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Amazon Deal Saved Zoox Robotaxi From Liquidation, Court Told

By Jennifer Kay 2024-10-17T14:07:04000-04:00

- Amazon acquired robotaxi startup Zoox in 2020 for \$1.3 billion
- Investors say Zoox's leaders failed to maximize value in deal

Robotaxi startup Zoox Inc. was on the cusp of liquidation when Amazon.com Inc. made the only merger offer that included common stockholders, an attorney representing the companies told the Delaware Chancery Court on Thursday.

Amazon's \$1.3 billion acquisition in 2020 followed two years where Zoox burned through money and incurred debt to continue operations, said William Savitt of Wachtell Lipton.

The company, founded in 2014, remains at the prototype stage. Former Zoox investors allege its senior leaders sought personal benefits from a sale instead of maximizing value for common shareholders.

"It was do something, or circle the drain," Savitt said. "Of the alternatives that were presented, only the Amazon deal offered anything for the common shares."

General Motors' autonomous vehicle subsidiary, Cruise, and Nvidia Corp. also had proposed sales offers in 2020, but Zoox's board rejected both. Details about the Nvidia and Cruise proposals are heavily redacted in briefs from [Amazon and Zoox](#) and the [investors](#).

Nvidia's proposal came with "crushing strings attached" and a refusal to pay royalties for Zoox's intellectual property, "its most valuable asset," Savitt said, asking Chancellor Kathaleen St. Jude McCormick to dismiss the investors' lawsuit. She adjourned Thursday's hearing without ruling on the motion.

The investors argue Amazon knowingly helped Zoox's directors, including co-founder Jesse Levinson and CEO Aicha Evans, secure bonuses and job security at the expense of common shareholders.

“The conflicts drove this sale process,” said the investors’ attorney, David Knotts of Robbins Geller. “Nearly all tech startups need to raise funding or face liquidation, but that doesn’t mean we throw fiduciary duties out the window.”

Levinson was Zoox’s largest shareholder, with a 37% stake. He had an interest in pursuing a deal that would allow him to continue independent operations, but neither Levinson nor Evans received anything from Amazon that they didn’t already have, Savitt said.

“The Amazon deal was to replicate what these folks had at Zoox,” he said.

Amazon and Zoox’s leadership are also represented by Ross Aronstam & Moritz. The investors leading the lawsuit are also represented by Friedlander & Gorris.

The case is Wei v. Levinson, Del. Ch., No. 2023-0521, oral argument 10/17/24 .

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Four Delaware Supreme Court Arguments to Pay Attention to This Fall

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Ellen Bardash



Delaware Supreme Court Building. Courtesy photo

News

Closely-watched cases could have implications for areas of corporate law that have come up repeatedly in attorneys' conversations this year and in 2023, including controlling shareholders, out-of-state incorporations and how much leeway the Court of Chancery has in reviewing arbitration awards and non-competes.

October 17, 2024 at 01:23 PM

🕒 6 minute read

Commercial Litigation



By Ellen Bardash



The Delaware Supreme Court has a Chancery-heavy docket for the end of 2024. Several cases scheduled for oral argument before Thanksgiving could have implications for areas of corporate law that have come up repeatedly in attorneys' conversations this year and in 2023, including controlling shareholders, out-of-state incorporations and how much leeway the Court of Chancery has in reviewing arbitration awards and non-competes.

Oracle Derivative Litigation

Oracle shareholders, represented by Friedlander & Gorris, Robbins Geller Rudman & Dowd and Robbins LLP, want the Supreme Court to overturn a post-trial decision upholding Oracle's \$9.3 billion acquisition of NetSuite in 2019. They claim Vice Chancellor Sam Glasscock III was wrong in deciding as a matter of law that Larry Ellison, who held stock in both companies, was not a controlling stockholder and that the deal wasn't subject to the entire fairness standard.

The case is set to heard on Wednesday.

Also in dispute is whether the plaintiffs should have been handed over certain memos related to a special litigation committee of Oracle directors that gave shareholders the nod to continue with their Chancery case. Oracle, represented on appeal by Kramer Levin Naftalis & Frankel and Potter Anderson & Corroon, claims those materials are work product that isn't guaranteed to be turned over in a case unless the special litigation committee's recommendation is under the court's review—a factor the appellees claim doesn't apply in the Oracle case because the plaintiffs didn't challenge that recommendation.

The shareholders say Ellison withheld key information about the acquisition from the directors who needed it to be fully informed on the proposed deal, and that's enough for the court to have applied the entire fairness test rather than deferring to the business judgment rule.

TripAdvisor's Trip to Nevada

After the boards of TripAdvisor Inc. and Liberty TripAdvisor Holdings Inc. decided to convert from Delaware corporations to Nevada ones, shareholders asked the Court of Chancery for an injunction blocking the move in April 2023. In February, Vice Chancellor J. Travis Laster declined to dismiss the case entirely, finding that entire fairness should be applied because a move to Nevada could be seen as a move to a more fiduciary friendly jurisdiction, potentially affecting shareholders' chances of winning those cases.

The case is set to go before the justices on October 30.

The TripAdvisor entities and individual defendants in the case, including CEO and president of both, Gregory Maffei, filed for interlocutory appeal, which Laster rejected but the Supreme Court granted. Attorneys with O'Melveny & Myers; Weil, Gotshal & Manges; Potter Anderson & Corroon; and Ross Aronstam & Moritz are representing the appellants.

The TripAdvisor side argues the difference between denying and dismissing its motion to dismiss is the difference between already filed or eminent litigation and hypothetical future litigation. TripAdvisor claims while it could be argued that the fiduciaries were getting a

material benefit if they were already defending litigation against them, case law states the same doesn't apply to speculative litigation risk.

TripAdvisor's shareholders, represented by Bernstein Litowitz Berger & Grossmann, Block & Leviton, Friedman Oster & Tejtzel and Kaskela Law, claim at the crux of Laster's decision to apply entire fairness is the finding that the TripAdvisor entities are controlled companies, and a similar move might not face the same standard of review otherwise. If the Supreme Court reverses the decision, they allege, minority stockholders are at risk of being taken advantage of by controllers.

Deference to Contracts, Arbitration

Appellant RMP Seller Holdings, sold Save Mart, a chain of supermarkets in Nevada and California, to SM Buyer, a private equity firm, for \$245 million. As part of the deal, the seller's interest in Super Store Industries Inc., a processing and distribution business affiliated with Save Mart, was spun off and sold separately.

After closing, the buyer made adjustments that factored in Super Store-related indebtedness, which the parties agreed to arbitrate. The arbitrator concluded that under the terms of the contract, the seller owed the buyer a refund of \$87.4 million for the Super Store debt. With interest, that meant the seller would pay the buyer \$20 million as well as its Super Store ownership.

Laster decided in February that while the adjustment "made no sense" economically, Delaware case law on deference to both contracts and arbitration gives the court a narrow window to weigh in on arbitration awards, and the arbitrator's analysis of the award didn't fit into that window.

In its opening brief, the seller, represented by Sheppard, Mullin, Richter & Hampton and Potter Anderson & Corroon, called the appeal "an ideal vehicle to clarify precedent" on when the Court of Chancery has the power to reject arbitration awards. The seller claims the award is the result of a "manifest disregard of the law."

