimming, and other issues, Judge Jacqueline Scott Corley said Tuesday for the US District Court for the Northern District of California. The investors also fell short of alleging the necessary level of intent in the proposed class action, she said.

The investors will have until Nov. 12 to amend their complaint to try to address the deficiencies.

The fire—which killed 101 people, destroyed the historic town of Lahaina, and caused more than \$5.5 billion in damages—has led to a number of lawsuits. Fire victims' families have sued Hawaiian Electric, while the utility and Maui County are attempting to sort out responsibility through dueling suits.

Investors sued Hawaiian Electric within weeks of the fire. The stock lost more than 60% of its value following news reports that the utility lacked policies and procedures to reduce the risk of wildfires and mitigate their impact, the plaintiffs said. A separate shareholder derivative suit, also before Corley, seeks to hold Hawaiian Electric's leaders, and those of a subsidiary, responsible for its potential liability.

The lead plaintiff in the class action, Daniel Warren, said six categories of statements about wildfire preparation misled investors. Some of the alleged misrepresentations were by Hawaiian Electric's subsidiaries Hawaiian Electric Co. and Maui Electric Co.

Corley dismissed the allegations over the subsidiaries' statements, saying Warren didn't show those statements could be imputed to the parent company.

As to the parent company's challenged statements, most weren't sufficiently alleged to be false when made, she said. And a statement that safety was "our number one priority" was too general to be actionable, she said.

Pomerantz LLP is lead counsel for the investors. Skadden, Arps, Slate, Meagher & Flom LLP represents Hawaiian Electric.

The case is *Bhargal v. Hawaiian Elec. Indus., Inc.*, N.D. Cal., No. 3:23-cv-04332, 10/15/24 .

(Updated with additional reporting starting in fourth paragraph.)

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

To contact the editors responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com; Brian Flood at bflood@bloombergindustry.com

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Oct. 16, 2024, 12:31 PM PDT

Gatos Silver, Investors Get Final Nod for \$21 Million Settlement

By Martina Barash

Bloomberg Law News 2024-10-17T10:26:11824479599-04:00

Gatos Silver, Investors Get Final Nod for \$21 Million Settlement

By Martina Barash 2024-10-16T15:31:13000-04:00

Gatos Silver Inc.'s agreement to resolve investor claims over its alleged overestimate of mineral reserves for \$21 million is fair and reasonable, a federal court said in finalizing the class action accord.

Attorneys' fees for class counsel of nearly \$5.9 million, or 28% of the total, are also approved, Judge Philip A. Brimmer said for the US District Court for the District of Colorado.

- The investors alleged the silver and zinc mining company, relying on a report that allegedly overstated its Cerro Los Gatos project's metal content by 30% to 50%, made misleading comments and omissions in its 2020 initial public offering and later filings
- No investors objected to the class settlement or opted out of it, Brimmer said in the order, which followed his preliminary approval in February
- Shareholder derivative litigation on behalf of Gatos Silver in the District of Delaware was voluntarily dismissed in June

Bleichmar Fonti & Auld LLP was lead counsel for the investors. Davis Polk & Wardwell LLP and Foster Graham Milstein & Calisher LLP represented Gatos.

The case is *Bilinsky v. Gatos Silver, Inc.*, D. Colo., No. 1:22-cv-00453, 10/15/24 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

To contact the editor responsible for this story: Kiera Geraghty at kgeraghty@bloombergindustry.com

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Meta can't dismiss liability for kids' social media use

DJ [dailyjournal.com/articles/381444-meta-can-t-dismiss-liability-for-kids-social-media-use](https://www.dailyjournal.com/articles/381444-meta-can-t-dismiss-liability-for-kids-social-media-use)

Technology,

Consumer Protection Law

Oct. 17, 2024

The judge noted that Section 230 of the Communications Decency Act significantly limited the claims and insulated the design and deployment of most features alleged in the lawsuits to be unfair or unconscionable from a consumer standpoint.

A federal judge in Oakland largely blocked Meta Platforms' bid to dismiss liability claims by 35 states accusing the company of getting children hooked onto its social media.

Despite narrowing the scope of the claims, U.S. District Judge Yvonne Gonzalez Rogers ruled on Tuesday that much of the states' consumer protection claims were cognizable. California is among the states involved in the multidistrict litigation against Meta, TikTok YouTube, and other popular websites.

"Meta's alleged yearslong public campaign of deception as to the risks of addiction and mental harms to minors from platform use fits readily within these states' deceptive acts and practices framework. Meta's design, development, and deployment of certain product features plausibly constitutes unfair or unconscionable practices under all at-issue federal and state standards," Gonzalez Rogers wrote in her order.

However, the judge noted that Section 230 of the Communications Decency Act significantly limited the claims and insulated the design and deployment of most features alleged in the lawsuits to be unfair or unconscionable from a consumer standpoint. Section 230 provides broad immunity to online services and providers concerning third-party content on the internet.

The first bellwether trial of dozens of lawsuits brought by private plaintiffs, school districts and states is scheduled for next fall. Led by Lieff Cabraser Heimann & Bernstein LLP and Motley Rice LLC, several firms have accused Meta and other social media platforms of intentionally designing their products to promote compulsive use among minors.

Defended by Covington & Burling LLP and other firms, Meta has denied any wrongdoing. The company's attorneys have insisted that Section 230 and the First Amendment protect it from any liability that arises from claimed design defects or failure to warn consumers. *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 4:22-md-03047-YGR (N.D. Cal., filed Oct. 6, 2022).

In her order, Gonzalez Rogers listed several of Meta's design features and explained how they may contribute to retaining a teen user base, but noted they are protected by Section 230.

For example, Facebook and Instagram's use of algorithms to curate content and the websites' use of "infinite scroll and autoplay" to automatically load new posts were protected under Section 230. Similarly, the statute provided immunity to Meta's use of disruptive notifications and the quantification of "likes," or the number of people expressing their validation or approval of a post.

Gonzalez Rogers also pointed out that Meta made certain content only temporarily available to induce a sense of fear of missing out. The judge said Meta is allowed under the law to drive teen engagement by implementing notifications and visual cues that the posts would disappear forever if unviewed.

However, Gonzalez Rogers found that certain features were not protected under Section 230, such as appearance-altering filters and Instagram's daily time limit, which Meta said would enable users to restrict the amount of time they spend on Instagram each day. She also found that Instagram's multiple account function was also unprotected by the statute.

"In the context of adolescents, this feature -- which is not exclusively focused on content or publishing activity -- can serve as an end-run around other features such as those related to time restrictions," the judge wrote. Meta's internal research and reporting documents its knowledge of harms resulting from specific content on its platforms as well as harms related to the design of platform features," Gonzalez Rogers wrote in the 102-page filing.

#381444

Sunidhi Sridhar

Daily Journal Staff Writer
sunidhi_sridhar@dailyjournal.com

Judge Cites 'National Outrage' in Upholding State AG Claims Against Meta

[law.com/2024/10/16/judge-cites-national-outrage-in-upholding-state-ag-claims-against-meta](https://www.law.com/2024/10/16/judge-cites-national-outrage-in-upholding-state-ag-claims-against-meta/)

Amanda Bronstad



What You Need to Know

- The judge allowed claims to go forward alleging that Meta touted the safety of its social media apps through deceptive statements and unfair business practices.
- Meta disagreed with the ruling, citing Instagram's new Teen Accounts, which limits who can contact them and the content they see.
- Tuesday's ruling was the second major dismissal order in the multidistrict litigation against Meta and three other social media sites: TikTok, Snapchat and YouTube.

Lawyers suing social media companies for addicting America's youth won another key victory on Tuesday after a federal judge allowed claims brought by more than 30 state attorneys general to move forward.

U.S. District Judge Yvonne Gonzalez Rogers, of the Northern District of California, focused most of her 99-page ruling on the alleged misrepresentations made to consumers by Meta Platforms Inc., the parent company of Facebook and Instagram. With a few exceptions, she

refused to dismiss the claims by the states, which include a bipartisan complaint of 33 states led by California and a separate case from Florida.

She allowed claims to go forward alleging that Meta failed to warn about the mental health effects of its products on young users and touted its safety through deceptive statements and unfair business practices.



U.S. District Judge Yvonne Gonzalez Rogers of the Northern District of California.

"Altogether, these isolated representations are part of a cohesive whole which, as alleged, form a deceptive scheme by Meta to obfuscate the risks of serious harm stemming from platform use—in other words, a scheme to hide a variety of objective risks to user safety and well-being," she wrote. "The states here allege a years-long course of conduct replete with numerous public statements regarding user safety varying widely in character and degree of deceit."

And the benefits of social media did not outweigh the harms, she concluded.

"Given the national outrage, Meta's arguments here strain credulity," she wrote.

Previn Warren, of Motley Rice in Washington, D.C., who is co-lead counsel of the social media multidistrict litigation, which involves hundreds of cases, said the "national outrage" is real.

"As plaintiffs allege, the companies had internal knowledge about the effects of their platforms on kids, and they failed to warn the public and parents and regulators about those problems, and they let kids be walked into harm's way as a result of that," he said. "We believe that's outrageous."

A Meta spokesperson, in an emailed statement, said, "While we welcome the court's decision to limit the focus of some claims, consistent with prior rulings on Section 230, we disagree with the overall ruling."

"We've developed numerous tools to support parents and teens, and we recently announced that we're significantly changing the Instagram experience for tens of millions of teens with new Teen Accounts, a protected experience for teens that automatically limits who can contact them and the content they see," Meta continued. "We believe the evidence will demonstrate our commitment to supporting young people."

Those changes on Instagram, Warren said in a previous statement last month, could have been implemented years ago.

"Time and again, Instagram and its parent company Meta shelved important safety features that could have avoided compulsive use and danger to kids—only to return to those features and publicly tout them in response to PR crises," he said. "The safety of our kids should never be an afterthought for any technology company."

'Growing Body of Case Law'

The lawsuits allege novel claims that social media usage caused adolescents to become addicted, leading to mental health disorders and, for some, suicide.

Tuesday's ruling was the second major dismissal order in the multidistrict litigation against Meta and three other social media companies: TikTok, Snapchat parent company Snap and YouTube, owned by Google. On Nov. 14, 2023, Gonzalez Rogers upheld some claims under product liability laws relating to design defects, but dismissed others as protected under the Communications Decency Act's Section 230, which immunizes tech companies from the acts of third parties. As in her prior ruling, Gonzalez Rogers found, for instance, that while the constant display of "likes" was protected, appearance-altering filters were not.

She also refused to dismiss allegations that Meta violated the U.S. Children's Online Privacy Protection Act, or COPPA.

Tuesday's ruling could influence judges in cases filed earlier this month by California, New York and a dozen other state attorneys general alleging that TikTok, owned by ByteDance, misled the public about its safety with respect to youth mental health. At least six other states, including Texas, have previously sued TikTok.



Previn Warren of Motley Rice in Washington, D.C. Courtesy photo

"Despite there being a patchwork of different orders and rulings around the country on this issue, there is broad consistency on the fact that Section 230 doesn't immunize platforms from failing to warn the public about defects and lying by omission about safety risks associated with the use of their platforms by kids," Warren said. "My expectation is that the courts hearing the various lawsuits brought against TikTok by state AGs would come out the same way. That remains to be seen, and there's no way to know with certainty, but it does appear there's a pretty growing body of case law on that proposition."

Although most of her order focused on the state attorneys general actions, Gonzalez Rogers also refused to dismiss consumer claims brought by individuals against Meta, Snapchat, YouTube and TikTok.

Warren said dismissal motions are pending as to the school districts that have sued social media. In June, in separate litigation in California state courts, Los Angeles County Superior Court Judge Carolyn Kuhl sustained demurrers in youth addiction lawsuits brought by four school districts in California, Florida, Rhode Island and Washington. Google, Meta, Snap and TikTok had moved to strike the lawsuits under Section 230 of the CDA.

Kuhl's dismissal of the school districts was unlikely to influence Gonzalez Rogers, Warren said.

"The judges operate independently," he said. "They obviously have indicated they talked to one another but clearly [they're] independent jurists and thinkers. It remains to be seen how our judge comes out on those issues."

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Law Firms Mentioned

Motley Rice

McKinsey close to settling US opioid investigations, sources say

 [reuters.com/legal/mckinsey-nears-500-mln-settlement-with-doj-over-opioid-probe-bloomberg-news-2024-10-16](https://www.reuters.com/legal/mckinsey-nears-500-mln-settlement-with-doj-over-opioid-probe-bloomberg-news-2024-10-16)

Nate Raymond, Mike Spector



The McKinsey & Company logo is displayed at the 54th International Paris Airshow at Le Bourget Airport near Paris, France, June 21, 2023. REUTERS/Benoit Tessier/File Photo Purchase Licensing Rights , opens new tab

Oct 16 (Reuters) - Consulting firm McKinsey & Co is close to an agreement with U.S. prosecutors to pay more than \$500 million to resolve longstanding federal investigations into its past work helping opioid makers boost sales that allegedly contributed to a deadly addiction epidemic, two people familiar with the matter said.

A deal, which has not been finalized, would resolve U.S. Justice Department criminal and civil probes, the people said.

The time frame for the announcement of any agreement remained unclear, they said. The terms of the settlement could change as negotiations continue, one of the sources said.

McKinsey and the Justice Department declined to comment. Bloomberg earlier reported that McKinsey was close to resolving the probes.

Federal prosecutors have been investigating McKinsey's role in the opioid epidemic, focusing on its work advising OxyContin maker Purdue Pharma and other drugmakers, Reuters reported in April.

The probe examines whether McKinsey engaged in a criminal conspiracy when advising pharmaceutical manufacturers on marketing strategies to boost sales of prescription painkillers that led to widespread addiction and fatal overdoses.

McKinsey has already reached separate agreements totaling nearly \$1 billion to settle widespread opioid lawsuits and other related legal actions. These settlements involve all 50 states, Washington, D.C., U.S. territories, various local governments, school districts, Native American tribes, and health insurers.

In 2019, McKinsey announced it would no longer advise clients on opioid-related businesses. The company has maintained that none of the settlements contain admissions of liability or wrongdoing.

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Reporting by Nate Raymond in Boston, Mike Spector in New York and Jaiveer Singh Shekhawat in Bengaluru; Editing by Tasim Zahid and Bill Berkrot

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Nate Raymond
Thomson Reuters

Nate Raymond reports on the federal judiciary and litigation. He can be reached at nate.raymond@thomsonreuters.com.

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Mike Spector
Thomson Reuters

Mike Spector is an Investigative Reporter for Reuters' legal team. He strives to pursue special reports and other enterprising and exclusive stories that expose wrongdoing, highlight threats to consumers and illuminate how ordinary people are affected by the decisions of judges and lawyers across the United States. His stories often involve corporate

crises linked to bankruptcy proceedings, mass tort litigation and government investigations. He was the first journalist to expose Johnson and Johnson's plan to offload into bankruptcy lawsuits alleging its iconic Baby Powder and other cosmetic talc products caused cancer. A series he led explaining how companies and nonprofits use the bankruptcy system to evade lawsuits over sexual abuse and deadly products received the Deadline Club's Daniel Pearl Award for Investigative Reporting. He has also investigated pervasive secrecy in American courts that covers up evidence of deadly products and allegations from Black women that chemical hair relaxers sold by large cosmetics companies caused cancer. He previously worked at The Wall Street Journal covering bankruptcy, private equity, mergers and acquisitions and the automotive industry.