The buyer, represented by Kirkland & Ellis and Richards, Layton & Finger, maintains the court's analysis was correct and "there is no precedent to clarify, only precedent to follow" when it comes to arbitration awards.

The matter is on the docket for October 30.

Non-Compete Provisions

Private equity firm Court Square Capital Management's employment contract with Kevin Brown included a non-compete provision which didn't bar Brown from going to work for a competitor but did require that, for a year after leaving Court Square, Brown not be

compensated for giving investment advice on any investment opportunities actively being considered by Court Square at the time he left.

Court Square claimed Brown went on to breach the provision by advising his new employer and a Court Square competitor, MSD Partners, on two matters he had worked on before leaving Court Square.

After trial, Chancellor Kathaleen St. J. McCormick ruled Brown had not breached the non-compete provision and that Court Square had wrongfully withheld from Brown \$5.3 million in carried interest payments from funds that he worked on while at Court Square.

Dechert and Morris James are representing Court Square, which argues on appeal that McCormick's ruling placed the same type of restrictions on Court Square as those the Supreme Court rejected earlier this year in *Cantor Fitzgerald v. Ainslie*. The parameters of the decision in that case have already been brought back before the appellate court for clarification, with the court yet to decide certified questions posed by the U.S. Court of Appeals for the Seventh Circuit.

Brown, represented by Heyman Enerio Gattuso & Hirzel and Susman Godfrey, claims for the reasoning in *Cantor Fitzgerald* to apply, Court Square would have had to prove both that Brown breached the provision and that his breach was material, under longstanding contract law principles. Because McCormick found no breach had occurred, Brown argues, Court Square had no reason to stop paying him carried interest.

The justices are set to hear the argument on November 20.

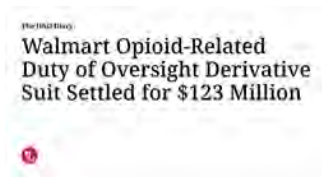
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Walmart Opioid-Related Duty of Oversight Derivative Suit Settled for \$123 Million

K [dandodiary.com/2024/10/articles/shareholders-derivative-litigation/walmart-opioid-related-duty-of-oversight-derivative-suit-settled-for-123-million](https://www.dandodiary.com/2024/10/articles/shareholders-derivative-litigation/walmart-opioid-related-duty-of-oversight-derivative-suit-settled-for-123-million)

October 17, 2024



By Kevin LaCroix on October 17, 2024
Posted in Shareholders Derivative Litigation



In what is one of the largest settlements in a breach of the duty of oversight lawsuit, the parties to the Walmart Opioid-Related Shareholder Derivative lawsuit have agreed to settle the case for \$123 million. The settlement

is also one of the largest-ever derivative lawsuit settlements. As discussed below, the Walmart settlement is the latest in a series of jumbo settlements in opioid-related breach of the duty of oversight claims. The settlement is subject to court approval. A copy of the parties' October 13, 2024, Stipulation of Settlement can be found [here](#).

Background

Walmart runs one of the largest pharmacy chains in the U.S., with over 5,000 retail pharmacies in the company's stores. Its pharmacies are subject to compliance with the Controlled Substances Act. In November 2009, the company's pharmacies were the subject of a DEA investigation regarding its CSA compliance. In November 2011, the company entered a settlement agreement with the DEA requiring the company to institute certain changes and put controls in place to ensure CSA compliance. As was the subject of the later Delaware derivative lawsuit, it was alleged that the board was not monitoring the company's compliance with the DEA settlement or of the CSA and that the company and its board emphasized profits over compliance. Among other things, the plaintiffs subsequently alleged that the board was aware of red flags regarding the non-compliance.

Numerous opioid related proceedings followed. In 2016 and 2017 the company was the subject of a "barrage" of lawsuits. In 2017, it was named as a defendant in the Opioid multidistrict litigation. In March 2021, a jury in the MDL litigation found that the plaintiffs had proven that Walmart engaged in illegal conduct involving controlled substances. The court

later entered a \$650.6 million damages award against Walmart and other pharmacy defendants. In November 2022, Walmart entered a \$3.1 billion nationwide settlement of various claims by state, local, and tribal governments.

In November 2021, plaintiff shareholders filed the first of several shareholder derivative complaints against certain directors and officers of Walmart. The plaintiffs filed an amended complaint in February 2022. The amended complaint, a copy of which can be found [here](#), consists of two counts, the first against the director defendants and the second against the officer defendants. Both counts allege that the defendants breached their fiduciary duties by consciously failing to ensure that Walmart complied with the CSA and the DEA settlement, and also allege that the defendants failed to make a good faith effort to “implement and monitor internal reporting policies and systems.”

In the court’s April 2023 order substantially denying the defendants’ motion to dismiss the amended complaint ([here](#)), the court specifically noted that the plaintiffs’ claims in essence alleged that the defendants had breached their duty of oversight. The court specifically noted that the plaintiffs alleged three kinds of breach of the duty of oversight: a so-called Massey claim, that the individual defendants knew Walmart was failing to comply with its legal obligations and made a conscious decision to prioritize profits over compliance; a red-flag claim, that a series of red flags put Walmart’s directors and officers on notice of Walmart’s noncompliance or potential corporate trauma, yet the directors and officers consciously ignored them; and an information systems claim, alleging that the directors and officers knew that they had an obligation to establish a monitoring system to address a core compliance risk, yet consciously failed to make a good faith effort to fulfill that obligation.

The Settlement

After the court substantially denied the motion to dismiss, the board handed the derivative claims to a single-member special litigation committee. The parties subsequently entered mediation efforts. In September, the mediator made a settlement recommendation that both sides accepted. In the parties’ stipulation of settlement, the defendants reiterated their position that they deny all of the plaintiffs’ allegations.

Readers of this blog will be interested to note what the parties’ stipulation says with respect to the source of funds. The stipulation defines the settlement amount as \$123 million cash to be paid “by the Insurers to Walmart as part of the consideration for the Settlement contemplated by this Stipulation.” The stipulation further defines the term “Insurers” to mean the defendants’ directors and officers insurance carriers.

Discussion

In my recent round-up of the top current stories in the world of D&O liability, I noted that one of the top trends to watch is the proliferation of lawsuit alleging that directors and officers had violated their duty of oversight. These kinds of claims are notoriously difficult to maintain, and recently Delaware's court has demonstrated impatience with the increasing numbers of these kinds of claims. Nevertheless, some of these claims have over recent years survived motions to dismiss and some have resulted of these cases have resulted in substantial settlements.

The most substantial settlement of a duty of oversight claim is the \$237.5 million settlement in the Boeing air crash derivative lawsuit settlement. Notably, that case, as also appears to be true of this recent settlement in the Walmart case, the Boeing case was settled entirely by the payment of D&O insurance.

The Walmart case settlement is not only one of the largest breach of the duty of oversight claims settlements, it is also one of the largest-ever shareholder derivative lawsuit settlements, as well. According to the list that I have maintained on this site ranking the largest derivative settlements, the Walmart settlement is the 15th largest shareholder derivative lawsuit settlement, and also the largest so far this year.

It is worth noting that this lawsuit and its settlement relates to the opioid epidemic in this country. As I have noted in numerous posts on this site (most recently here), the opioid epidemic has been the source of extensive corporate and securities litigation. There have in fact been very substantial settlements arising out of this litigation, including even very large shareholder derivative settlements.

Indeed, the next largest settlement on my list of largest derivative suit settlements is the \$124 million settlement in the Cardinal Health Opioid-Related Derivative Lawsuit (discussed here). Notably, and as discussed in detail here, the Cardinal Health lawsuit was also based on an alleged breach of the duty of oversight, under Ohio law.

In addition to the Cardinal Health and the Walmart lawsuits, McKesson also settled a breach of they duty of oversight opioid related derivative lawsuit. As discussed here, McKesson settled the lawsuit for \$175 million. The McKesson settlement is the ninth largest ever derivative lawsuit settlement.

It is clear that in the field of opioid related derivative litigation, breach of the duty of oversight claims have been successful from the plaintiffs' perspective and have resulted in a series of settlements that are among the largest ever derivative lawsuit settlements. It seems as if within the larger discussion of breach of the duty of oversight cases, the opioid cases represent their own special category, characterized by successful survival of motions to dismiss and substantial settlements.

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

By Mike Leonard

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

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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

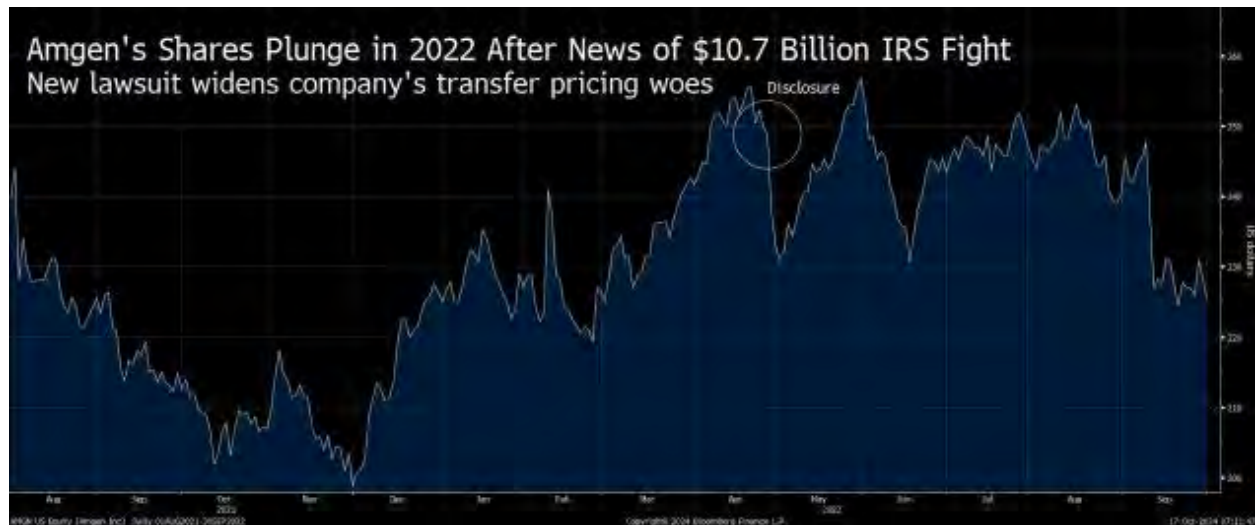
An investor is suing Amgen Inc.'s leaders over the company's \$10.7 billion fight with the IRS, which has said the biopharmaceutical giant dodged a huge tax bill by shifting profits to a subsidiary.

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 .

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Oct. 17, 2024, 11:35 AM PDT

AST SpaceMobile Investor Drops Suit Against Board, Executives

By Martina Barash

Bloomberg Law News 2024-10-18T10:48:27181754357-04:00

AST SpaceMobile Investor Drops Suit Against Board, Executives

By Martina Barash 2024-10-17T14:35:50000-04:00

An AST SpaceMobile Inc. investor's suit against the broadband company's directors and two executives over alleged satellite production misrepresentations has been dismissed at the shareholder's request.

No settlement is involved, and stockholders don't have to be notified in advance of closing the case, Judge David Counts of the US District Court for the Western District of Texas said Wednesday in the dismissal order.

- Plaintiff Laurie Hanna decided to voluntarily dismiss the suit following "further investigation," the parties said the previous day in requesting dismissal
- An attorney for Hanna didn't immediately respond to an emailed request for additional information about the decision
- Hanna alleged that AST misrepresented the production stage of its test satellite both before and after its merger with a special purpose acquisition company in April 2021

The Brown Law Firm PC represented Hanna. Alston & Bird LLP represented the individual defendants and nominal defendant AST.

The case is Hanna v. Avellan , W.D. Tex., No. 7:24-cv-00171, 10/16/24 .

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Meta Shareholder Lawsuit Over Child Safety Meets Doubtful Judge

By Isaiah Poritz

- Investors failed to show an economic harm, judge says
- Similar shareholder suit in same court allowed to proceed

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Meta Shareholder Lawsuit Over Child Safety Meets Doubtful Judge

By Isaiah Poritz 2024-10-17T15:59:44000-04:00

- Investors failed to show an economic harm, judge says
- Similar shareholder suit in same court allowed to proceed

A federal judge in San Francisco appeared skeptical of a lawsuit from Meta Platforms Inc. shareholders accusing the tech company of misleading investors about its child safety practices at Thursday hearing.

Judge Charles R. Breyer said he was “having a very hard time” understanding which allegedly false statements made by the company were legally actionable.

“I think it’s the plaintiffs’ burden to come forward on this, and I don’t know that they’ve met it,” he said.

The judge said the shareholders faced an “insurmountable problem” because their complaint failed to link the alleged falsehoods about child safety in Meta’s proxy statements filed with the US Securities and Exchange Commission to an economic harm.

The shareholders sued in the US District Court for the Northern District of California in April, alleging Meta isn’t taking adequate steps to protect children on Instagram and Facebook despite saying that it has effective controls in place.

The suit pointed to a number of Meta scandals, including media investigations about child sexual abuse material on Instagram and penalties imposed by data privacy regulators investigating Meta’s handling of children’s data.

The complaint had asked the judge to postpone Meta's annual shareholder meeting, scheduled for May 29, to allow the company to make additional disclosures and for shareholders to review them.

The meeting went ahead as scheduled, and Breyer later ruled that the motion for the preliminary injunction was meritless, finding that it failed to allege that the proxy statements contained "material misrepresentations or omissions."

Meta moved to dismiss the suit in August.

At the Thursday hearing, the shareholders' attorney Francis Bottini of Bottini & Bottini Inc. argued that the complaint doesn't need to show economic harm when it's only seeking injunctive relief.

If the court required the economic harm standard, shareholders would never be able to exercise their legal rights and obtain injunctive relief when companies lied on their proxy statements, Bottini said.

He also pointed to a recent decision by a judge in the same court who largely allowed an investor suit against Meta based on false statements relating to the "Facebook Files" scandal to proceed.

Breyer said there are differences between the cases based on the timing of Meta's proxy statements, but also said he would reexamine the opinion.

"Any district court judge, especially in my own court, should pay attention to what their colleagues say in a similar situation," Breyer said. "We're not bound by it, but it's important for a variety of reasons."

Davis Polk & Wardwell LLP represents Meta.

The case is *Eisner v. Meta Platforms Inc.*, N.D. Cal., No. 24-cv-02175, 10/17/24 .