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LA Archdiocese agrees to pay \$880M to settle clergy abuse claims

DJ [dailyjournal.com/articles/381443-la-archdiocese-agrees-to-pay-880m-to-settle-clergy-abuse-claims](https://www.dailyjournal.com/articles/381443-la-archdiocese-agrees-to-pay-880m-to-settle-clergy-abuse-claims)

The Archdiocese of Los Angeles agreed Wednesday to pay \$880 million to victims of clergy sexual abuse. With the \$740 million paid to victims in 2007, the church has now agreed to pay a record \$1.5 billion.

"It's been a long time coming and a huge amount and work to get to this point. I'm convinced that the archdiocese has done everything they could to make this thing work and compensate clients. But it is a bittersweet day, as it always is," said Raymond P. Boucher of Boucher LLP, one of the four plaintiffs' liaison counsel.

The other liaison counsel are: Michael Reck of Jeff Anderson & Associates, Spencer Lucas of Panish Shea Ravipudi LLP, and Morgan A. Stewart from Manly, Stewart & Finaldi.

Kirk D. Dillman, a partner at McKool Smith, represented the church. He said Archbishop José H. Gomez wanted "most importantly to get victims closure and healing."

"We determined the best way forward was with focused mediation with the plaintiffs' liaison committee to share and be as transparent as we could about the finances of the archdiocese. And we did that.

"It was that dialog, I think, that convinced the plaintiffs we were not trying to get out on the cheap. We put cards on the table," Dillman said.

Liaison counsel Lucas said the settlement was made more difficult by the fact that the church's insurance was exhausted from the previous payouts to abuse victims.

"The difficulties were multifaceted. We were dealing with an individual defendant. Looking at investment accounts. Looking at all their assets. So that was a challenge. It took years of investigation and detailed analysis and turning over every stone," Lucas said.

In 2007, the church agreed to pay \$740 million to nearly 600 victims of abuse by clergy, teachers and other members of the Los Angeles archdiocese. In the latest round, 1,353 people claimed abuse by members of the archdiocese. The church has also agreed to undisclosed settlements with about 500 other plaintiffs.

Reck said the settlement will require public disclosure of any perpetrator files. "That's noteworthy given that there was a lot more cases than there were in the other round. So, not all those [perpetrators] were known."

Boucher said settlement talks had been going on for nearly two years but really started to come together in the past six to eight weeks. He said retired Superior Court Judge Daniel J. Buckley, now of Signature Resolution, "kept pushing to get this realized."

He praised the Los Angeles archdiocese, which "did not take the cowardly road of filing for bankruptcy" like several other dioceses in California and in other states have done in recent months.

Lucas said everyone understood no one benefited from bankruptcy. "Many years of delay and bankruptcy lawyers making tens of millions of dollars that just comes out of the pockets of survivors at the end of the day," he said.

Lawyers for the 1,353 plaintiffs must sign off on the latest settlement before it is finalized. The plaintiffs' liaison counsel held a meeting Wednesday with the victims' attorneys - estimated to be around 100. They must now take the deal back to their clients to get approval.

Asked if he was comfortable that he would get the approval of so many people, liaison counsel Stewart responded: "I'm comfortable that it has to go through that process. If it doesn't get a result that is favorable, then the archdiocese will have to file for bankruptcy protection."

"We as a liaison team reached the best and highest number we could reach without the archdiocese filing for bankruptcy," he concluded.

Liaison counsel Reck had a similar answer to the question.

"I really hope so," he responded. "The reality is that we've all seen what happens if a diocese is in bankruptcy. We've seen how that will delay any measure of justice for survivors."

Boucher said there was "some degree of relief" among his clients who have "suffered in silence for so many years."

"They can finally start to put this to bed. And that's so important in these types of settlements."

Superior Court Judge David S. Cunningham has presided over the litigation.

#381443

Los Angeles Archdiocese reaches \$880 million sex abuse settlement

 [reuters.com/legal/los-angeles-archdiocese-reaches-880-million-sex-abuse-settlement-2024-10-16](https://www.reuters.com/legal/los-angeles-archdiocese-reaches-880-million-sex-abuse-settlement-2024-10-16)

Dietrich Knauth

Item 1 of 2 People hold quilts at a press conference outside of Cathedral of Our Lady of the Angels for victims of sexual abuse by priests in the Catholic Archdiocese of Los Angeles in Los Angeles, California, February 1, 2013. REUTERS/David McNew/File Photo

[1/2]People hold quilts at a press conference outside of Cathedral of Our Lady of the Angels for victims of sexual abuse by priests in the Catholic Archdiocese of Los Angeles in Los Angeles, California, February 1, 2013. REUTERS/David McNew/File Photo Rights 

NEW YORK, Oct 16 (Reuters) - The Roman Catholic Archdiocese of Los Angeles has agreed to pay \$880 million to 1,353 people who alleged that they were sexually abused as children by Catholic priests, in the largest settlement by a U.S. diocese over decades-old abuse claims.

Archbishop Jose H. Gomez expressed sorrow for the abuse in announcing the settlement on Wednesday.

"I am sorry for every one of these incidents, from the bottom of my heart," Gomez said in a statement. "My hope is that this settlement will provide some measure of healing for what these men and women have suffered."

The Archdiocese began mediating the abuse claims after California enacted a law that allowed new lawsuits to be based on past instances of sexual abuse involving minors.

The California law and similar laws in other states have driven many large Catholic organizations to seek bankruptcy protection around the U.S. In California, the Archdiocese of San Francisco and the dioceses of Oakland and San Diego have filed for bankruptcy to resolve similar abuse claims.

The Los Angeles Archdiocese reached its settlement without filing for bankruptcy. Gomez said the Archdiocese would be able to pay victims from cash reserves, investments, loans and contributions from other religious organizations that had been named in lawsuits. The payments will not impact the Archdiocese's mission of "serving the poor and vulnerable in our communities," Gomez said.

Attorneys for the Archdiocese and the Plaintiffs' Liaison Counsel representing abuse claimants issued a joint statement on Wednesday thanking survivors for coming forward with their stories and ensuring that similar abuse will not occur in the future.

"While there is no amount of money that can replace what was taken from these 1,353 brave individuals who have suffered in silence for decades, there is justice in accountability," the Plaintiffs' Liaison Counsel said in a joint statement.

Reporting by Dietrich Knauth; Editing by Leslie Adler

Ozempic Plaintiffs Push for Marketing Discovery After MDL Judge Imposes Limits

 [law.com/thelegalintelligencer/2024/10/16/ozempic-plaintiffs-push-for-marketing-discovery-after-mdl-judge-imposes-limits](https://www.law.com/thelegalintelligencer/2024/10/16/ozempic-plaintiffs-push-for-marketing-discovery-after-mdl-judge-imposes-limits)

Aleeza Furman

What You Need to Know

- Parties in the Ozempic MDL are fighting over whether certain marketing discovery should be permitted in the early stages of the litigation.
- The plaintiffs argue that certain marketing evidence is necessary to address key legal issues.
- A ruling on the dispute is expected soon.

Plaintiffs in the Ozempic multidistrict litigation are pushing back against limitations the court placed on discovery into the defendants' marketing campaigns.

In response to an order cautioning the parties against early discovery into the defendants' marketing, the plaintiffs argued that some degree of marketing discovery is necessary to address key legal issues that stand to shape the course of the litigation.

Defendants Eli Lilly and Novo Nordisk, meanwhile, contend that marketing evidence is not relevant to the matters the court has prioritized for early resolution.

"Permitting marketing discovery at this stage would undercut the efficiencies gained by first handling early discovery and motion practice on cross-cutting issues," the defendants asserted in a joint response to the plaintiffs' motion.

U.S. District Judge Karen Marston of the Eastern District of Pennsylvania had entered a case management order in August granting the defendants' request for early discovery and motions practice on two issues that apply broadly to cases across the MDL. The first issue was how to reliably diagnose gastroparesis—the injury central to most of the individual plaintiffs' claims. The second was whether the plaintiffs' failure-to-warn claims are preempted by federal law and/or whether the warnings in the defendants' products labeling were adequate.

Marston specified that the parties' early discovery related to the second issue should not delve into the defendants' marketing campaigns. "Such issues are best left until after the court rules on whether, as a matter of law, any plaintiff may assert a claim for failure to warn based in whole or in part on a manufacturer's direct-to-consumer marketing," she ruled in a footnote.

But the plaintiffs asserted in a September motion that certain forms of marketing discovery beyond direct-to-consumer advertising would be important to the analyses on preemption and the adequacy of the defendants' warnings. They argued that the plaintiffs should be permitted to seek out marketing materials related to the companies' promotion of the drugs to the medical community.

"These are not case-specific issues," the plaintiffs contended. "The marketing was national in scale and magnitude, and everything that occurred with regard to these drugs over the last several years is in some way tethered to the marketing."

The plaintiffs asked the court to either clarify that the case management order was not intended to broadly bar marketing discovery or lift any intentional prohibition on marketing discovery.

The defendants disputed the relevance of marketing discovery to the preemption and warning adequacy issues, accusing the plaintiffs of seeking "broad-ranging and burdensome marketing discovery to pursue litigation angles peripheral to these core, cross-cutting issues."

A ruling on the issue is expected soon.

More than 1,000 cases have been filed so far in the MDL, where plaintiffs claim pharmaceutical manufacturers Novo Nordisk and Eli Lilly failed to warn that Ozempic and other drugs such as Mounjaro and Wegovy, which are prescribed for diabetes but most commonly used for weight loss, could cause stomach paralysis.

Lead plaintiffs counsel—Paul Pennock, of Morgan & Morgan in New York; Parvin Aminolroaya, of Seeger Weiss in Ridgefield Park, New Jersey; Jonathan Orent of Motley Rice of Providence, Rhode Island; and Sarah Ruane of Wagstaff & Cartmell in Kansas City, Missouri—declined to comment.

Eli Lilly did not respond to a request for comment.

A spokesperson for Novo Nordisk said in a statement, "The known risks and benefits of semaglutide and liraglutide medicines are described in their FDA-approved product labeling. Novo Nordisk stands behind the safety and efficacy of all of our GLP-1 medicines when they are used as indicated and when they are taken under the care of a licensed health care professional."

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LA judge sets aside part of landmark silicosis verdict

DJ [dailyjournal.com/articles/381448-la-judge-sets-aside-part-of-landmark-silicosis-verdict](https://www.dailyjournal.com/articles/381448-la-judge-sets-aside-part-of-landmark-silicosis-verdict)

A Los Angeles judge ruled in favor of an engineered stone company that a jury had previously found partially liable for causing silicosis in a stone fabrication worker. Judge William Fahey found that the plaintiff presented insufficient evidence at trial to hold defendant Color Marble Inc. responsible for the illness.

"In sum, the court concludes that plaintiff failed to introduce substantial evidence as to all the essentials required in this case," Fahey wrote in his Oct. 9 ruling.

James P. Nevin Jr. of Brayton Purcell LLP in Novato, who represents the plaintiff, criticized the ruling as a "grave injustice" in an email on Wednesday.

"A jury's decision as to Color Marble after a long trial has been taken away from them and from our client," Nevin said. "We believe in the American justice system, and we intend on appealing."

Color Marble is represented by Rey S. Yang and Johanna L. Boktor of Yang Professional Law Corp. in Pasadena. Boktor declined to comment on behalf of the team in a phone call on Wednesday.

The order partially reverses a \$52 million jury verdict in August finding Color Marble liable along with co-defendants Caesarstone USA and Cambria. The verdict assigned 15% of the responsibility to Caesarstone, 10% to Cambria and 2.5% to Color Marble. A further 70% was assigned to other parties including the plaintiff's employers, with 2.5% assigned to the plaintiff himself.

Plaintiff Gustavo Reyes Gonzalez, a 34-year-old immigrant from Mexico, had accused the artificial stone slab manufacturers of being liable for his fatal accelerated silicosis, a lung disease caused by inhaling tiny particles of silica in dust and linked to working with these products. Reyes Gonzalez worked in stone fabrication shops for 15 years until at 33 he developed the condition and received a lung transplant. He will likely require further lung transplants in the future, his lawsuit stated. *Reyes-Gonzalez v. Aaroha Radiant Marble & Granite Slabs, a California corporation et al.*, 22STCV31907 (L.A. Super. Ct., filed Sept. 29, 2022).

Following the jury verdict, Color Marble moved for judgment notwithstanding on grounds that the verdict was inconsistent and that no substantial evidence connecting the company to Gonzalez's illness had been presented at trial.

"Plaintiff presented no evidence of the relevant standard of care," read the motion. "Plaintiff presented no evidence that any act or omission by Color Marble fell below some unknown and undefined standard of care relating to a retail store that sells non-defective products with non-defective warnings. Moreover, at trial, there were no documents introduced against Color Marble."

In opposition, the plaintiff claimed that the record contained "ample evidence" to indicate the company's liability, pointing to a declaration document by Nevin.

"Indeed, it was undisputed by all defendants that plaintiff had silicosis and that his silicosis was caused by inhaling crystalline silica in the course of his work," the opposition read. "Since Color Marble entirely failed to provide any warnings or use or cutting instructions when it sold its products, the jury was certainly entitled to find that it acted negligently, i.e., that it failed to exercise reasonable care in the sale of its stone products, and that the company's negligence was a cause of Plaintiff's silicosis."

However, Fahey said in his ruling that in citing Nevin's declaration, the plaintiff was "apparently suggesting that the court should do plaintiff's analysis."

"However, trial courts should not have to 'sift through bales of irrelevant information in an attempt to glean a kernel of substance,'" Fahey continued, quoting from *580 Folsom Assoc. v. Prometheus Development Co.*, 223 Cal. App. 3d 1, 26 (1990).

He then added an additional quote from *United States v. Dunkel*, 927 F.2d 955, 956 (1991): "Judges are not like pigs, hunting for truffles buried in briefs."

Furthermore, the ruling said, the plaintiff's opposition invited "rank speculation" as to how the jury might have applied jury instructions to what he called the "exceedingly minimal" evidence against Color Marble.

"This court declines the invitation to speculate. Instead the court concludes that because the jury found that Color Marble was not strictly liable for distributing and failing to warn about an allegedly defective product, it is 'hopelessly inconsistent' to find Color Marble liable for negligence based on those same theories," Fahey wrote, quoting from *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 14 Cal. 4th 814, 819 (1997).

Nevin confirmed on Wednesday that further post-trial motions as to Cambria and Caesarstone are pending.

#381448

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Oct. 16, 2024, 8:59 AM PDT; Updated: Oct. 16, 2024, 12:50 PM PDT

Fidelity Sued for Hack Exposing 77,000 Clients' Finance Data (1)

By Cassandra Coyer

Documents

 [Complaint](#) [Docket](#)**COURT:** D. Mass.**TRACK DOCKET:** No. [1:24-cv-12625](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-10-17T10:23:12211093906-04:00

Fidelity Sued for Hack Exposing 77,000 Clients' Finance Data (1)

By Cassandra Coyer 2024-10-16T11:59:27000-04:00

Fidelity Investments' failure to adequately secure its computer systems led to an August data breach exposing the sensitive personal and financial data of more than 75,000 clients, a proposed class action said.

The company, also known as Fidelity Management & Research, didn't follow standard cybersecurity practices, such as encrypting client information and providing sufficient employee training, according to a complaint filed Tuesday in the US District Court for the District of Massachusetts.