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Meta must face Massachusetts social media addiction lawsuit, judge rules

 [reuters.com/legal/meta-must-face-massachusetts-social-media-addiction-lawsuit-judge-rules-2024-10-18](https://www.reuters.com/legal/meta-must-face-massachusetts-social-media-addiction-lawsuit-judge-rules-2024-10-18)

Reuters

By Reuters

October 18, 2024 9:58 AM PDT Updated 7 min ago

A man walks past a logo of mobile application Instagram, during a conference in Mumbai, India, September 20, 2023. REUTERS/Francis Mascarenhas/File Photo Purchase Licensing Rights , opens new tab

BOSTON, Oct 18 (Reuters) - A Massachusetts judge has rejected Meta Platforms' (META.O) , opens new tab bid to dismiss a lawsuit by the state alleging the social media company purposely deployed features on its Instagram platform to addict young users and deceived the public about the dangers its product posed to teenagers' mental health.

Suffolk County Superior Court Judge Peter Krupp in Boston, in a decision made public on Friday, rejected Meta's request to dismiss claims by Massachusetts Attorney General Andrea Joy Campbell that it violated state consumer protection law and created a public nuisance.

Reporting by Nate Raymond in Boston

Meta, social media operators can't pull plug on states' suit over young people's 'addiction'



norcalrecord.com/stories/665279345-meta-social-media-operators-can-t-pull-plug-on-states-suit-over-young-people-s-addiction

October 17, 2024

Lawsuits



Judge Yvonne Gonzalez Rogers likened litigation over social media addiction to the landmark tobacco settlement. | [UScourts.gov](https://uscourts.gov)

A federal judge has rejected an attempt by Meta, the parent company of Facebook and Instagram, Google and other social media companies to pull the plug on a lawsuit brought by California and more than 30 other U.S. states, who are seeking to financially punish and collect a potentially massive payday from the social media providers for allegedly intentionally designing their products and platforms to addict young people.

On Oct. 15, U.S. District Judge Yvonne Gonzalez Rogers largely denied the motion by the social media companies to dismiss the legal action brought by a coalition of 33 U.S. state attorneys general.

In the ruling, the judge declared that a provision of federal law, known as Section 230 of the federal Communications Act, limits some of the claims against Meta and other social media platform operators, including the operators of YouTube, SnapChat and TikTok, particularly concerning how they developed and deployed their online products. But that law doesn't shield the company from the states' claims, the judge said.

Section 230 generally immunizes internet service providers and social media platforms from being held legally liable for content posted online.

But the judge said, in this case, the states have presented enough evidence at this point to show that the social media companies knew or should have known that their products allegedly were addictive, particularly to young users, and were responsible for fueling associated societal harms, and allegedly misled the public concerning the risk, the judge ruled.

And the judge said the companies can't point to larger societal benefits from their products to potentially offset or justify their alleged addictive properties.

"... The States must plead that the alleged consumer injuries were 'not outweighed by countervailing benefits to consumers or to competition,'" the judge wrote. "Given the national outrage, Meta's arguments here strain credulity.

"The States identify allegations of the known range of serious harms resulting from compulsive use of Instagram and Facebook, and specifically the negative 'net effect' of platform use on young users."

The lawsuit was filed in San Francisco federal court in October 2023. The lawsuit was joined by California Attorney General Rob Bonta and a long list of both Democratic and Republican state attorneys general from across most of the U.S.

Other states joining the lawsuit included other western states, including Arizona, Washington and Oregon, and other large states, including Pennsylvania, Ohio, New York, New Jersey and Illinois.

The complaint centers on allegations that the popular social media platforms are designed to "entice, engage and ultimately ensnare" teens and children, to "maximize financial gains."

Meta and the other social media companies have "repeatedly misled the public about the substantial dangers of its social media platforms," the complaint says. "It has concealed the ways in which these platforms exploit and manipulate its most vulnerable consumers: teenagers and children. And it has ignored the sweeping damage these platforms have caused to the mental and physical health of our nation's youth."

The states' complaint was very similar to a barrage of other lawsuits filed by trial lawyers throughout the country on behalf of school districts and other entities against Meta and other top social media platforms.

Those lawsuits have been collected in mass proceedings centered in the U.S. District Court for the Northern District of California, where Meta is headquartered.

The lawsuits all level similar accusations against Meta, as well as other social media titans, including Google; Snap Inc., operator of the Snapchat app; and ByteDance, operator of TikTok.

The lawsuits all accuse the social media companies of creating public nuisances by essentially addicting students to a constant barrage of games, videos, photos and more.

They assert this has harmed students and schools alike, creating a mental and behavioral health crisis among American children and teens, encouraging young people to engage in potentially harmful behaviors, while increasing dysfunction, anxiety, depression and other psychological and emotional disorders and maladies.

The state coalition centered its case on claiming Meta's actions amount to violations of state consumer fraud and deceptive practices laws, as well as violations of a federal law, known as the Children's Online Privacy Protection Act, which requires social media companies to ensure no one under age 13 is using their sites without verified parental consent.

The complaint asserts Meta knows children are improperly using their platforms, and is allegedly well aware of the "harmful effects" of its products. But the company allegedly "has persisted in developing and deploying features that exploit young users' psychological vulnerabilities and significantly harm young users in its pursuit of profit."

The state coalition is seeking an array of potential damages, including civil penalties and other payments from Meta. Each state's damages claim differs slightly, based on each state's different laws.

Potentially billions of dollars worth of civil penalties and other damages could be at stake in the states' case, in addition to untold damages that could result from the other consolidated private claims against the social media operators.

In her ruling, the judge noted her "skepticism" at some of plaintiffs' "novel theories" in support of their claims against Meta and other social media companies. But she said the states' lawsuit is part of a still developing "area of law in some flux," as courts in various jurisdictions grapple with how to apply consumer protection and fraud laws to social media products.

"Thus... the court declines to foreclose the States' (and personal injury plaintiffs') failure-to-warn theories as to known risks of addiction attendant to any platform features or platform construction in general as barred by Section 230. The Court's skepticism of these claims is noted, but for now, the claims proceed."

In response to the ruling, Attorney General Bonta released a statement hailing the decision.

He said: "Meta needs to be held accountable for the very real harm it has inflicted on children here in California and across the country. Along with legislation providing for market-wide changes, this litigation will help determine how social media companies can be held accountable and how these companies can treat our children for decades to come. I have an immense amount of hope for the future."

"As the home to the greatest innovators in the world and a robust technology sector, California has a particular opportunity and obligation to be a catalyst for change. Meta can and must do better. Our children deserve their childhoods back."

A spokesperson for Meta provided a statement to Reuters following the ruling, saying the company disagreed with the judge and had rolled out new features and protections "to support parents and teens."

A spokesperson for Google, which operates YouTube, told Reuters the company believes the allegations in the lawsuits are "simply not true." The company said it also was committed to making its online products a "safer, healthier experience."

ORGANIZATIONS IN THIS STORY

U.S. District Court for the Northern District of California

Legal Fee Tracker: Lawyers eye \$700 million payout in latest Blue Cross settlement

 [reuters.com/legal/legalindustry/legal-fee-tracker-lawyers-eye-700-million-payout-latest-blue-cross-settlement-2024-10-17](https://www.reuters.com/legal/legalindustry/legal-fee-tracker-lawyers-eye-700-million-payout-latest-blue-cross-settlement-2024-10-17)

David Thomas, Mike Scarcella

A picture illustration shows U.S. 100 dollar bank notes taken in Tokyo on August 2, 2011. REUTERS/Yuriko Nakao Purchase Licensing Rights , opens new tab

Plus: An unusual insurance policy in Quinn Emanuel's \$185 million ObamaCare fee fight

Oct 17 (Reuters) - Plaintiffs' lawyers behind a new \$2.8 billion class action antitrust settlement with Blue Cross Blue Shield are planning to request up to \$700 million in legal fees for their work, adding to hundreds of millions of dollars in fees already awarded in the sprawling case.

The settlement with hospitals and other health care providers, which requires court approval, would create a system-wide platform facilitating member benefits and mandate other reforms that the attorneys said would lead to more transparency, efficiency and accountability. It would also provide more contracting opportunities with Blue Cross.

The providers' lawyers, led by Joe Whatley and Edith Kallas of Whatley Kallas, told U.S. District Judge R. David Proctor in their settlement papers on Monday that they would ask for as much as a quarter of the \$2.8 billion in fees.

It would be second nine-figure attorney fee award in the antitrust litigation against BCBS, a 12-year-old legal saga that reached the U.S. Supreme Court earlier this year.

BCBS struck a \$2.7 billion settlement with commercial and individual subscriber plaintiffs in 2020. That led to a fee award of \$667 million for subscribers' counsel led by Boies Schiller Flexner and Hausfeld.

Whatley and Kallas said that in the providers' settlement, they've been focused on winning preliminary approval for the deal before they formally seek legal fees.

"When we do turn to the issue of attorneys' fees, the value of the settlement will drive the issue, but you will see that provider plaintiffs' counsel have spent approximately \$100 million in expenses and devoted an unprecedented number of hours over more than 12 years to achieve the outstanding result for the class," Whatley and Kallas said in an email.

A BCBS spokesperson declined to comment on the legal fees in the case. The insurer has denied wrongdoing.

Whatley Kallas is one of at least 30 law firms representing providers in the case. Those that responded to Reuters declined to comment on how the fee award would be divided.

The plaintiffs first sued in 2012, claiming Blue Cross and its affiliates divided the country into exclusive areas where they did not compete with each other. The lawsuit said the alleged conspiracy increased the cost of insurance and drove down reimbursements.

A member of the subscriber class objected to the fee award, arguing it was too high. The U.S. Supreme Court upheld both the fee award and the overall subscriber settlement in June.

As for the latest settlement, Whatley and Kallas said in an email that there was "no basis for a legitimate objection" to the deal.

INSURANCE COMPLICATES QUINN EMANUEL FEE FIGHT

In other legal fee news, a U.S. federal claims court judge last week awarded Quinn Emanuel Urquhart & Sullivan \$92.4 million for its work on a multibillion-dollar federal healthcare insurance case. The judge halved the \$185 million fee that the court previously awarded, after an appeals panel ruled last year that it was excessive.

The award stemmed from a \$3.7 billion judgment Quinn Emanuel secured in 2020 for a class of insurers that said the Obama administration breached its obligations under an Obamacare provision aimed at encouraging medical coverage to uninsured Americans.

The ensuing fee dispute contains a wrinkle: Quinn Emanuel in 2021 took out an insurance policy on the original \$185 million award and later distributed the bounty to the firm's partners.

"The size of the case and the award are very unusual to say the least. And getting insurance on the award is highly unusual," said Professor Tom Baker, an insurance expert who teaches at University of Pennsylvania's law school. Baker said he would expect Quinn Emanuel to appeal the reduced award.

Redacted copies of the policy documents were disclosed in the case. The primary policy said insurers' maximum liability was \$25 million, but additional excess policies appear to cover the firm for many times that amount.

The documents show Quinn Emanuel was obligated to pursue its interest in the \$185 million fee award "vigorously, in good faith and with the same zeal as if no insurance were in place."

Quinn Emanuel did not immediately respond to requests for comment, and neither did the main challengers to the fee award, UnitedHealthcare and Kaiser.

UnitedHealth and Kaiser argued last year that Quinn Emanuel's insurance policies pushed the firm to litigate to preserve the entire \$185 million award. They said the policies improperly asserted outside influence on the fee dispute.

"The class's right to prompt repayment should not depend on the conduct of a stranger to this litigation," the insurers told the court.

The policy documents show that Quinn can argue that continuing to pursue the maximum amount of \$185 million would be "fruitless."

That doesn't mean the fight is over, said insurance expert Marc Mayerson.

He said there appeared to be a risk of "multiple simultaneous suits and arbitrations" based on the insurance carriers' individual contracts with the firm.

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

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Legal Fee Tracker: American Airlines presses \$139 mln fee bid after \$1 verdict

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Reporting by David Thomas

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Thomson Reuters

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Orrick Secures Summary Judgment for RingCentral in Privacy Class Action

 [law.com/therecorder/2024/10/18/orrick-secures-summary-judgment-for-ringcentral-in-privacy-class-action](https://www.law.com/therecorder/2024/10/18/orrick-secures-summary-judgment-for-ringcentral-in-privacy-class-action)

Kat Black

What You Need to Know

- San Mateo Superior Court Judge Jeffrey R. Finigan granted summary judgment to RingCentral in a privacy class action that accused the company of wiretapping.
- RingCentral is a voice over internet protocol provider that allows users to make phone calls and send text messages using the internet, not traditional phone lines.
- The court ruled that RingCentral qualified for the same exemptions afforded to telephone companies and public utilities under California law.

A California state court granted summary judgment to RingCentral, a voice over internet protocol company, in a privacy class action alleging that it intercepted and recorded phone calls without the plaintiffs' consent.

San Mateo Superior Court Judge Jeffrey R. Finigan issued the ruling on Oct. 11, which concluded that the same exemptions accorded to telephone companies under California's wiretapping statutes applied to RingCentral and other VoIP providers. The minute order of the judge's decision was filed this week.

RingCentral was represented by a team at Orrick, Herrington & Sutcliffe, including partners Aravind Swaminathan and Jacob Heath, associates Jesse Beringer, Sarah Meehan and Dan Alleva and former firm of counsel Nicole Tadano.

RingCentral, a cloud-based communications platform that provides subscribers with call recording and text messaging services, was founded in 1999 and is based in Belmont, California. VoIP is a technology that allows users to make phone calls using an internet connection instead of traditional phone lines. RingCentral enables subscribers to record, store and retrieve phone calls and text messages.

Goldstein, Borgen, Dardarian & Ho filed the original claim in 2020 on behalf of lead plaintiff Meena Reuben and any state resident who exchanged text messages with a RingCentral customer or whose phone calls to a RingCentral customer were recorded from July 2019 to the present.

The plaintiffs brought the case under California's Invasion of Privacy Act, alleging violations of California Penal Code §631 and California Penal Code §632.7, which prohibit wiretapping and recording communications, respectively, without the parties' permission. Under CIPA, plaintiffs can recover statutory damages of up to \$5,000 per violation. A first amended complaint was filed in September 2021.

The defense counsel argued in a motion for summary judgment, which was filed in February, that RingCentral qualifies for provisions under CIPA—§§631(b)(1) and 632.7(b)(1)—that exempt both public utilities and telephone companies "engaged in the business of providing communications services and facilities" from liability if the "acts otherwise prohibited are for the purpose of construction, maintenance, conduct or operation of the services and facilities."