Massachusetts-based Fidelity is "one of the world's largest asset managers," the complaint said, "with over \$5.4 trillion in assets under management as of June 2024."

Cybercriminals accessed the asset manager's computer network between Aug. 17 and 19, gaining access to names, Social Security numbers, financial account information, and driver's license information, according to the complaint.

The hack affected 77,099 people, according to an Oct. 9 data breach notification to the Maine attorney general.

Plaintiff Peggie Little, a Tennessee resident, also accused Fidelity of not providing timely notice of the breach to customers. The complaint said the firm didn't disclose it "for several weeks" after it occurred.

The proposed class action alleged negligence, breach of implied contract, and unjust enrichment. It seeks reimbursement of litigation costs and monetary relief.

The suit's demands also include asking the court to require Fidelity to segment customer data, stop transmitting personal data via unencrypted emails, hire third-party auditors, and employ internal security personnel to conduct testing.

Representatives for Fidelity didn't immediately respond to a request for comment.

Siri & Glimstad LLP and Murphy Law Firm represent the plaintiff.

The case is Little v. FIDELITY INVESTMENTS a/k/a FMR LLC , D. Mass., No. 1:24-cv-12625, complaint filed 10/15/24 .

(Updated to tweak headline and adds reference to data breach notification in fifth paragraph.)

To contact the reporter on this story: Cassandre Coyer in Washington at ccoyer@bloombergindustry.com

To contact the editor responsible for this story: Tonia Moore at tmoore@bloombergindustry.com

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Oct. 17, 2024, 2:30 AM PDT

Lawyers' \$2,000 Hourly Rates Crimp Big Law's Appetite for Risk

By Roy Strom

Bloomberg Law News 2024-10-17T10:27:25035059422-04:00

Lawyers' \$2,000 Hourly Rates Crimp Big Law's Appetite for Risk

By Roy Strom 2024-10-17T05:30:02000-04:00

Welcome back to the Big Law Business column . I'm Roy Strom, and today we look at why large firms are reluctant to take on contingency fee cases. Sign up to receive this column in your Inbox on Thursday mornings.

Big Law litigators have a great business model. They bill by the hour, and they collect fees whether their clients win or lose.

A possible downside is that their returns are capped by the number of hours they can work.

To boost their returns, and to keep pace with the surging profitability of major corporate practices, a handful of large firms have delved deeper into contingency fee cases. Kirkland & Ellis is one prominent example. The firm has taken on more plaintiff-side work since announcing its entrance into that business five years ago.

By representing plaintiffs and getting a potential reward for winning the case, Big Law firms can juice their litigation revenue. But taking risk is not Big Law's strong suit.

On that front, firms looking to enter the plaintiff-side practice could take some cues from their more risk-tolerant counterparts at smaller trial firms such as Susman Godfrey.

Earlier this week, I wrote a story about a tough room: the Wednesday meeting where Susman Godfrey partners pitch colleagues on cases they believe are worth the firm's time and money. The meeting is where the collective wisdom of about 150 lawyers decides.

That meeting is a luxury that Big Law litigation shops just don't have. Getting hundreds, or in some cases a thousand, lawyers together to talk about a single case just isn't a good use of their time—especially when many of them could be billing \$2,000 an hour.

That's a big opportunity cost. A thousand litigators sitting in a room for just one hour could cost a law firm \$1 million in lost work, assuming the average hourly rate for those lawyers was a mere \$1,000.

Now, think about the potential lost revenue for a firm that spends two or three years working on a contingency fee case that loses. It's massive. The firm is not just out the millions of dollars they could have won. They're out the millions in fees they could have billed to an hourly client.

"That's tangible for them," said Kalpana Srinivasan, managing partner at Susman. "For us, it's more about what are the other matters we could have pursued? Because we're not thinking about hourly time as our baseline to begin with. It's just a little bit of a different mentality."

To solve for that opportunity cost, larger firms have often turned to litigation funders. Funders can pay some of the law firm's fees upfront or on an hourly basis, taking some of the risk off the table. Returns for funders can take a chunk of the award away from clients.

"They're trying to figure out how to offer those contingency fees," said William Farrell, a cofounder of litigation funder Longford Capital, which has worked with Susman.

"One way is to look at their smaller competitors like Susman and learn to offer contingencies," he said. "Another way to do it is to lean on funders like Longford to help them effectively offer contingencies without having to shoulder the full risk."

Even as they add contingency cases, most of the largest firms have not gotten more comfortable with the risks involved, Farrell said. Many large firms have something like 5% of their work-in-progress, known as WIP, dedicated to true contingency fee matters, he said. Some firms have tried to reduce that figure even lower by laying some of the risk on funders.

"Have those firms been trending towards more risk tolerance? The answer is no," Farrell said. "Part of the reason is because of litigation funding."

Another challenge is compensation.

Plugging a risk-based contingency fee practice into a mainly hourly firm is a tricky task. Most Big Law partners are used to receiving fairly stable, and growing, compensation every year. Contingency fee cases generate revenue in lumps, and partners would have to be comfortable with leaner years.

"Maybe it's partnership dynamics or political dynamics that make that impossible," said Charles Agee, chief executive officer at litigation finance advisory firm Westfleet Advisors. "Because I don't know of firms that are doing that."

Firms also must believe in their ability to pick winners. And that's a muscle they haven't flexed as often as risk-taking firms like Susman or litigation funders. If you're going to bet on yourself, you have to pick winners.

"I'd bet any amount of money that Susman has a better track record at picking successful cases than any litigation funder," Agee said.

Worth Your Time

On Litigation Funding: Emily Siegel reports on the litigation funding business at Fortress Investment Group, taking an inside look at the firm that's battled to the top of the industry.

On Attorney's Fees: A federal judge cut in half Quinn Emanuel's massive fee for work on a lawsuit by health insurers, reducing the firm's take to \$92.4 million. The previous award, roughly \$185 million, had amounted to 5% of the billions in damages the firm won for its clients.

On Firm Partnerships: Cleary Gottlieb will start naming non-equity partners, following rivals that use the classification to retain top associate talent. The firm says the move will help retain lawyers.

That's it for this week! Thanks for reading and please send me your thoughts, critiques, and tips.

To contact the reporter on this story: Roy Strom in Chicago at rstrom@bloomberglaw.com

To contact the editors responsible for this story: Alessandra Rafferty at arafferty@bloombergindustry.com
John Hughes at jhughes@bloombergindustry.com;

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Oct. 16, 2024, 11:50 AM PDT

Matt Levine's Money Stuff: Activist Investors Are Podcasters Now

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Activist Investors Are Podcasters Now

By Matt Levine 2024-10-16T14:50:20992-04:00

Everybody has a podcast

One thing that I have learned, as the writer of a financial newsletter, is that people like podcasts. “You should have a podcast,” people kept telling me, so now I do. I personally prefer to get my information by reading, but different people have different preferences, and in recent years podcasts have been pretty hot.

I am in the media business, but a lot of people are in media-adjacent businesses. Activist investing, for instance, is among other things an indirect way to monetize media: You develop some thesis about a company, you buy some of the company's stock, you launch a proxy fight to get your nominees on the company's board so they can carry out your thesis, and you go out and *persuade* the other shareholders that your thesis is correct. If it works, the other shareholders vote for your candidates, you take over the board, you carry out your thesis, and if it's right the stock goes up and you make money on your position.

There are a lot of steps here — you need to do good fundamental analysis, pick good board members, etc. — but one of them is that you need to take your arguments to other shareholders in ways that they find persuasive and that get their attention. In the olden days, that meant writing proxy statements to mail to the shareholders making your case in great detail. In modern times, you still have to do that — the proxy statements are the main regulated part of the proxy fight — but you also have to do other, more media-savvy, more audience-friendly stuff. You need a snazzy webpage. You need a presentation to give to the proxy advisers. You need social media and memes and zingers; you need to fight for attention in a crowded media landscape.

And now you need a podcast. Axios reports:

Elliott Management, known for the range of tactics it has deployed on its targets, has just added one more weapon to its arsenal: a podcast.

Why it matters: Elliott's new podcast is aimed straight at Southwest Airlines, and it shows how far the activist is willing to go when it comes to pushing its slate of director candidates. ...

On Tuesday, Elliott went a step further, saying it launched "Stronger Southwest," a new podcast series that will feature conversations with the hedge fund's director nominees.

Episodes are available on StrongerSouthwest.com, Apple, Spotify, YouTube and other platforms.

The first episode features Elliott's nominee Gregg Saretsky, the former CEO of Westjet.

Elliott's podcast strategy marks the first time an activist has used the medium in this fashion.

It's even a video podcast; here it is on YouTube. There are no ads for mattresses or Squarespace, because the monetization model here is different.

I am not going to listen to a whole episode, even at 1.25x speed, but skimming it it seems like a fairly low-key discussion of Saretsky's background, his time in the aviation industry and his interest in Southwest. The host is an Elliott employee who works in their engagement and stewardship function, and it is all very calm and professional, not nearly as spicy as a lot of activist materials. A CEO targeted by Elliott once told a reporter that "when he began to research Elliott online, the experience was like 'Googling this thing on your arm and it says, "You're going to die."'" This podcast does not send the message "You're going to die."

But it's the first one. In five years there will be activist podcasts hosted by comedians where the director nominees come on and roast current management. "These *****ing *****s are destroying the company," the nominee will say, "wait am I allowed to say that," and the host will reply "of course you're allowed to say that!" And the SEC enforcement lawyer listening to the podcast will cringe a little.

Maybe next they'll do an email newsletter.

Also: Activist short selling is a bit different from activist long investing, in part because you can monetize your media operation more directly. You don't have to run a proxy fight and get your candidates elected and have your thesis work out: You can short the stock, publish a report, persuade the market that the company is bad, watch the stock go down and then buy back the stock at a profit. You can do this all in the space of a day or two, without waiting to see how your thesis works out, though if you do that you might get in trouble. Plus you are probably even ruder about management than long activists are: Elliott's thesis is something like "Southwest is a good company but needs change," while an activist short seller's thesis is often "this company is a fraud *and* management is incompetent." I feel like there's a future in activist short podcasting.

Leveraged Bitcoin Gold ETF

One way to think about the exchange-traded fund industry is that it is in the business of manufacturing fun bets for retail traders. You *can*, if you want, treat your online brokerage account as a fun gambling site, and some people clearly do, and there is money to be made in catering to them. The way you cater to them is by designing fun bets: They will bet more if there are more fun bets, and if you design those bets you get some of the money. What makes a bet fun? I mean:

1. It is about some event you know and care about. Most Americans would rather bet on their hometown football team, or the presidential election, than on a second-division team handball match in Hungary. Fun stock-market bets will be about companies or themes that people know and love and have opinions about, “Tesla” or “AI” or “crypto” or whatever.

- 2. It has a high potential payoff. Sportsbooks advertise complicated parlays that can (with low probability) make you a lot of money, because people like making a lot of money. Fun stock-market bets will have leverage, so you can put in a little money and have a chance to make a lot of money (or lose all of it) quickly. You are not looking to steadily compound at 10% per year; you’re here to gamble.

So we talked last month about triple levered ETFs, where the pitch is basically “you put in \$100 and you get the payoff of owning \$300 worth of Nvidia Corp. stock.” Perfect: You probably have an opinion about Nvidia, Nvidia is volatile, and you get triple leverage, so you could make a lot of money.

If you like levered Nvidia, can I interest you in levered Bitcoin? Bitcoin is also a volatile asset that people have strong opinions about, so you can buy a 2x levered Bitcoin ETF to get some extra-juiced Bitcoin exposure. Or, gold, same thing, people love gold so you can get a double gold ETF.

You can go further in making this fun though. Here’s a press release for a 2x levered ETF that puts half its money in Bitcoin and half in gold:

Through the combination of a digital currency (bitcoin) and a physical currency (gold) in a single vehicle – the STKD Bitcoin & Gold ETF (BTGD), launching today – investors now have the opportunity to invest in two scarcity assets that may protect against future inflation and currency debasement.

BTGD is unique in that for every \$1 invested the Fund seeks to provide 100% of exposure to its bitcoin strategy and 100% of exposure to its gold strategy. The bitcoin strategy seeks to capture the price return of bitcoin, investing in bitcoin futures and ETPs, while the gold strategy similarly seeks to capture the price return of gold via investments in gold futures and gold ETPs.

You put in \$100 and you get the payoff of owning \$100 of gold *and* \$100 of Bitcoin. You use the leverage, not to double your bet, but to make two *different* bets. I have no idea if this is a good or a bad idea, but it is clearly a *fun* idea. Obviously you could construct it yourself: Just put \$50 into a 2x Bitcoin ETF and \$50 into a 2x gold ETF, and you’ve more or less replicated this bet. But they thought of it and you didn’t. Eventually someone is going to build an ETF that is like “you put in \$100 and you get the payoff of owning \$100 of Dogecoin plus betting \$100 on the Jets this weekend.”

Private credit is the new public credit

I wish that private credit had a different name. Like, there are three main categories of debt financing: bank loans, bonds, and bleebzorks. If you are a company or a private equity sponsor looking to borrow money, your investment banker will come to you with a pitchbook covering the advantages and disadvantages of each; the first page will be "Overview: Loans, Bonds and Bleebzorks." Or I could say "loans, bonds and bleebzorks all trade over the counter intermediated by dealers who are mostly banks, though the market structures and investors are slightly different." Or I'd be like "after the success of bond and loan funds, a lot of exchange-traded-fund issuers are launching bleebzork ETFs." And everyone would be like right, yes, of course, the third kind of credit ought to be broadly comparable to the other two kinds of credit.

But instead bleebzorks are called "private credit," which makes you think that (1) bonds and loans are "public" and (2) there is some essential distinction between "public" and "private." In equity markets, there's some obvious meaning to that distinction — retail investors can buy public stocks, while private equity is more exclusive — but in credit markets it is fuzzier. Bonds and bank loans aren't all *that* public; it's not like retail investors can buy bank loans, or even many bonds, through their brokerage app. Private credit is a bit more private than the other sorts of credit — it often is not broadly syndicated at origination, it doesn't trade as much, it is less standardized — but it's not a sharp difference.

Anyway:

Apollo Global Management Inc. Chief Executive Officer Marc Rowan is seeing the public and private markets converging with the latter attracting more competition for trading on Wall Street. ...

Demand for private credit will come as firms launch more paths to liquidity and allow investors to trade in and out of deals.

Last month, Apollo and State Street Corp. filed documents to launch an exchange-traded fund, a portion of which will be dedicated to private credit. As part of that proposal, Apollo has agreed to provide bids on investments that it sources. The firm has also outlined plans to build out a trading desk for investment-grade private credit loans.

"We will attract lots of competition," Rowan said during the event. "Once that happens, what's the difference between public and private?"

Elsewhere in private credit, here's a speech by US Securities and Exchange Commission commissioner Hester Peirce saying that private credit is fine and doesn't really need to be regulated:

Fundamentally, moving the risks associated with credit off bank balance sheets with their government backstop and into the capital markets, where fund investors' equity is the backstop, enhances systemic resilience.

Lock-ups and other restrictions on private investor redemptions mitigate run risk. Private credit funds typically match the duration of their assets and liabilities by drawing capital from long-term investors. Most private credit funds are closed-end funds with terms of approximately five years. Investors face withdrawal restrictions, which create a stable capital base. ...