The minute order identified three issues advanced by the class action: whether RingCentral qualified for the CIPA exemptions; whether RingCentral could be considered a third-party "eavesdropper" under CIPA; and whether text messages counted as "communications" under §632.7.

The court solidified that VoIP providers and their services are protected by the same statute exemptions as telephone companies and public utilities and that call recording qualified as a "service" essential to their function.

It ruled that the company was not liable for its subscribers' actions because it cannot access subscribers' stored phone calls or text messages without the subscribers' consent, meaning that, since RingCentral is merely the provider of such services and does not intercept or record communications for its own benefit, it effectively does not qualify as a "third-party" eavesdropper under CIPA. It noted that RingCentral issues an advisory to its customers informing them of their responsibility for obtaining consent from call or text recipients before recording their communications.

"Plaintiff describes RingCentral's service as 'recording communications without consent,'" Finigan wrote. "That is not accurate. RingCentral offers 'call recording.' Call recording is not prohibited by the statutes. Call recording 'without the consent of all parties' is prohibited."

It also found that RingCentral's texting services fell within CIPA exemptions, though it disagreed with the defense counsel's assertion that §632.7 "does not apply to text messages."

RingCentral's counsel at Orrick declined to comment at this time. RingCentral and the plaintiff's counsel at Goldstein Borgen did not immediately respond to requests for comment.

NOT FOR REPRINT

Tubi tries to keep ethics case alive against mass arbitration firm Keller Postman

 [reuters.com/legal/legalindustry/column-tubi-tries-keep-ethics-case-alive-against-mass-arbitration-firm-keller-2024-10-17](https://www.reuters.com/legal/legalindustry/column-tubi-tries-keep-ethics-case-alive-against-mass-arbitration-firm-keller-2024-10-17)

Alison Frankel

U.S. flag and Judge gavel are seen in this illustration taken, August 6, 2024.

REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights , opens new tab

Oct 17 (Reuters) - Fox Corp's streaming TV subsidiary Tubi is counting on a newly filed brief , opens new tab to keep alive its lawsuit against pioneering mass arbitration firm Keller Postman – and to preserve defendants' hopes for a new strategy to discourage the tactics that have made mass arbitration the latest scourge of defendants.

First, some background. Tubi's lawyers at Jenner & Block filed their complaint , opens new tab against Keller Postman in federal court in Washington, D.C., last May, a month after Keller Postman notified the Fox (FOXA.O) , opens new tab subsidiary about arbitration demands by nearly 24,000 Tubi customers who claimed the streaming service's advertisements violated a California anti-discrimination law that has been interpreted to prohibit age- and gender-targeted advertising.

The Tubi suit wasn't the first time that a company facing mass arbitration demands sued the plaintiffs' firm orchestrating the campaign. As my Reuters colleague David Thomas reported last winter, skincare company L'Occitane managed last spring to derail a mass arbitration campaign in part by suing plaintiffs' lawyers at Zimmerman Reed over an aspect of their marketing tactics.

But Tubi's suit was more ambitious: It attacked the essential business model of Keller Postman – and, by extension, every other plaintiffs' firm that has adopted similar tactics.

Tubi argued that when Keller Postman advised clients to file arbitration demands without engaging in the informal dispute process required in the Tubi consumer contract, the firm was illegally interfering with its clients' Tubi contracts.

And, according to Tubi's theory, Keller Postman wasn't advancing its clients' interests when it advised them to breach their contracts. It was acting in its own interest, rushing to file arbitration cases to maximize its leverage from hefty arbitration fees before the arbitration provider JAMS changed its rules to make mass arbitration less expensive for companies.

Here's why Tubi's theory is potentially consequential. As mass arbitration has gained momentum over the last five years, hundreds of companies have adopted mandatory pre-arbitration dispute resolution programs like Tubi's. Plaintiffs' lawyers, broadly speaking, regard these programs as a cynical roadblock to deter legitimate arbitration demands. But if Tubi's theory holds up, every company with a pre-arbitration dispute could make a similar

argument if socked with a mass arbitration campaign: When mass arbitration lawyers tell clients to disregard pre-arbitration requirements and instead rush to file arbitration demands, the Tubi theory goes, they are liable for improperly meddling with their clients' contracts for the sake of garnering their own fat legal fees.

Keller Postman moved [here](#), opens new tab in September to dismiss Tubi's lawsuit. It offered two key arguments. First, it said, it had not induced clients to breach their contract with Tubi. Keller Postman said it regarded the streamer's mandatory informal pre-arbitration dispute resolution process as unconscionable. But the only way for Tubi users to determine the legitimacy of threshold issues, under Tubi's own contract, is to arbitrate them. So, Keller Postman said, when it filed for Tubi customers to arbitrate the threshold conscionability of the contract's pre-arbitration processes, it was actually adhering to the dictates of the contract.

More fundamentally, Keller argued, longtime precedent stands for the principle that lawyers cannot be liable for advising clients to breach a contract unless the lawyers are acting in their own self-interest, not the interests of their client. Keller Postman pointed out that it handles arbitration claims on contingency, so it wins fees only based on its clients' recovery. Its interests, the law firm said, are entirely aligned with those of its clients.

"Encouraging clients to seek redress for Tubi's tortious conduct is not itself tortious conduct," Keller Postman insisted. "Tubi clearly would prefer a system in which lawyers could not encourage consumers to bring legal claims but instead must sit in their offices, waiting for consumers to identify their legal rights on their own and then seek out a lawyer to represent them, one by one. But these desires are insufficient and improper grounds for a tortious interference claim, and no attempts at artful pleading can cure the fundamental legal defects with Tubi's claims."

Tubi's lawyers at Jenner & Block fired back on Wednesday, accusing Keller Postman of wrongly portraying precedent on lawyers' immunity from tortious interference claims. Caselaw, Tubi said, clarifies that lawyers aren't immune from claims if they act "in a malicious, fraudulent or tortious manner."

Keller Postman, Tubi alleged, did just that. The law firm "concocted" a legal theory, marketed for clients to pursue the theory, failed to vet their purported claims – ultimately filing arbitration demands for about 8,000 people who didn't even have registered Tubi accounts – and failed to obtain informed consent from its purported clients before compromising their claims by breaching the terms of their Tubi contracts.

"Keller Postman created risk for its clients that it does not share," Tubi asserted. "The only conclusion that can be drawn from these well-pleaded allegations is that Keller Postman acted in a malicious, fraudulent or tortious manner that has frustrated the administration of justice."

U.S. District Judge Ana Reyes, who is overseeing the case, was intensely interested in these issues at a Sept. 4 status conference during which both sides previewed their dismissal briefs. She also raised concerns about whether she could hear the case while Keller Postman's clients are litigating before a JAMS arbitrator.

You will not be surprised to hear that Keller Postman and Jenner disagree on that point as well: Keller called for a stay of Tubi's suit against the law firm. Jenner urged Reyes to allow Tubi's case to move ahead.

Keller's Warren Postman declined to provide a statement on the new Tubi brief. Tubi counsel from Jenner & Block declined to comment.

Read more:

Fox's Tubi sues law firm over 'manufactured' mass arbitration claims

WarnerMedia seeks to disqualify mass arbitration firm, alleges ethics breaches

L'Occitane sues US law firm over wiretapping law 'shakedown'

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Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

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

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Climate change may be 'accident,' but CO2 is 'pollutant,' Hawaii court rules

 legalnewsline.com/stories/665113599-climate-change-may-be-accident-but-co2-is-pollutant-hawaii-court-rules

October 18, 2024

Climate Change



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HONOLULU (Legal Newsline) - Recklessly emitting greenhouse gases into the atmosphere qualifies as an “accident” but CO2 is also a “pollutant” excluded from insurance coverage, the Hawaii Supreme Court ruled, answering questions central to a closely watched climate lawsuit.

Aloha Petroleum sued AIG to establish coverage for the costs of a lawsuit Honolulu filed against oil companies, claiming they exacerbated global warming by misleading consumers into consuming too much fossil fuels. The lawsuit was filed in federal court in Hawaii, but that court sought guidance from the Hawaii Supreme Court on whether state law mandates coverage.

The answer is no, the high court ruled in an opinion written by Justice Todd Eddins. While insurance generally covers “accidents,” including reckless behavior, a broadly written exclusion for “pollution” also applies.

AIG issued policies to Aloha from 1978 to 2010, covering “an accident” that results in damage “neither expected nor intended from the standpoint of the insured.” After 1988, the clause included “continuous or repeated exposure to substantially the same general harmful conditions.”

The policies also had clauses excluding coverage for “pollution,” which it defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” The policies also excluded government claims to clean up “or in any way responding to” pollutants.

Aloha, a unit of Sunoco, sued AIG to cover the costs of Honolulu's suit and AIG refused, saying the company's conduct was intentional and thus not an "accident." The Supreme Court disagreed.

"Insurance coverage does not require that the insured be blameless," the court ruled. "Accidents that were preventable with better foresight still deserve coverage."

The court cited a case in which the driver of a car from which the passenger fatally shot someone could claim it was an "accident," while the shooter could not. A truck driver who did nothing while a passenger raped a woman in the back of the vehicle also couldn't claim it was an "accident," since he knew the woman would be injured.

The court said it would invite excess litigation if it ruled reckless behavior wasn't an "accident," as insurers and policyholders wrangled over the "fine-grained distinction" between recklessness and negligence.

The Virginia Supreme Court ruled the opposite way in 2012, holding an insurer had no duty to cover AES Corp.'s costs associated with the Kivalina lawsuit. That case, on behalf of villagers in Alaska, ultimately failed. But Virginia and Hawaii law differ, the Hawaii Supreme Court said.

Aloha wasn't so lucky on the pollution exclusion. Since any substance can be an irritant in large enough concentrations, the court said, the pollution exclusion "requires some limiting principle to avoid absurdity." Aloha argued CO2 is a natural byproduct of burning fossil fuels in a "legal, ordinary and intended way." But Hawaii regulates greenhouse gases as pollutants, the Supreme Court said, and just because using a product is legal doesn't mean the resulting emissions aren't pollution.

"What makes a product a pollutant is that it causes damage due to its presence in the environment," the court ruled. "If a business sells a product that is inherently polluting, that fact must be part of its reasonable expectation. To hold otherwise would write the pollution exclusion out of the policy."

Honolulu claims Aloha's former parent, Phillips 66, and current parent, Sunoco, were on notice their products could cause global warming but misled consumers about the risk, causing them to burn more fuel than they otherwise would have. The U.S. Supreme Court recently sought the opinion of the U.S. Solicitor General on whether it should take up an appeal of the Honolulu case, which could spell the end of climate litigation in state courts, most of which is being pursued on a contingency-fee basis by private lawyers.

Tobacco

Tobacco giants near \$24bn settlement over long-running Canadian lawsuit

British American Tobacco, Philip Morris and Japan Tobacco close to resolving class action suit



The companies have been trying to resolve the litigation since their Canadian subsidiaries were ordered in 2015 to pay C\$15.6bn damages to compensate smokers for health problems © Cagkan Sayin/Alamy

Eri Sugiura in London 6 HOURS AGO



The tobacco industry is close to ending a long-running Canadian lawsuit, after a court-appointed mediator for British American Tobacco, Philip Morris International and Japan Tobacco proposed a C\$32.5bn (\$23.6bn) settlement.

The companies have been negotiating a possible resolution to the litigation after a Quebec court ordered their Canadian subsidiaries to pay C\$15.6bn damages in 2015 to compensate smokers for health problems, marking the [largest damages award](#) in the country's history.

PMI said on Friday that under the proposal, the settlement would be paid by its unit Rothmans, Benson & Hedges (RBH), and the Canadian units of the two other tobacco companies. The allocation of the amount between the companies in the proceedings remained unresolved, it added.

Upfront payments will be funded from cash in the companies and deposits made into court, while ongoing payments will be determined by the three companies' profits from tobacco products in Canada. Contributions will start at 85 per cent of net profit, with a 5 per cent reduction every five years to 70 per cent after 15 years, it said.

It added that voting on the plan would happen in December and if accepted by claimants, a hearing to consider approval of the plan would be expected in the first half of next year.

The plan brings a potential end to litigation that has hung over the companies for more than two decades, and was brought on behalf of two groups of smokers, including people who had developed throat and lung cancer, and others who were addicted to nicotine. The class action suits [were the first](#) in Canada in which damages were ordered against the industry to compensate smokers for health problems.

"After years of mediation, we welcome this important step towards the resolution of long-pending tobacco product-related litigation in Canada," said Jacek Olczak, the chief executive PMI.

"Although important issues with the plan remain to be resolved, we are hopeful that this legal process will soon conclude, allowing RBH and its stakeholders to focus on the future," he added.

Rae Maile, analyst at Panmure Liberum said the proposed settlement was a relief for investors, as it does not involve cost beyond Canada, and will not impact growing segments such as vaping, heat-not-burn and nicotine pouches.

"The companies will still be able to make money from these newer areas, provided that [they] get enough scale to make money," he said.

PMI's announcement follows BAT's earlier on Friday, which confirmed that a compromise and arrangement plan had been filed by a court-appointed mediator in the Ontario Superior Court of Justice, but did not disclose the details.

BAT's unit Imperial Tobacco Canada (ITCAN), RBH and JT's Canadian subsidiary JTI-Macdonald all filed for bankruptcy protection in 2019 soon after a Quebec court upheld the 2015 decision after the industry appealed.

“Today marks a positive step towards finding a resolution,” said BAT on Friday. “This has been a complex, confidential mediation and . . . we are hopeful of a quick conclusion to this process and securing a Canadian settlement for the benefit of all stakeholders.”

JTI-Macdonald said it had been “actively engaged in the confidential mediation” but added there were “certain critical issues that would need to be resolved if we are to find a settlement plan that is workable”.

BAT shares were down 4 per cent on Friday.

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Bloomberg Law News 2024-10-18T13:27:1233564433-04:00

Big Tobacco Firms Near to Settling Canada Smoking Risk Cases (1)

By Tuhin Kar2024-10-18T10:14:37082-04:00

- Companies had been ordered to pay damages over lack of warning
- New proposal resolves all Canada tobacco litigation, firms say

Three of the world's biggest tobacco companies are near a possible deal to resolve longstanding claims in Canada that they held back information about the health risks of cigarettes.

Under the proposal from a court-appointed mediator, Canadian subsidiaries of Philip Morris International Inc., British American Tobacco Plc and Japan Tobacco Inc. would pay an aggregate C\$32.5 billion (\$23.6 billion) to settle product-related litigation, Philip Morris said in a statement Friday.