Banks not only compete with, but support and benefit from the private credit market. Banks lend money to private credit funds, transfer risk from their balance sheets to private credit funds, and set up joint private credit ventures. Private credit funds generally operate with less leverage than banks, which protects them and the broader financial system. As the relationships between private credit funds and banks evolve, we should watch for hidden leverage, regulatory arbitrage, and hidden interconnections with banks, but the heterogeneity of those arrangements protects against a system-wide problem. In general, we should welcome the movement of risk from bank balance sheets to private credit funds.

Capital-light

Also elsewhere in the movement of risk from bank balance sheets to private credit funds:

Banco Santander SA wants to offload more risk to private investors as it seeks to free up capital.

The bank is looking to speed up transactions that transfer risk to investors such as private credit firms, Santander's global head of capital and profitability management, Sergio Gámez, said in a presentation to analysts earlier this month.

Such transfers could take the form of asset sales, guarantees or securitizations, according to the presentation, which was seen by Bloomberg News. ...

Lenders globally are increasingly seeking to share risk in their loan books as regulations make it costly to keep it, while buy-side firms that aren't subject to those rules are looking for opportunities to invest. Santander is at the forefront of this shift. It's one of the most active banks in the market for synthetic risk transfers, and a staple in the structured markets, which repackage debt into securities of varying risk and size. ...

Gámez leads Santander's global asset desk, which focuses on ways to shed risk tied to loans and reinvest the freed-up capital more profitably. The goal is to increase the turnover of assets on the bank's balance sheet and shift to a business model that makes more money from fees and consumes less capital, according to the presentation.

"Around one third of the bank's balance sheet can be rotated every year," JPMorgan Chase & Co. analyst Sofie Peterzens wrote in a note earlier this month. If "managed effectively through securitizations and other capital rotations tools, this can release up to 15 basis points CET 1 per quarter."

Increasingly the model of bank lending is that banks *make* the loans, but they don't *keep* the loans. Banks used to combine the functions of:

1. Customer acquisition, customer service, relationships, having branches and loan officers, etc., so they could make loans, plus
- 2. Having *money*, so they could fund the loans.

It is hard to replicate the first set of things from scratch: If you want to compete with Santander in lending, you need to hire a lot of bankers to go out and call on Santander's clients. On the other hand, there's a lot of money around, and a lot of it is — as Peirce says — in long-term, locked-up, lightly regulated private credit funds that are natural owners of long-term credit risk. Whereas banks get a lot of their money from short-term deposits, and are heavily regulated to make sure those deposits are safe. Why shouldn't they rotate their balance sheets constantly?

Elsewhere here's a story about how "Klarna is offloading most of its UK 'buy now, pay later' portfolio to US hedge fund Elliott for undisclosed terms, in a deal that will free up as much as £30bn for new loans." Klarna "has been licensed as a bank in Sweden since 2017," and is subject to bank regulation, but it is not, you know, Santander. It is not really surprising that a BNPL fintech startup would be in the business of making loans and turning around to sell the risk to big investors: Why would Klarna have the biggest or cheapest balance sheet to make loans? But big traditional banks are increasingly in the same business.

Block trades

One thing that sometimes happens is that a private equity firm that owns a big stake in a public company will go to some investment banks and say "I'd like to sell this stake, can you quote me a price? I'll call you back in four hours, be ready." This is called a "block trade." The banks will naturally be tempted to spend those four hours calling customers — hedge funds and other investors who might buy the shares — to ask how much stock *they* would like to buy, and at what price: If a bank can pre-sell the shares before buying them, it has less risk and can quote a price more confidently. But if the banks do that, then the customers will all know that a big block of stock is coming. So the customers will go ahead and sell the stock *before* the block trade, which will drive down the price, which will result in the private equity firm getting a lower price on its block trade.

The private equity firm doesn't want this, so it will normally swear the banks to secrecy: "I'll call you in four hours to get the price, but don't tell anyone about the trade before then." And the banks will be tempted to walk right up to the line: They'll call customers and say "hypothetically if I were to bring you a block for a large-cap company in the Indian widgets market, what kind of discount would you want?" And practices evolve, so that these days private equity firms will say things like "prior to the purchaser being selected, please do not engage in any discussion with potential investors or purchasers, even hypothetical ones, including discussions in which several names are mentioned in order to solicit general interest." Just, really, don't leak the block trade!

And then sometimes a bank will leak the block trade anyway, which will get it in trouble with US regulators. Earlier this year Morgan Stanley paid \$249 million of fines for leaking block trades. Bad, don't do that.

But you might expect the bank to suffer another punishment for doing this. The customers who did the block trades — the private equity firms who swore the banks to secrecy — will be pretty annoyed. The bank betrayed them, ignored their explicit instructions, and cost them money. These customers are often repeat players: not random individuals selling one block of stock once, but big private equity firms that do these trades regularly. You might expect a bank that leaks block trades to be put in the “penalty box,” where the private equity firm won’t do trades with it for a while as punishment.

Or you might not. My usual assumption is (1) memories in financial markets are very short and (2) every customer sort of assumes that every bank is up to no good, so avoiding one bank because you caught it leaking block trades will just lead you to deal with other banks that you haven’t caught yet.

But here’s a Wall Street Journal story from last week about the block-trade penalty box:

Allegations that Bank of America employees in India shared nonpublic information with investors ahead of stock sales are costing the bank business.

Private-equity firm EQT pulled the bank from a mandate for an upcoming initial public offering of a student-loan company, according to people familiar with the matter. A Norwegian conglomerate planning to take an Indian subsidiary public also has concerns about working with the bank because of the allegations, some of the people said.

The Wall Street Journal reported in September that Bank of America was investigating whether bankers in Asia shared nonpublic information with investors ahead of stock sales. The probe was launched after a whistleblower complaint alleged bankers had done so before a stock sale in India this spring.

From first principles you might think that getting a bad reputation with clients would be *worse*, for a bank, than annoying regulators. Sometimes that might even be true.

Cell phones

I used to get a lot of reader email proposing weird insider trading hypotheticals. I guess I still do. But now my most reliable funny reader-email hypotheticals are about the US Securities and Exchange Commission’s crackdown on financial-industry employees talking about work on “unofficial channels” like WhatsApp or texts from their personal phones. Here’s a good one:

On LinkedIn, I saw that an old coworker reached 17 years at his job. I texted him to say, “happy 17 years!”, to which he responded, “please don’t text my personal device regarding work”, obviously fearful of the SEC fines. He’s probably right, but it got me thinking, if I had replied on LinkedIn instead, wouldn’t that also be a covered communication in the SEC’s eyes? What if I react to the message with a thumbs up emoji? I guess that’s probably crime. Anyway, I thought you might appreciate this.

I did! I *suspect* that congratulating someone on a work anniversary is not the sort of “communication about business matters” that has to be kept to official channels, though it is not unambiguous. (What if a client, or potential client, had sent that text? Could the guy then reply “thanks, great to hear from you?” When does it cross from small talk to client relationship management?)

And, somewhat bizarrely, it seems like LinkedIn is not the sort of official channel that you're allowed to use to talk about work; the SEC has previously fined a bank because its employees sent each other LinkedIn messages. So, yes, if you work in finance, clicking a thumbs-up emoji on a potential client's work anniversary post is ... boy is this not legal advice, but maybe check with compliance before you do that? The law is so weird.

Things happen

Morgan Stanley Joins Wall Street's Trading, Banking Windfall. ASML's Plunge Shows the Diverging Fortunes of Chipmakers From AI. Secondary sales of private equity stakes set for record levels amid cash crunch. China's Wild Stock Market Swings Hurt a \$21 Trillion Bull Case. New U.S. Merger Rules Would Weigh Heavily on Private Equity. Why Wall Street Is Warming to the Tokenization of Assets. Neuralink's Top Surgeon Is the Even-Handed Counterbalance to Musk. Tech Utopian Project Praxis Gets \$525 Million in Commitments for Planned 'Heroic' City. The Guru Who Says He Can Get Your 11-Year-Old Into Harvard.

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To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

- 1. Also for technical reasons having to do with how the leverage is structured, you're really supposed to reconsider this bet every day — not just buy and hold it for the long term — which is an obvious plus from the perspective of the people selling you the bet.
- 2. Or maybe you did, but the point is to stimulate trading by people who didn't.
- 3. I am not absolutely convinced that this is true, by the way, and it's possible that the customer pre-hedging just gets the price to the correct market-clearing level for the block trade, but everyone seems pretty convinced that it's bad for the block price.

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Oct. 16, 2024, 9:00 PM PDT

Bankers Dodging Blame Is a Neverending Story: Paul J. Davies

By Paul J. Davies

Opinion

Bloomberg Law News 2024-10-17T10:24:29767180625-04:00

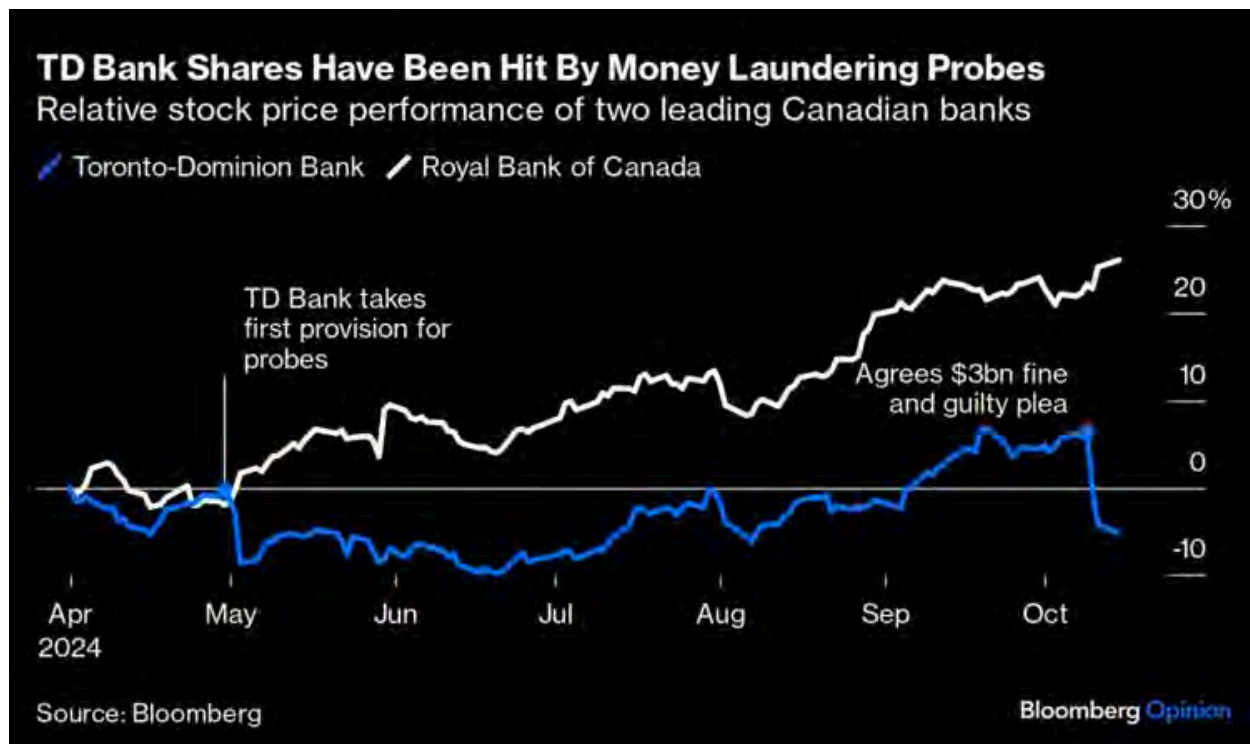
Bankers Dodging Blame Is a Neverending Story: Paul J. Davies

By Paul J. Davies 2024-10-17T00:00:20580-04:00

There's one lesson for any bank executive looking at the record money laundering penalties handed to Toronto-Dominion Bank last week: Whatever happens in their business, they're never going to jail.

The Canadian bank was hit with fines totaling \$3.1 billion and pled guilty as an institution for enabling egregious and long-lasting money laundering, much of it linked to the criminal trade in Fentanyl, the drug ravaging parts of the US.

Its shareholders are paying the price; its executives and management, not so much. The fines have cut its expected net income in 2024 by about one-third, based on forecasts collected by Bloomberg. The sanctions include an asset cap in the US that stops it from growing there. And last year it had to ditch plans to acquire US bank First Horizon Corp. due to the criminal and regulatory investigations.



Bharat Masrani, TD's chief executive officer, had his pay docked for 2023, in relation to "US regulatory issues" and the scrapped takeover. But he lost just C\$1 million (\$726,000) and still got total compensation of C\$13.3 million, which means a 7% cut. Masrani may see his remuneration reduced again for this year, and he's retiring in April after more than a decade as CEO, but will remain as an adviser until next October.

Leo Salom, TD's head of banking in the US where the money laundering took place, had been seen as a leading succession candidate, but missed out to Raymond Chun, currently head of TD's Canadian retail bank. Salom also forfeited some pay last year for the same reasons as Masrani — losing \$201,000 out of a \$4.6 million package.

"This is on us. We own it. We should have done better," Masrani said on a call with investors last week. "We've taken full accountability," Salom added.

Really? Is that it? The Department of Justice may have secured a guilty plea from the bank itself for the criminal charges of failing to maintain adequate anti-money laundering procedures — but apparently no action, civil or criminal, is planned against the leaders who set its culture, incentives and practices.

"Banks don't commit crimes, bankers do," Dennis Kelleher, head of Better Markets, a campaign group for Wall Street reform, said to me. "If the DOJ is so toothless and timid that it is not going to take action against senior leaders here then when are they going to take it? Executives get lavish bonuses and full credit for everything that goes well with a bank and bear no responsibility for anything that goes wrong." This sends a message that executives will never be held personally accountable for criminal activity at their bank, he added.

Let me remind you of the rap sheet. TD “willfully failed” to build an adequate anti-money laundering program despite the bank and senior management being aware of significant deficiencies for a decade, according to the US Treasury Department’s Financial Crimes Enforcement Network. It took on high-risk customers without mitigation and, when suspicious activity was detected, failed to deal with it. An illicit money network involved in Fentanyl trafficking regularly deposited hundreds of thousands in dollars in cash over the counter at TD branches in New York. Employees joked and worried in internal messages about the blatant money laundering going on.

TD didn’t begin to address its known shortcomings until after law enforcement and regulators began their probes. It never self-reported its issues; instead, investigators were led to the bank by pursuing the drug smugglers. And, most importantly for the bank’s leadership, all this derived from the bank prioritizing no growth in expenses, which starved its compliance operations of resources to tackle potential money laundering.

“The Bank’s fervent emphasis on costs fostered an environment that discouraged addressing the material, substantive compliance issues that the Bank faced,” the FinCEN consent order states.

Most CEOs talk readily about the importance of setting the right incentives and culture. Some even have a practical grasp of what that means. But all should be ultimately responsible for bad culture and its damage. If managers won’t give executives bad news because they’ve learned, implicitly or explicitly, that it isn’t welcome, then the CEO is culpable.

Two employees have been charged in court cases linked to money laundering through TD Bank’s US business, and there could still be further prosecutions. The DOJ said its investigations are ongoing, although it declined to say whether TD staff were subjects. Meanwhile, FinCEN has ordered TD to conduct an independent accountability review to recommend whether more employees should be disciplined or if pay should be clawed back from former staff, and how the bank’s culture contributed to its failings.

None of this suggests top executives will face the music for the “systemic and pervasive” violations they ultimately oversaw, in FinCEN’s words. The leaders’ financial penalties are limited; they’re free to occupy positions of responsibility in finance. More than 15 years since banking bosses escaped serious consequences for a global financial crisis that almost collapsed the global economy, this episode sends another bad message that the safety and hygiene of the industry still aren’t the priority they ought to be.

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FT Alphaville US financial regulation

When dismantling the administrative state blows up in your face

Oh, Chevron, we hardly knew ye



Todd H. Baker 3 HOURS AGO



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Todd H Baker is a senior fellow at Richman Center for Business, Law and Public Policy at Columbia Business School and Columbia Law School.

On Wednesday, the [Bank Policy Institute](#) and [The Clearing House](#) moved to intervene in a case called *Corner Post vs. Board of Governors of the Federal Reserve System*.

If that sounds vaguely familiar, that's because this was the case through which the US Supreme Court significantly extended the timeframe in which courts can review federal agency regulations, allowing newly-minted entities the opportunity to re-litigate ostensibly "final" rules years after the rules are promulgated.

Along with the Supreme Court's decision in *Loper Bright Enterprises vs. Raimondo* — which eliminated the so-called "[Chevron deference](#)" to administrative agency statutory interpretations — *Corner Post* was heralded gleefully in business circles as the [end of the "administrative state"](#).

That's because the two cases made it far easier for a regulated entity to challenge any agency's action and made judges, rather than bureaucrats, the principal interpreters of law and congressional intent.

As the American Bankers Association president [said](#) at the time, (referring to *Loper Bright*):

“

[T]he ruling sends a crystal-clear message to federal agencies that their powers are not unlimited . . . This is an important win for accountability and predictability at a time when agencies are unleashing a tsunami of regulation — in many cases clearly exceeding their statutory authority while making it harder for banks to serve their customers.

However, apparently the big dogs of the US banking industry weren't paying enough attention to the leopards in their midst. The kind of leopards [that eat your face](#) even after you vote for them.

The oopsie here is that the *Corner Post* case involves a challenge to the Federal Reserve Board's 2011 rule implementing the so-called [Durbin amendment](#). The bigger banks hate this with the heat of a thousand suns because it cut debit card interchange fees by more than half and shifted the economics of bank consumer payments in favour of retailers.

The plaintiff in *Loper Bright* was a truck-stop conveniently established in 2018, after the six-year statute of limitations on rule challenges was thought to have expired. It claimed a continuing right to challenge the Fed's rule as too lenient to the banks under the statute, arguing for an even lower cap on bank debit card interchange than the Fed had provided. The Supreme Court agreed.

The BPI and TCH are in effect now saying they never thought the leopards would eat *their* faces. It appears that agency statutory interpretations are just fine when they go your way — it's only a problem when they don't.

In the [words](#) of Greg Baer, the BPI President and CEO:

“

Banks oppose the Durbin Amendment’s price fixing requirement as a matter of policy but stand with the Federal Reserve to defend the legality of its 2011 implementing regulation . . .

It’s clear now that the lobbyists and others who worked so hard to undermine the so-called “administrative state” didn’t worry enough about what the new judge-arbitrated, endlessly-challengeable rulemaking model would produce when agencies started issuing regulations that businesses actually liked. [Here’s the full motion to intervene.](#)

If only they had read the original *Chevron* case.

This involved a challenge by environmentalists to a Republican-appointed EPA administrator’s conservative and business-protective interpretation of air pollution law. The lower court had rejected the EPA’s interpretation and substituted a harsher standard.

Chevron appealed and won the case when the Supreme Court ruled that the lower court erred by substituting its judgment for the EPA’s because the agency’s statutory interpretation was “a reasonable policy choice for the agency to make.”

Maybe the leopards ate their copy.

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<https://www.wsj.com/health/healthcare/elevancehealth-elv-q3-earnings-report-2024-7dee94ae>

HEALTH | HEALTHCARE

Elevance Shares Dive After Insurer Faces 'Unprecedented' Medicaid Challenge

Company says rates it is paid under government program for low-income Americans fall short of what it needs

By [Anna Wilde Mathews](#) [Follow](#)

Updated Oct. 17, 2024 11:35 am ET



Elevance Health reported adjusted earnings well short of analysts' projections. PHOTO: MICHAEL CONROY/ASSOCIATED PRESS

Elevance Health **ELV -12.18%** ▼ earnings fell short of Wall Street projections in the latest sign of how medical expenses are squeezing insurers' government businesses, a result that punished shares across the sector.

Elevance's miss was largely caused by pressure in its Medicaid business, which Chief Executive Gail Boudreaux called an "unprecedented challenge" on Thursday. The company said the healthcare cost trend in Medicaid was running at three to five times the usual rate.

Elevance shares dropped roughly 13% in midday trading.

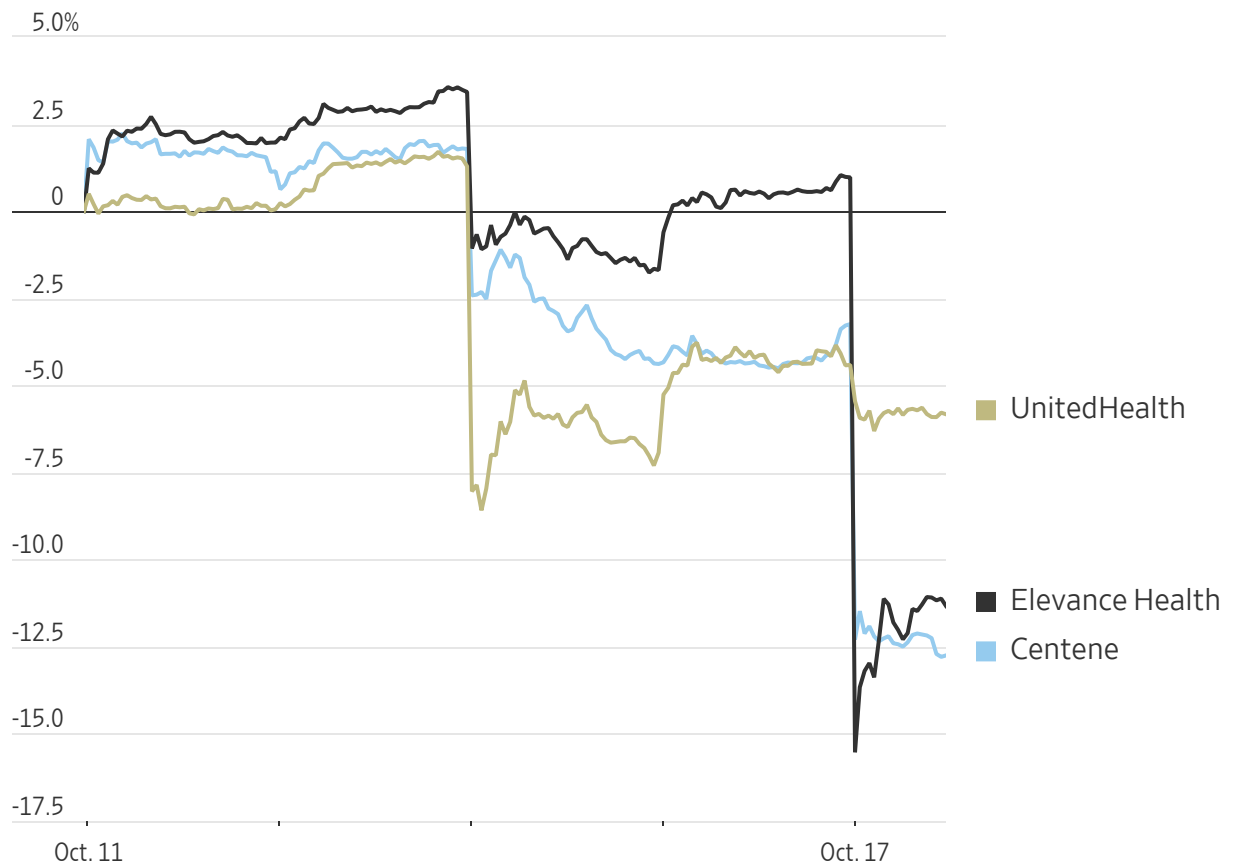
The company reported adjusted earnings of \$8.37 a share for the third quarter, well short of analysts' projection of \$9.66 a share, according to FactSet.

Elevance said the issues were expected to persist into next year, and it suggested its adjusted earnings for 2025 will grow in at least the mid-single-digit percentage range, substantially below the company's long-term target of 12% or more.

"We have not had an environment like this before in Medicaid," Boudreaux said during a call with analysts Thursday.

The company's results, which came after industry bellwether UnitedHealth also reported higher-than-expected medical expenses in its Medicare and Medicaid businesses, added to the drop-off in shares across the insurance industry. Centene, which has a large Medicaid business, saw a 9% decline. Shares of UnitedHealth and CVS were also down.

Share performance, past five sessions



As of Oct. 17, 12:40 p.m. ET

Source: FactSet

Elevance's earnings will bolster investors' alarm over rising healthcare costs, and they also underscore an issue that will continue to affect a sector that has been increasingly focused on managing government health programs. In addition to members accessing more costly medical care than expected, the industry's challenges in both Medicare and Medicaid stem from federal and state policies.

Like other insurers, Elevance is saying that the rates it is paid under the government program for low-income Americans fall short of what it needs, due to the medical costs of Medicaid enrollees. The mismatch is tied to a wave of enrollees being dropped from Medicaid after the government reintroduced eligibility checks, which it had suspended during the public-emergency period implemented amid the pandemic.

Elevance executives said the issues are "time bound," and it will negotiate higher Medicaid rates, but the process will take time. The company said that it expects the gap between its Medicaid payments and costs to narrow in 2025, and that it was confident in its Medicaid and Medicare businesses over the long term.

For the third quarter, the company's medical loss ratio, or the share of premiums spent on medical care, was 89.5%, when analysts had expected 87.5%. Elevance also lowered its adjusted earnings guidance for 2024, to \$33 a share from about \$37.20 a share.

Elevance reported net income of \$1.01 billion, or \$4.36 a share, declining from \$1.3 billion, or \$5.45 a share, a year earlier.

Revenue rose to \$45.11 billion from \$42.85 billion. Analysts polled by FactSet expected \$43.47 billion.

Write to Anna Wilde Mathews at Anna.Mathews@wsj.com

Videos

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<https://www.wsj.com/business/autos/musk-taps-longtime-aide-to-oversee-teslas-operations-in-north-america-europe-dec46a80>

EXCLUSIVE AUTOS

At Tesla, Musk Taps Close Confidant for Top Executive Role

The change comes as the automaker is under pressure to revive its sales momentum and improve profitability

By [Becky Peterson](#) [Follow](#)

Updated Oct. 16, 2024 10:18 pm ET



Tesla Chief Executive Elon Musk PHOTO: GONZALO FUENTES/REUTERS

Tesla TSLA **-0.69%** ▼ Chief Executive Elon Musk has tapped one of his closest confidants to oversee operations in North America and Europe, two markets where the company is facing stiffer competition in the electric-car space and cooling consumer demand.

Omead Afshar, who joined Tesla in 2017, is now a vice president in charge of sales and manufacturing with senior executives in those two regions reporting to him, according to people familiar with the changes. He has assumed some responsibilities formerly held by Tom Zhu, Tesla's senior vice president for automotive, who earlier this year went back to China.

The move is a step up for the 37-year-old Afshar, who had previously worked in Tesla's office of the CEO. As in his earlier position, he will report directly to Musk.

Afshar became less visible at the electric-car maker starting in 2022 and in recent years has held roles at two of Musk's other companies, SpaceX and X, according to people with knowledge of the matter.

Afshar and Tesla didn't return requests for comment, nor is he listed on the company's website, which only shows three senior executives—Musk, Zhu, and Chief Financial Officer Vaibhav Taneja.

Afshar's LinkedIn page shows his title at Tesla since 2020 as an emoji wearing a cowboy hat.

Tesla's leadership team has been in flux since this spring, when Musk laid off more than 10% of the company and abruptly shifted plans for a long-promised affordable car model. Several top executives left at the time, including the heads of Tesla's energy business, its public policy group and the supercharger team.

The world's most valuable automaker is under pressure to revive its sales momentum and reverse a slide in profitability that has some analysts and investors concerned about the state of the car business. The move comes as Musk shifts more resources to robotics and artificial intelligence, two areas that he views as critical to the company's future.

Last week, he showed off a robotaxi without a steering wheel or pedals that Tesla plans to start producing in the next two to three years and which he said could sell for under \$30,000.

Tesla's stock, meanwhile, has dropped nearly 8% since the reveal with investors disappointed in the lack of specifics around his plans for autonomous-driving, which he has billed as a pivotal transition for the electric-car pioneer.

Tesla's global sales and manufacturing operations were previously overseen by Zhu, who returned to China in May as part of the internal restructuring, The Wall Street Journal has reported.

Zhu had made his mark in China, overseeing the construction of the Shanghai factory and successfully growing the business there. Some employees internally referred to him as the “fireman” for his ability to troubleshoot problems.

He moved to the U.S. in 2023 to take over as senior vice president of automotive, which made him number two at Tesla, reporting directly to Musk. His appointment was part of a broader effort to assuage some of Wall Street’s concerns that Musk was distracted with his other companies and lacked a clear succession plan.

Before joining Tesla, Afshar, who studied biomedical engineering, had spent roughly seven years at a medical-device company, according to his LinkedIn profile.

During his time in the office of the CEO, Afshar oversaw the development of Tesla’s 10 million-square-foot headquarters and factory in Austin, Texas. While running the Tesla factory, he came under scrutiny in an internal investigation looking into a glass-materials order that was identified as suspicious, Bloomberg reported in 2022.

The specialized-glass order drew the attention from Tesla lawyers and board members, probing whether company resources had been misused, and if Musk had a role, The Wall Street Journal reported last year.

Tesla employees had been working on a secret project that included plans for a glass-walled structure, described internally as a house for Musk, the Journal reported. The Justice Department and Securities and Exchange Commission opened an investigation into the events in 2023.

Afshar declined to comment to Bloomberg about its report and hasn’t responded to the Journal’s requests about the glass structure. Musk and his representatives haven’t responded to questions about the project or the investigations. On X, Musk has said he isn’t building a glass house but hasn’t addressed prior plans or work on the idea.

Write to Becky Peterson at becky.peterson@wsj.com

Appeared in the October 17, 2024, print edition as ‘Tesla Taps Musk Aide To Oversee Western Markets’.

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Oct. 16, 2024, 10:15 AM PDT

Trump Social Media Investor Gets Prison for Insider Trading (1)

By Chris Dolmetsch

- Gerald Shvartsman sentenced to 22 months in NY federal court
- Ex-president and his company weren't accused of wrongdoing

Bloomberg Law News 2024-10-17T10:25:49067254271-04:00

Trump Social Media Investor Gets Prison for Insider Trading (1)

By Chris Dolmetsch2024-10-16T13:15:01468-04:00

- Gerald Shvartsman sentenced to 22 months in NY federal court
- Ex-president and his company weren't accused of wrongdoing

An investor in the company that took Donald Trump's social media startup public will serve 22 months for trading on confidential information about the firm's merger plans before the deal was announced.

Gerald Shvartsman was sentenced by a federal judge in Manhattan on Wednesday for trading on secret details he had learned about Digital World Acquisition Corp. before the Trump deal was revealed in October 2021.

Shvartsman, 47, is one of three investors in Digital World who were charged by federal prosecutors in Manhattan in June 2023 with making more than \$22 million through their trading of the company's shares. He and his brother Michael pleaded guilty to securities fraud in April, while the other person charged in the case, Bruce Garelick, was found guilty after a jury trial in May.

Michael Shvartsman is scheduled to be sentenced on Thursday, while Garelick is slated to learn his fate on Nov. 7. Trump and his company weren't accused of wrongdoing.

The US had asked US District Judge Lewis Liman to impose a sentence of at least 24 months due to Gerald Shvartsman's "brazen corruption and greed," saying he made more than \$4.6 million trading on "valuable, confidential information" about the deal and not only misappropriated the information himself but tipped off friends and family.

Home Confinement

Defense lawyers had sought a sentence of 18 months of home confinement, saying “there is nothing in the indictment to suggest that Mr. Shvartsman was a leader or organizer of an extended or sophisticated insider trading ring” and “traded or tipped opportunistically” when he was given inside information by others.

At the sentencing hearing, Assistant US Attorney Matthew Shahabian said Shvartsman isn’t like an employee accused of trading on inside information but was in the “rarefied world” of investors who received valuable confidential information because of his “privileged economic position.”

“This is the kind of case where, if the defendant doesn’t get prison time,” it will send a message that “wealthy people can get away with it,” Shahabian said.

Roland Riopelle, a lawyer for Shvartsman, said a lengthy prison sentence isn’t necessary to deter others from similar crimes, noting that **Bernie Madoff’s** 150-year sentence didn’t stop others from committing Ponzi schemes and that Raj Rajaratnam’s 11-year prison term didn’t end insider trading.

‘Harsh Sentence’

“Imposing a harsh sentence doesn’t really deter the next person who succumbs to temptation,” Riopelle said.

A stoic Shvartsman apologized to his family, including his wife who was seated beside him, as well as his friends and the employees of his furniture company, noting that he is worried the business will close if he is sentenced to prison and they will lose their jobs.

“I am just plain sorry to stand here today,” he said, saying he did a lot of “stupid things” as a child and hoped to be better as an adult. “I thought I was better, I know now that I’m not,” he said. “I can’t begin to explain to you how ashamed I am of my actions in this case.”

The judge said that insider trading “hurts all of us” and that people expect it will be punished appropriately. Liman said Shvartsman’s conduct was “brazen” and that a prison sentence is needed to “send a message to those who think they can make a quick buck” and get away with it. Sentences without prison time would encourage more insider trading, he said.

“There would be a societal breakdown and a breakdown in the market,” he said.

Shvartsman and the other two men, all from Florida, were early investors in Digital World and had signed nondisclosure deals with the company that give them access to secret data about its merger targets, which included Trump’s social media company, Trump Media & Technology Group Corp.

Digital World announced an agreement to merge with Trump Media in October 2021, sending the shares soaring and handing the three men millions of dollars in profit from trades they made beforehand, according to prosecutors. The long-stalled merger, completed in March, allowed the media startup, which operates Trump's Truth Social platform, to begin trading as a public company.

\$7 Billion

Trump Media hit a low in September, shedding more than \$7 billion since a peak in May, but has since rebounded.

The deal to take Trump's media company public has also spawned other litigation for others involved in the deal. The former head of Digital World, Patrick Orlando, was awarded about 800,000 more shares of Trump Media by a Delaware court last month, two months after federal regulators accused him of misleading investors, and two founders of the media company claim Trump unlawfully sought to massively dilute their stake to "take the lion's share" for himself.

The deal to take Trump Media public was delayed for years after the US Justice Department and Securities and Exchange Commission launched investigations — delays that DWAC says cost it more than \$100 million. Last year it agreed to pay \$18 million to settle claims by the SEC that the SPAC misled investors about its plans. And in mid-July the SEC made similar claims against Orlando himself.

SPACs are shells designed to buy another company with the investment money they attract and serve as the vehicle for its public listing. SPACs quickly evolved from an obscure corner of the financial world to an investing craze before coming under more government scrutiny.

The case is US v. Shvartsman, 23-cr-307, US District Court, Southern District of New York (Manhattan).

(Updates with details from sentencing hearing. An earlier version of the story corrected spelling of defendant's name and his lawyers' sentencing proposal.)

To contact the reporter on this story:

Chris Dolmetsch in Federal Court in Manhattan at cdolmetsch@bloomberg.net

To contact the editors responsible for this story:

Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net

Peter Blumberg, Anthony Aarons

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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Chinese AI Co. Hit With Investor Suit Over Nasdaq Compliance

By **Sydney Price**

Law360 (October 16, 2024, 9:34 PM EDT) -- China-based artificial intelligence company Xiao-I Corp. was hit with a proposed investor class action in New York federal court alleging it downplayed increasing research and development costs that it was incurring, increasing the likelihood that it would fail to comply with the Nasdaq Stock Market's minimum price requirement after going public.

The suit filed Tuesday by investor Yunfan Fan alleges Xiao-I's initial public offering documents failed to fully address the significant negative effect that research and development expenses would have on the company's financial results, which in turn would make it harder for Xiao-I to comply with Nasdaq listing rules. In July, the company announced it was at risk of being delisted after its share price had dropped to under \$1 for 30 consecutive days, according to the suit.

According to the complaint, Xiao-I is a holding company with no operations of its own. Its subsidiary Shanghai Xiao-I Robot Technology Co. Ltd. operates the company's AI business.

The suit's class period begins March 9, 2023, the day Xiao-I conducted its IPO, issuing 5.7 million of its American depositary shares for \$6.80 each, according to the complaint.

In addition to Xiao-I, several signatories to the company's registration statement are defendants in the suit, including CEO Hui Yuan and Chief Financial Officer Wei Weng. GKL Corporate Search Inc., which was Xiao-I's authorized U.S. representative during the IPO, according to the suit, is also a defendant.

Xiao-I's financial and compliance issues began to surface when the U.S. Securities and Exchange Commission sent Xiao-I a letter in July 2023 outlining issues with the company's preparation of its financial statements and requesting that the company revise a previous filing with more explicit risk disclosures, the suit alleges.

Several weeks later, the company announced on Sept. 25, 2023, that its unaudited financial results revealed a net loss of \$18.8 million for the first half of 2023, compared to a net income of \$600,000 for the same period of 2022, noting that the 708% year-over-year research and development expenses increase could not be offset by "improved efficiency."

On this news, the price of Xiao-I shares declined by 30 cents, or over 14%, to close at \$1.81 per share on Sept. 25.

Xiao-I continued to post disappointing financial results for the next several quarters, the suit alleges. For example, on April 30, 2024, Xiao-I announced that its total operating expenses increased nearly 81% year-over-year to \$61.3 million.

On this news, the price of Xiao-I shares declined by 8 cents, or about 6%, to close at \$1.22 per share on April 30.

A few months later, on July 15, Xiao-I announced that it had received a letter dated July 11, 2024, notifying it that it is no longer in compliance with the \$1 minimum bid price requirement set by Nasdaq.

Xiao-I's shares continue to trade below the IPO price of \$6.80 per share, the suit states. Shares of

Xiao-1 closed at \$4.88 on Wednesday, according to Nasdaq.

Fan accuses the defendants of violations of the Securities Act and the Exchange Act and seeks damages on behalf of the proposed class.

Counsel for Fan and a representative of Xiao-I did not immediately respond to requests for comment on Wednesday.

Fan is represented by Jeremy A. Lieberman, J. Alexander Hood II and James M. LoPiano of Pomerantz LLP and Peretz Bronstein of Bronstein Gewirtz & Grossman LLC.

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

The case is Fan v. Xiao-I Corp. et al., case number 1:24-cv-07837, in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.

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Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Atty Pressed On DMI Stock Drop Focus In Del. Merger Suit

By **Jeff Montgomery**

Law360 (October 16, 2024, 8:18 PM EDT) -- A Delaware vice chancellor repeatedly pressed an attorney for shareholders of 3D printer manufacturer The ExOne Co. Wednesday on the relative importance of a stock drop experienced by acquirer Desktop Metal Inc. before and after shareholders voted on a \$575 million merger.

The question punctuated arguments on DMI's motion to dismiss an ExOne stockholder suit that focused on alleged pre-deal disclosure failures and alleged bad-faith acceleration of a deal closing in order to moot a preliminary injunction bid in an earlier suit that sought to enjoin the merger.

DMI's trading price fell about 10% from Nov. 8 to Nov. 10, 2021, when reports surfaced of a whistleblower complaint focused on a DMI subsidiary, noted Jesse Fruchter of Ademi LLP, counsel to the stockholders, and a vote on the deal was Nov. 9. The company's price fell another 10% the following week.

"Why is it material to stockholders casting a vote on the merger?" Vice Chancellor Lori W. Will asked Fruchter.

"The drop itself is material with respect to the fact that the drop immediately follows disclosure" of the whistleblower complaint "to the market," Fruchter replied. "It also suggests that the market views it as material."

"The question is whether the information is material," the vice chancellor said, adding a short time later: "I'm asking why this is material, not just helpful, but material to a reasonable stockholder casting a vote on the merger."

The **suit alleges** that the vote on the merger — which won approval from about 66.5% of shareholders — was "flawed" because most investors didn't learn about the risks at subsidiary EnvisionTec until after they had already cast their votes.

Burlington, Massachusetts-based DMI was accused of waiting until the evening of Nov. 8, 2021, to disclose that it was investigating a whistleblower complaint of compliance issues at EnvisionTec's Dearborn, Michigan, facility and that EnvisionTec CEO Al Siblani, also a member of DMI's board, would resign.

"The guy resigns immediately upon opening of the whistleblower investigation," Fruchter said in questioning "the idea that stockholders aren't going to consider that important."

"I'm still having a hard time trying to understand why the vote was not fully informed," the vice chancellor said, noting that the vote was uncoerced.

Kristin N. Murphy of Latham & Watkins LLP, counsel to DMI, told the vice chancellor that the deal was the product of a yearslong process and multiple bids.

That process, Murphy said, warrants judging the complaint under the state Supreme Court's 2015 finding in **Corwin v. KKR Financial Holdings LLC**, which grants business judgment deference when a transaction is approved by a fully informed, uncoerced vote of disinterested stockholders.

"We're here now because one ExOne stockholder disagrees with the judgment of the ExOne board to proceed with closing of the transaction," Murphy said, adding that the complaint "does not point to any information that should have been disclosed" by the company, but rather, "he just said stockholders didn't have enough time."

The whistleblower investigation, Murphy said, focused on a single product, a dental resin, of the DMI subsidiary involved. But the court, she said, is "not required to accept every strained interpretation" in the complaint, involving "a lot of speculation about what happened over a three- or four-day period and whether directors reached the wrong conclusion."

A U.S. district court judge in Massachusetts dismissed in September 2023 a proposed securities suit accusing DMI and its executives of misleading investors about a recalled product, a mislabeled resin made in a non-FDA-registered facility, used in making false teeth.

The initial lawsuit, filed Dec. 21, 2021, accused Desktop Metal of securities fraud in connection with statements about products manufactured by EnvisionTEC, which it acquired for \$300 million in January 2021. U.S. District Judge Indira Talwani concluded that the suit failed to plead any actionable misleading statements or deception that would support securities fraud claims.

Vice Chancellor Will said the stockholder claims focused in part on "10 percent of products manufactured by a subsidiary of a massive company." She asked, "Why is that material to the stockholders' vote?" on what the vice chancellor described as a premium merger.

"I think the other question is, why would they not have stockholders decide for themselves." Fruchter said.

Vice Chancellor Will said she would take the arguments under advisement.

Stockholder Pietro Campanella and the proposed class are represented by Ryan M. Ernst of Bielli & Klauder LLC and Guri Ademi and Jesse Fruchter of Ademi LLP.

Desktop Metal Inc.'s directors and officers and the company are represented by Raymond J. DiCamillo, Brock Czeschin, Kevin M. Gallagher and Elizabeth J. Freud of Richards Layton & Finger PA and Blair Connelly, Kristin N. Murphy and Jordan D. Cook of Latham & Watkins LLP.

The case is Pietro Campanella et al. v. S. Kent Rockwell et al., case number 2021-1013, in the Court of Chancery of the State of Delaware.

--Editing by Linda Voorhis.



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Gatos Silver Investor Deal Gets Final OK, Attys Score \$6M Fee

By **Emilie Ruscoe**

Law360 (October 16, 2024, 9:26 PM EDT) -- Attorneys from Bleichmar Fonti & Auld LLP, Wheeler Trigg O'Donnell LLP and The Schall Law Firm will receive over \$6 million after representing investors in a settlement with precious metals company Gatos Silver Inc. over claims the company knowingly overstated expectations about the resources and reserves in its mine in Mexico.

In a Tuesday order in Denver federal court, U.S. District Judge Philip A. Brimmer gave final approval to a \$21 million settlement and granted the plaintiffs attorney fee request for 28% of the case's proceeds, plus litigation costs of over \$226,000.

The parties sought approval for the settlement deal in March, telling Judge Brimmer that their proposed settlement resulted in part from a June 2023 mediation session involving "multiple demands and counteroffers."

The latest version of the investor complaint, from 2022, claimed that the company's public filings cited a technical report that overstated the mine's reserves. Despite knowing the report wasn't accurate, representatives for Gatos Silver called the report reliable, "even as the internally known facts showed the exact opposite," the investors contended.

The investors are represented by Bleichmar Fonti & Auld LLP, Wheeler Trigg O'Donnell LLP and The Schall Law Firm.

Gatos and the individual defendants are represented by Michael Flynn, Lawrence Portnoy, Isaac M. Gelbfish and Danielle Mullery of Davis Polk & Wardwell LLP, and Michael A. Rollin of Foster Graham Milstein & Calisher LLP.

The case is *Bilinsky v. Gatos Silver Inc. et al.*, case number 22-cv-00453, in the U.S. District Court for the District of Colorado.

--Additional reporting by Sydney Price. Editing by Kristen Becker.

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Hawaii Utility Beats Investor Suit Over Wildfire, For Now

By **Craig Clough**

Law360 (October 16, 2024, 6:42 PM EDT) -- A California judge on Tuesday dismissed a shareholder suit filed against Hawaiian Electric Industries Inc. in the wake of a deadly fire on Maui in 2023, but will allow plaintiffs to amend their claims that the company failed to warn investors about its inadequate risk mitigation program.

The plaintiffs challenged 25 statements made by HEI or some of its leaders in the lawsuit, but U.S. District Judge Jaqueline Scott Corley dismissed all the claims with a finding that the plaintiffs did not plausibly allege the statements were false or misleading when they were made, with 11 of the statements being attributed to subsidiaries that are not named defendants.

The judge found that the plaintiffs do not contest that the 11 statements were made by HEI's wholly owned subsidiary, Hawaiian Electric Company, Inc., which in turn wholly owns Hawaiian Electric Light Company Inc.

"Accepting as true HEI wholly owned HECO, HEI's ownership alone does not plausibly support an inference that HEI had ultimate authority over HECO's statements, and Plaintiffs have pled no other facts to establish as much," Judge Corley wrote in the order.

The judge cited the U.S. Supreme Court's 2011 ruling in **Janus Capital Group, Inc. v. First Derivative Traders** while sorting through HEI's alleged responsibility for its subsidiaries' statements, with Janus holding that the "maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."

Janus also held that "[a]n entity without ultimate authority 'can merely suggest what to say, not 'make' a statement in its own right." Citing the ruling, the judge wrote the court "cannot 'disregard the corporate form' by holding HEI liable for HECO's statements based solely on the presence of a parent subsidiary relationship."

Bhappinderpal Bhargal filed the proposed class action in August 2023 as a shareholder of Hawaiian Electric Industries Inc., which says it provides power to 95% of the state's residents. A wildfire earlier that month devastated the historic town of Lahaina and killed over 100 residents of Maui.

Bhargal's **complaint** echoed claims made in a lawsuit filed against the utility by some **homeowners** and said that videos taken by residents appear to show downed power lines owned by Hawaiian Electric sparking some of the fires. The complaint also pointed to media reports claiming that the utility company knew for years about the threats that wildfires posed but spent little money to mitigate those risks through safety improvements.

The company's stock price declined significantly after the fire broke out Aug 8, according to the suit. Bhargal blamed that price drop on the news stories about Hawaiian Electric's safety protocols and accused the company of failing to warn investors about its wildfire risks.

Other statements the judge found not to have been plausibly alleged to be false or misleading included ones from a 2021 Environmental, Social, and Governance report issued by HEI about the replacement of exposed power lines with insulated wire conductors.

The plaintiffs allege HEI led investors to believe exposed lines had been replaced with insulated

conductors, which can help prevent fires in areas with high wind. The suit alleges the lines "were totally bare and uninsulated" during the Lahaina wildfire.

"Plaintiffs have not plausibly alleged these statements were false or misleading," the judge wrote. "The challenged statements are not that HEI replaced every traditional power line with insulated conductor systems. Rather, the ESG Reports state replacements occurred 'in targeted areas prone to vegetation-related outages.'"

"Plaintiffs do not allege Lahaina was an area 'prone to vegetation-related outages,'" the judge continued. "And even if this allegation appeared in the amended complaint, it might not be sufficient given there are over 20,000 utility poles on Maui alone."

The judge also found that statements about utility pole maintenance, advice received from wildfire collaborators and the prioritization of safety were not plausibly alleged to be false or misleading, and that the plaintiffs failed to establish a strong inference of scienter.

"Given Plaintiffs' claims are not implausible as a matter of law, the Court grants Plaintiffs leave to amend the complaint," the judge wrote.

Hawaiian Electric Industries and counsel for the parties did not immediately respond to requests for comment.

Bhangal is represented by Jennifer Pafiti and Austin Van of Pomerantz LLP.

The defendants are represented by Mark R.S. Foster, Jay B. Kasner, Susan L. Saltzstein, Peter B. Morrison, Raza Rasheed, Zachary Faigen, Ian C. Lerman, Nick Peiffer and Michelle Portillo of Skadden Arps Slate Meagher & Flom LLP.

The case is Bhangal v. Hawaiian Electric Industries Inc. et al., case number 3:23-cv-04332, in the U.S. District Court for the Northern District of California.

--Additional reporting by Jessica Corso. Editing by Vaqas Asghar.

Update: The story has been updated with additional counsel information.



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BetterHelp Can't Ax Suit Over Sharing Data With Advertisers

By **Allison Grande**

Law360 (October 16, 2024, 11:03 PM EDT) -- A California federal judge has trimmed but refused to completely toss a consolidated putative class action accusing online counseling platform BetterHelp Inc. of unlawfully disclosing consumers' confidential information to third parties for advertising purposes, finding that newly added details boosted several of the plaintiffs' claims.

In a mixed ruling issued Tuesday, U.S. District Judge Richard Seeborg preserved consumer protection, breach of implied contract and wiretap claims brought against BetterHelp in the consolidated litigation over its alleged data protection failures, while dismissing for good claims brought under the state's Confidentiality of Medical Information Act and for injunctive and declaratory relief.

Most of the allegations had been previously addressed and dismissed by Judge Seeborg in a July ruling that granted the plaintiffs leave to amend their pleadings. With the latest consolidated amended complaint, the judge found that the plaintiffs had cured several of these deficiencies, including the ones that doomed their Unfair Competition Law and Consumers Legal Remedy Act claims.

The allegations had previously been dismissed for failure to plead the required economic injury-in-fact, with Judge Seeborg finding that the plaintiffs' focus on the claimed economic value of their purportedly misappropriated personal information wasn't enough to establish compensable damages.

In amending their complaint, the plaintiffs stressed that they had relied on BetterHelp's assurances that it would keep their personal information confidential in paying for its services on a monthly basis, an assertion that Judge Seeborg found persuasive despite BetterHelp's arguments that the theory fell flat because the plaintiffs were no longer pursuing a false advertising claim and had failed to show they were specifically paying for data security services they didn't receive.

"BetterHelp's argument ... presupposes it breached no enforceable promises to keep plaintiffs' personal information confidential," Judge Seeborg ruled. "Plaintiffs have adequately alleged they relied on BetterHelp's assurances of confidentiality when they paid BetterHelp for its services."

Judge Seeborg also found that there was no basis at this time to dismiss the breach of implied contract claim because the plaintiffs had heeded the directive in his prior order "to provide greater specificity in alleging how the contracts were formed, the alleged contractual terms, and the facts plaintiffs contend establish breach."

"Plaintiffs have now more clearly identified the particular promises they contend BetterHelp made and breached," the judge concluded.

Tuesday's ruling also preserved claims under the federal Wiretap Act, which survived the prior ruling and remained unchanged in the plaintiffs' amended pleadings, and new claims that they added to their latest consolidated complaint under the Stored Communications Act.

BetterHelp had argued that the SCA doesn't apply to the company because it's not "in the business of providing electronic communications services" as required by the statute.

But Judge Seeborg found that BetterHelp had failed to show that "the statute should be construed so

narrowly as to apply only to internet service providers" and that the amended complaint's assertion that the company's customers communicate with their therapists "through the conduit of BetterHelp's websites" was enough to sustain their claims.

The plaintiffs, however, failed to resurrect their previously dismissed claims under California's Confidentiality of Medical Information Act, which prohibits the unauthorized disclosure and negligent maintenance or preservation of medical information by a "provider of healthcare."

Judge Seeborg found that the amended complaint presented "no additional facts" on the issue of whether a provider of mental health services was covered by the law and that the plaintiffs new legal theory that the statute extends to all "corporations" following a 2001 update to the law didn't fare any better.

"The [statutory] language must ... be read in context and with an application of commonsense," the judge ruled. "Plaintiffs' argument that the CMIA should be understood as applying to all corporations by virtue of the 2001 amendment is creative, but not persuasive."

Judge Seeborg further noted that another change that became effective at the start of 2023, "well after the complained-of conduct occurred" that explicitly drew businesses offering "mental health digital services" under the law's reach additionally "undermines any argument that BetterHelp was already subject to the [law] merely because it was a 'corporation.'"

The plaintiffs, who **began filing** the suits that are now part of the consolidated litigation after the Federal Trade Commission announced a \$7.8 million settlement with BetterHelp in **March 2023** over its allegedly unlawful sharing of consumers' sensitive health information with Facebook and other third parties to fuel advertising, also couldn't save their injunctive and declaratory relief claims with their amended pleadings.

These claims were previously dismissed because the plaintiffs hadn't sufficiently alleged that they faced a "sufficient likelihood" that they'd be "wronged in a similar way" by BetterHelp absence injunctive relief.

Judge Seeborg instructed the plaintiffs that, in order to save their claims, they had to show that BetterHelp had the ability to control the conduct of third parties and that they faced ongoing or future harm despite the injunctive relief obtained by the FTC's settlement, which required BetterHelp to stop sharing consumers' sensitive health information for advertising purposes and further limited the way in which the company can use personal data moving forward.

"The [operative complaint] fails to do either," Judge Seeborg concluded. "Plaintiffs' allegations that BetterHelp has not complied with all of its obligations under the FTC's injunction, even if accurate, do not provide a basis for this court to enter a second injunction requiring similar action."

Representatives for the parties couldn't be reached for comment Wednesday.

The plaintiffs are represented by Gary. M. Klinger of Milberg Coleman Bryson Phillips Grossman PLLC, Christina Tusan of Hammond Law PC, Maureen M. Brady of McShane & Brady LLC and Alan M. Mansfield of Whatley Kallas LLP.

BetterHelp is represented by Livia M. Kiser, Jeffrey Hammer, James A. Unger and Craig H. Bessenger of King & Spalding LLP.

The case is In re BetterHelp Inc. Data Disclosure Cases, case number 3:23-cv-01033, in the U.S. District Court for the Northern District of California.

--Editing by Emily Kokoll.



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Direct Buyers Get Final OK For \$44M Drug Price-Fixing Deal

By **Matthew Santoni**

Law360 (October 16, 2024, 7:26 PM EDT) -- A Pennsylvania federal court has granted final approval to \$44.4 million in settlements between drugmakers Apotex, Breckenridge and Heritage and direct purchasers in a multidistrict litigation over alleged price-fixing in the generic-drug industry.

U.S. District Judge Cynthia M. Rufe gave her final approval to a deal Tuesday that will have Apotex Corp. pay \$30 million, Breckenridge Pharmaceutical Inc. \$4.36 million and Heritage Pharmaceuticals Inc. \$10 million to settle claims that they were part of conspiracies to keep the prices of generic drugs artificially high.

The deal also included reimbursement of \$4.5 million in expenses for the class representatives, \$80,000 in service awards for the four lead plaintiffs, and up to one-third of the remaining \$39.8 million in the settlement fund for attorney fees to be determined later.

"The court determines that the proposed settlements are 'fair, reasonable and adequate,'" the **judge's order** said.

Since 2016, civil suits accusing drugmakers of conspiring to set inflated prices for generic drugs have been consolidated in Pennsylvania's Eastern District. Tuesday's settlement will release claims against Apotex, Breckenridge and Heritage by a class defined as "all persons ... that directly purchased one or more of the named generic drugs from one or more current or former defendants" between May 2009 and December 2019.

Judge Rufe wrote that the proposed class settlement met the requirements for numerosity because there were more than 700 members identified across the United States.

The direct purchaser plaintiffs are led by César Castillo LLC, FWK Holdings LLC, Rochester Drug Cooperative Inc. and KPH Healthcare Services Inc., also known as Kinney Drugs. They will each get \$20,000 in service awards under the settlement.

About 30 class members had opted out of the settlement, the opinion said. Rite Aid had initially sought to be excluded from the settlement but changed course, and Cigna had requested to be left out but filed too late and was denied in a separate order, the judge said.

The settlement also met the legal requirements for commonality, she wrote.

"Here, there are common issues of law and fact as to all class members: that they made direct purchases of generic pharmaceuticals that were priced higher than they should have been because of an alleged conspiracy among manufacturers, including the settling defendants," the opinion said.

The opinion noted that Apotex's payment into the settlement fund may decrease by up to \$3.6 million depending on who has opted out of the deal, while Breckenridge's settlement amount could go up by \$1.2 million and Heritage's by \$2.5 million under a "most favored nation" clause if any of the plaintiffs who opted out reach a more favorable settlement later.

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

Apotex Corp. is represented by Steven F. Cherry and April Williams of WilmerHale LLP and James W.

Matthews of Foley & Lardner LLP.

Breckenridge Pharmaceutical Inc. is represented by Donald W. Hawthorne of Curtis Mallet-Prevost Colt & Mosle LLP.

Heritage Pharmaceuticals is represented by Edward B. Schwartz of Reed Smith LLP.

The direct purchasers are represented by Dianne M. Nast of NastLaw LLC, David F. Sorensen of Berger Montague PC, Robert N. Kaplan of Kaplan Fox & Kilsheimer LLP, Michael L. Roberts of Roberts Law Firm PA, Thomas M. Sobol of Hagens Berman Sobol Shapiro LLP and Linda P. Nussbaum of Nussbaum Law Group PC.

The case is In re: Generic Pharmaceuticals Pricing Antitrust Litigation, case number 2:16-md-02724, in the U.S. District Court for the Eastern District of Pennsylvania.

--Additional reporting by Ryan Harroff. Editing by Patrick Reagan.

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UFC, Fighters Get New Hearing On Revised \$375M Settlement

By **Elaine Briseño**

Law360 (October 16, 2024, 4:34 PM EDT) -- A Nevada federal judge has scheduled an Oct. 22 hearing to consider a \$375 million proposed settlement between UFC and former fighters that would resolve claims the organization underpaid match participants for years, according to a minute order on Tuesday.

The suppressed wages suit, filed in 2014 by former fighter Cung Le, had seen another proposed resolution in March, which would have also settled claims in a case brought by Kajan Johnson in 2021 over similar accusations.

However, U.S. District Judge Richard F. Boulware II rejected the proposed \$335 million settlement on July 30, expressing concern about the dollar figure and the fact it would resolve lawsuits at different points in the legal process.

The Johnson case remains ongoing and is being handled by the same team of attorneys who represented the fighters in the Le case.

If approved by the court, 35 fighters in the Le case will see a payout of more than \$1 million, and around 100 will receive more than \$500,000. The remaining fighters will net anywhere from \$50,000 to more than \$250,000 each. There are 1,100 total fighters in the Le class.

More than 100 fighters submitted declarations to the court **voicing their support** for the settlement.

The fighters are represented by Eric L. Cramer, Michael Dell'Angelo, Ellen T. Noteware, Patrick F. Madden, Najah A. Jacobs and Joshua P. Davis of Berger Montague, Richard A. Koffman, Benjamin D. Brown, Daniel H. Silverman and Daniel Gifford of Cohen Milstein Sellers & Toll PLLC, Joseph R. Saveri, Kevin E. Rayhill, Christopher K.L. Young and Itak Moradi of Joseph Saveri Law Firm LLP, Don Springmeyer of Kemp Jones LLP, Robert C. Maysey and Jerome K. Elwell of Warner Angle Hallam Jackson & Formanek PLC, and Crane Pomerantz of Clark Hill PLC.

The UFC is represented by Christopher S. Yates, Aaron T. Chiu, Sean M. Berkowitz, Laura R. Washington and David L. Johnson of Latham & Watkins LLP, William A. Isaacson, Jessica E. Phillips, Brette M. Tannenbaum and Yotam Barkai of Paul Weiss Rifkind Wharton & Garrison LLP, and Donald J. Campbell and J. Colby Williams of Campbell & Williams.

The cases are Le et al. v. Zuffa LLC, case number 2:15-cv-01045, and Johnson et al. v. Zuffa LLC et al., case number 2:21-cv-01189, both in the U.S. District Court for the District of Nevada.

--Editing by Philip Shea.

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RTX To Pay \$1B For Qatari Bribes And Defrauding US Gov't

By **Stewart Bishop**

Law360, New York (October 16, 2024, 12:50 PM EDT) -- RTX Corp. and its Raytheon subsidiary have agreed to pay approximately \$1 billion and enter into two separate deferred prosecution agreements in connection with a bribery scheme to secure Qatari military contracts, as well as separate ploys to defraud the U.S. government in deals for Patriot missile and radar systems.



RTX Corp. and its Raytheon subsidiary have resolved charges of conspiring to violate the Foreign Corrupt Practices Act's anti-bribery provisions, as well as the disclosure requirements of the Arms Export Control Act and related regulations. (Photo by Jaque Silva/SOPA Images/Sipa USA) (Sipa via AP Images)

The global resolutions of criminal and civil investigations by multiple offices within the Department of Justice, as well as the U.S. Securities and Exchange Commission, come after RTX in August reached a \$200 million settlement with the U.S. Department of State to resolve violations of export control rules, including sending controlled defense items and data to China.

Attorneys for Raytheon and RTX, formerly known as Raytheon Technologies Corp., appeared in Brooklyn federal court Wednesday morning before U.S. District Judge Ramon Reyes to resolve charges of conspiring to violate the Foreign Corrupt Practices Act's anti-bribery provisions, as well as the disclosure requirements of the Arms Export Control Act and related regulations.

RTX general counsel Raja Maharajh agreed to waive indictment on Raytheon's behalf and accept a 3½-

year deferred prosecution agreement with the DOJ's Fraud Section, the Justice Department's Counterintelligence and Export Control Section and Brooklyn federal prosecutors.

As part of the deal, Raytheon admitted that it bribed a top official of the Qatar Emiri Air Force in order to secure contract extensions for upgrades to Qatar's air defense systems and offered to bribe the same official for another military contract that ultimately fell through.

Pursuant to the New York DPA, Raytheon agreed to pay around \$281 million in criminal monetary penalties and forfeiture, as well as accept the supervision of an independent monitor at the company.

The Securities and Exchange Commission separately announced Wednesday that RTX will pay over \$124 million to resolve its civil claims over the Qatari bribes.

Another criminal case was filed Wednesday in Massachusetts federal court against Raytheon on charges of defrauding the U.S. government in procurement deals for radar and Patriot missile systems, which the contractor has agreed to resolve via a three-year DPA.

Boston federal prosecutors say Raytheon has agreed to settle a related False Claims Act suit, as well, for a total of more than \$574 million. Nearly \$23.8 million of that amount will be paid to the relator.

"Such corrupt and fraudulent conduct, especially by a publicly traded U.S. defense contractor, erodes public trust and harms the [Department of Defense], businesses that play by the rules, and American taxpayers," DOJ Criminal Division Deputy Assistant Attorney General Kevin Driscoll said in a statement.

RTX said it's taking responsibility for the misconduct.

"We have worked diligently during the investigations to remediate that misconduct and continue to do so," RTX said. "We are committed to working closely with the incoming independent monitor to improve and further enhance our ethics and compliance program."

Prosecutors say between 2012 and 2016, Raytheon secured contract extensions with Qatar to upgrade the country's air defense systems by bribing a top official in the Qatar Emiri Air Force, described in the indictment only as "Foreign Official 1."

At the Qatari official's request, according to the statement of facts, Raytheon agreed to bribe the official by entering into bogus subcontracts for nearly \$2 million with a Qatari consultancy for "studies" of air defense operations in connection with the contract extensions.

In reality, the Qatari consultants performed no work on the studies, which were actually prepared by a Raytheon employee, and Raytheon knew at least part of the money was being paid to the Qatari official, the statement of facts says. Raytheon earned \$36.7 million from the Qatari contract extension.

The defense contractor also offered the official another bribe for a potential \$510 million joint military operations center contract, though that deal never went through.

As for the Massachusetts allegations, Raytheon admitted to lying to U.S. government officials from 2012 to 2018 in connection with contracts for Patriot missile batteries and radar systems, in order to secure the deals at inflated prices, which netted the company an extra \$111 million.

The two sole source, no-bid contracts were governed by the Truthful Cost or Pricing Data Act, which requires contractors to certify the accuracy of its cost and pricing data.

However, in deals for Patriot missile systems, Raytheon employees learned early on that the projects were going to cost a lot less than anticipated, yet they failed to inform the government about the cost savings and falsely certified otherwise. Raytheon also misled the government about staffing for the radar systems deal.

Raytheon did not self-disclose the misconduct, but did receive some credit from the government for cooperation and timely remedial compliance enhancements. However, since those reforms are new and not fully implemented, the company had to agree to a monitor.

While Raytheon has no prior criminal history, prosecutors did note it's been the subject of three prior regulatory actions, including a 2013 deal with the State Department over Arms Export Control Act

violations.

As part of the DOJ's revised corporate criminal enforcement policy, even unrelated prior misconduct can be taken into account in criminal resolutions. However, old infractions are given less weight.

The government in the New York case is represented by Katherine Raut and Elina Rubin-Smith of the DOJ's Fraud Section, Christine Bonomo and Leslie Esbrook of the DOJ's Counterintelligence and Export Control Section and David Pitluck, Hiral Mehta and Jessica Weigel of the U.S. Attorney's Office for the Eastern District of New York.

In the Massachusetts cases, the government is represented by Kyle Hankey, Laura Connelly and Tamara Livshiz of the DOJ's Fraud Section, Brian LaMacchia and Benjamin Saltzman of the U.S. Attorney's Office for the District of Massachusetts and Art Coulter, Patrick Klein and Jared Wiesner of the DOJ's Civil Division.

Relator Karen Atesoglu is represented by Patrick Almonrode and Jason Brown of Brown LLC.

Raytheon and RTX are represented by Lauren Nunez, Thomas Hanusik, Tiffany Wynn, Jason Crawford, Rina Gashaw and Allison Fleming of Crowell & Moring LLP, William Stuckwisch of William J. Stuckwisch PC and Christopher Maner of Kirkland & Ellis LLP.

The SEC is represented in-house by Irene Gutierrez, Ilana Sultan, Eric Heining, Sonali Singh and Tracy Price.

The cases are U.S. v. Raytheon, case number 1:24-cr-00399, in the U.S. District Court for the Eastern District of New York, In the Matter of RTX Corp., file number 3-22256, before the Securities and Exchange Commission, as well as U.S. v. Raytheon, case number 1:24-cr-10319, and U.S. v. Raytheon et al, case number 1:21-cv-10690, both in the U.S. District Court for the District of Massachusetts.

--Editing by Alyssa Miller and Michael Watanabe.

Update: This article has been updated with details of the allegations.

Correction: A previous version of this story misstated the amount of the settlement and included a misspelled name. The errors have been corrected.



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TD Bank's \$3B AML Deal Sparks Scrutiny Of Its Oversight

By **Jon Hill**

Law360 (October 16, 2024, 11:20 PM EDT) -- The long-standing, widespread compliance failures at the root of TD Bank's blockbuster \$3 billion U.S. anti-money laundering settlement last week have stunned experts and brought tough punishment for the Canadian bank — but they're also raising questions about why regulators didn't act sooner.

Banking industry legal observers told Law360 that while it's not clear when or how federal regulators became aware of the decade-long deficiencies that TD Bank admitted to as part of criminal and civil enforcement actions **unveiled Oct. 10**, the scale and scope of its shortcomings suggest that the bank's supervisors potentially missed warning signs or didn't push forcefully for prompt fixes.

"Regulators should have caught a problem that is this pervasive over that long a time," said Julie A. Hill, a banking law professor and dean at the University of Wyoming College of Law. "Banks that are doing things that they shouldn't be doing will try to hide it from regulators," she added, but with TD Bank, "we're not talking about a small problem here or there."

In its plea agreement with prosecutors last week, TD Bank admitted that it failed for nearly a decade to maintain an adequate U.S. program for preventing dirty money from sloshing through its accounts, with the result that it handled more than \$600 million for drug traffickers and other money launderers.

Some of TD's problems involved insider misconduct by employees, but U.S. authorities have primarily heaped scorn on the bank for habitual underinvestment in compliance that allowed serious money laundering vulnerabilities to emerge and persist to a staggering degree.

From January 2018 to April 2024, for example, prosecutors said TD's outdated, poorly calibrated transaction monitoring system was screening less than 1 out of every 10 transactions. All told, more than \$18 trillion of customer activity flowed through the bank unmonitored during this six-year period.

"TD Bank created an environment that allowed financial crime to flourish," U.S. Attorney General Merrick Garland said at a news conference announcing charges last week. "By making its services convenient for criminals, it became one."

"Gobsmacked"

TD Bank has accepted massive criminal and civil penalties to settle with the U.S. Department of Justice and other government agencies, including the primary federal regulator of its two U.S. banking subsidiaries, the Office of the Comptroller of the Currency, which has responsibility for examining their anti-money laundering compliance.

TD has also committed to completing a "significant, multi-year" overhaul of its U.S. anti-money laundering program. Until this work is finished, the bank will be under heavy regulatory restraints from the OCC, including a strict asset cap and limits on its ability to expand into new business lines.

Getting back on track will be a tall task, in large part because of how severe the bank's compliance deficiencies reportedly were. Bank regulatory attorney Casey Jennings told Law360 that he was "gobsmacked" by the findings that the Justice Department and others laid out in their settlements.

Anti-money laundering compliance isn't quick or cheap, but it's "not rocket science," said Jennings, who is a partner in Seward & Kissel LLP's investment management group and former counsel at the Consumer Financial Protection Bureau. "Every bank compliance officer knows what a big deal AML is."

Jennings said that while a strong compliance program takes money to run and is bound to create the occasional inconvenience for customers, the solution for these frictions "is to invest in your transaction monitoring and invest in your resolution process."

"But the fact that the leadership at TD very clearly did not want to invest in compliance at all ... that 100% of the time is going to lead to bad outcomes," Jennings said. "That's just banking 101, which is why I was so gobsmacked to see the allegations. This should not have been a big surprise to them."

The University of Wyoming's Hill likewise stressed that the responsibility for ensuring TD Bank's anti-money laundering compliance ultimately falls to the bank itself. Still, as the 10th-largest bank by assets in the U.S., TD would also have had plenty of federal oversight checking up on its work.

Indeed, the OCC and other federal regulators had already come after TD Bank more than a decade before for previous alleged anti-money laundering violations.

In 2013, TD Bank was fined a total of \$52.5 million in settlements with regulators over its alleged role in what they said was a \$1.2 billion Ponzi scheme perpetrated by a now-disbarred Florida attorney, Scott Rothstein. Among other things, the bank failed from 2008 to 2009 to report suspicious activity involving accounts belonging to his firm, regulators said.

These alleged reporting lapses were "significant and egregious," the OCC said at the time, and the Financial Crimes Enforcement Network blamed a lack of adequate staff compliance training for contributing to the bank's "failure to recognize this suspicious activity."

But TD faced no further public enforcement actions from the OCC until last week. FinCEN and the Federal Reserve, which supervises TD's U.S. intermediate holding company, also took no public actions against the financial institution or its affiliates until last week.

"The government itself said this was a pervasive problem over a decade where there was virtually no compliance," Hill said. "Should regulators have picked that up sooner? Yes. Should they have punished it sooner? Yes."

"That's not to take away any of the responsibility from TD Bank," Hill added. "But regulators should be taking a hard look at themselves and their practice, because if they can't identify this, that's a huge red flag."

Although last week's enforcement actions took time to develop — TD Bank first **disclosed in August 2023** that it was under anti-money laundering scrutiny, which it has since described as resolved "following several years of active cooperation and engagement" — Seward & Kissel's Jennings said it is "perfectly fair" to question what the bank's regulators were up to over the past decade.

"AML is usually an exam focus, and TD is not a small bank," Jennings told Law360. "They certainly undergo a lot of regulatory examination because their size ... But this wasn't like, 'We had a bad Tuesday.' This was, 'We had several bad years.'"

"The regulators are probably going to question themselves over this, too, and may step up their AML examination procedures," he added.

The OCC declined to comment Wednesday in response to an inquiry seeking more information on how and when it became aware of TD Bank's issues, what interactions it had with bank prior to last week's settlements and whether it believes oversight changes are needed.

"The OCC does not comment on enforcement actions beyond what is posted on our website," a spokesperson said in a statement. "The OCC also does not comment on supervisory activities at individual banks."

Fed and FinCEN spokespeople likewise declined to comment.

The agencies' consent orders with TD also offer scant clues about what its regulators knew and when, although Megan Kilzy of Cole Schotz PC speculated that the bank's faulty system for identifying and preventing potentially illicit transactions may have helped delay its day of reckoning.

"If you don't have a robust AML program, it makes it more difficult to have meaningful communications with regulators," Kilzy told Law360.

Kilzy, who headed up the financial crimes unit of the Bergen County Prosecutor's Office in New Jersey and is now a member in Cole Schotz's white-collar criminal defense and government investigations practice, said transaction monitoring deficiencies could have created an information gap for TD and its regulators, keeping problematic activity in the dark for longer.

"I don't think that obfuscates the responsibility of the regulators here," Kilzy said. "They should absolutely be trained and actively engaged with recognizing a deficient system."

Still, when TD Bank's system fell so far short, "it seems that it would have been difficult for regulators to stay in contact with representations from TD Bank and have ongoing conversations with the bank the way that AML and [Bank Secrecy Act] officers are supposed to have," Kilzy said.

Taking a Harder Line

If regulators might not have been paying close enough attention to TD before, the bruising fines and other measures imposed last week show just how serious they are about making sure the bank shapes up going forward.

As part of the Fed's consent order, for example, TD Bank is required to relocate the portions of its global anti-money laundering compliance program that deal with U.S. laws, shifting them out of Canada and down to the U.S., where they can be more closely supervised by federal regulators.

At the same time, the OCC's asset cap institutes a stringent \$434 billion size limit on TD's U.S. banking operations that will compel them to slim down slightly to stay beneath this line, marking only the second time that a federal banking agency has slapped such handcuffs on a financial institution's overall growth.

Wells Fargo, which has labored under a Fed-ordered \$2 trillion asset cap **since 2018**, was the first. But while that cap has remained in place much longer than many observers originally expected, the OCC appears to have designed its cap for TD Bank with more of a need for remedial speed in mind.

In particular, the OCC order establishing the cap includes express provisions that allow the agency to reduce the size limit — that is, tighten the cuffs — by up to 7% annually if the bank does not meet certain deadlines for strengthening its U.S. anti-money laundering compliance.

Such provisions seem to reflect a lesson learned from the Fed's experience with Wells Fargo, "where the asset cap has gone on for years and years as the bank has tried to get compliant," the University of Wyoming's Hill said.

OCC officials "want to emphasize here that they expect compliance to happen rapidly, and that even though this is a problem that's been going on for a long period of time, they want to see more or less immediate change," Hill explained. "Now, whether they would ever actually use their discretion to require TD to shrink is another matter. I think often regulators claim power and then don't use it, but in theory, that power is there."

To that point, although asset caps have long been available to federal regulators as part of their bank enforcement toolkit, other types of sanctions have received far more use over the years, including restrictions on capital distributions and specific business activities.

But now that the tool has been dusted off again, Seward & Kissel's Jennings and Cole Schotz's Kilzy agreed that regulators may become more comfortable wielding asset caps in the future.

"Asset caps are going to be another method of public accountability to hold banks responsible for active, knowing failures of their compliance programs," Kilzy said.

"Every subsequent time they use this tool, it gets easier for them to substantiate it if challenged," Jennings said. "And if it has the effect they're looking for, if this really does send the message to the industry to clean up AML and causes TD to institute the world's greatest AML program, then they could definitely be more apt to use it again."

Because a cap can have drastic effects on a bank's profitability and market share, don't expect regulators to start breaking it out for mere "foot faults," Jennings added. "But for particularly egregious cases, I could see them keeping this in reserve as their big hammer to whack somebody when they really screw up."

--Editing by Kelly Duncan and Jay Jackson Jr.

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