The Canadian units were ordered in 2019 to pay damages after losing an appeal on class action suits filed by Quebec smokers.

That case stemmed from lawsuits originally filed in 1998, with the ruling marking the first damages awarded against the industry in Canada as smokers argued they were never warned on risks of tobacco use.

Analysts said at the time that so-called Big Tobacco firms risked bankruptcy in Canada from possible payments in the case. The Big Tobacco moniker generally encompasses the three firms named Friday plus Imperial Brands Plc and China Tobacco International HK Co.

The plan "resolves all Canadian tobacco litigation and provides a full and comprehensive release," BAT said in a statement Friday, adding that it would fund payments with cash on hand and from future sales.

BAT shares fell as much as 3.8% in London, their largest intraday drop in nearly a month. The dual-listed company's shares also registered their biggest intraday drop in over 10 months in Johannesburg trading.

Class Action

The new proposal includes compensation for participants in Quebec class action suits, Bruce W. Johnston, one of the lawyers for the plaintiffs, said in a statement on his firm's [website](#).

"We support this plan and are confident that almost all creditors will vote in favor," the statement said. The plan will be submitted to a vote by December 12.

The proposal could allow BAT to release \$2.3 billion in cash tied up as balance sheet liabilities for possible class action suits in Canada, Bloomberg Intelligence's **Duncan Fox** wrote in a note.

The plan remains subject to further negotiation by the parties involved and to claimant votes, as well as to Canadian court orders, Philip Morris said.

If it's accepted by claimants, "a hearing to consider approval of the proposed plan would then be expected in the first half of 2025," the US-based tobacco firm said.

Read More: Japan Tobacco Wins Court Protection in Canada Over Smoking Risks

(Updates with attorney, shares from seventh paragraph.)

--With assistance from **Melissa Shin**.

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Oct. 17, 2024, 8:52 AM PDT

CSX Receives SEC Subpoena Covering Years of Accounting Errors

By Nicola M. White

- Railroad previously reported mistakes, calling them immaterial
- Agency is also seeking details on non-financial metrics

Bloomberg Law News 2024-10-18T10:36:16626522596-04:00

CSX Receives SEC Subpoena Covering Years of Accounting Errors

By Nicola M. White2024-10-17T11:52:55329-04:00

- Railroad previously reported mistakes, calling them immaterial
- Agency is also seeking details on non-financial metrics

CSX Corp. received a subpoena from the US Securities and Exchange Commission focused on previously disclosed accounting errors and certain non-financial performance metrics.

The subpoena asked the railroad company to produce documents about accounting mistakes CSX disclosed in its previous quarterly report, according to a regulatory filing on Thursday. The company received the subpoena this month and is cooperating with the probe, CSX said in the filing.

"While the company believes its reporting complied with applicable requirements in all material respects, the company cannot anticipate the timing, scope, outcome or possible impact of the investigation, financial or otherwise," CSX said.

The filing didn't include details about the non-financial performance metrics the SEC was scrutinizing. The Jacksonville, Florida-based company didn't immediately respond to requests for comment.

CSX in August disclosed that it had to correct accounting errors for several prior periods tied to engineering scrap and engineering support labor. Miscoding of engineering materials and labor resulted in the company understating purchased services and labor and overstating properties, the company said at the time.

The mistakes weren't deemed material enough by CSX to trigger a formal restatement of previously published financial statements. It fixed the errors via revision, a correction that companies quietly tuck into their regulatory filings without the fanfare of a special SEC filing.

The concern extended as far back as 2021, and the revisions spilled over into how CSX made pension-related adjustments to other comprehensive income. They also required the company to reclassify certain balance sheet items, according to the August filing.

While the mistakes weren't material to prior periods, CSX said they would have been significant to 2024's full-year results if they were repeated in this year's second quarter.

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Oct. 17, 2024, 11:48 AM PDT

Matt Levine's Money Stuff: Musk Keeps Paying for X

By Matt Levine

Opinion

Bloomberg Law News 2024-10-18T10:58:17665276129-04:00

Matt Levine's Money Stuff: Musk Keeps Paying for X

By Matt Levine 2024-10-17T14:48:41021-04:00

X fines

It is sometimes useful to think of all of Elon Musk's ventures as one big company. I like to call it the Musk Mars Conglomerate, because it seems to be loosely organized around a theme of getting humans to Mars. (SpaceX rockets will take them there, Boring Company will dig tunnels for their habitats, Tesla will build appropriately cyberpunk vehicles to travel around Mars and Twitter/X will, I am not even kidding, be the government.) Musk's ventures seem to pretty freely share employees, resources, money and investors; sometimes, when it is convenient, they even merge with one another. There is a rough sense in which they are all one big company, where Musk is the founder, chief executive officer and controlling shareholder, and he gets to allocate resources among them in whatever way he thinks will maximize the overall value.

But only in a rough sense. In fact they are separate companies with separate legal structures and separate (though overlapping) shareholders. And in fact people pretty regularly get annoyed when Musk seems to allocate resources from Tesla (a public company) to his other businesses.

I have suggested that in some ways things would be simpler and easier if they were one company. But there are reasons to keep them separate. One is alignment of incentives: If each Musk entity is a single company with a relatively clear mission, employees can be paid in stock of that entity, and their efforts (to send up rockets, dig tunnels, etc.) can more directly affect their own wealth.

Another reason, though, is what I think of as “a basket of options is worth more than an option on a basket.” Elon Musk has a bunch of risky, capital-intensive ideas that might not work out. Each idea, if it works out, will make him a zillion dollars; if it doesn't, it will waste a lot of money. If he does each idea in its own company, the worst result for each one is zero: The company could end up worthless, and he'd lose whatever money he originally sank into it. (Which is not *that* much, since he's pretty good at fundraising for each of them: Much of the money will be lost by his co-investors.) Whereas if he does some big new idea in an existing company, and it doesn't work out, it can *reduce* the value of that company: There could be big *losses* on the new idea, taking money away from the company's existing profitable business. The value of a corporation, to its shareholders, can never go below zero. The value of a *division* of a bigger company can.

This is partly a matter of limited corporate liability: If a company's business ends up being worth less than its debts, the shareholders generally don't have to pay off those debts. The creditors just lose some money; the shareholders can't do worse than zero. All of Musk's companies have obvious *dangers*: What if self-driving Teslas crash a lot? What if Neuralink implants go awry? Well, in the US, if that happened, people would sue, and they would be awarded zillions of dollars of damages: The company would have to pay them much more money than it has. But in general, only the company — Tesla, Neuralink, whatever — that caused the harm would have to pay the damages. (And would, in this hypothetical, presumably go bankrupt.) The *rest* of Elon Musk's fortune would be fine, even if one of his companies ended up with a huge negative value.

This is not legal advice, though, to Musk or anyone else. Sometimes people get annoyed by this; sometimes you can “pierce the corporate veil” and make shareholders responsible for the actions of their companies. Siloing his risky activities in different companies is probably a good idea, for Musk, but it's not *absolutely* foolproof.

The risks of Tesla and Neuralink are pretty obvious, but of course Musk's most dangerous business line is social media. Bloomberg's Gian Volpicelli and Samuel Stoltz report:

The European Union has warned X that it may calculate fines against the social-media platform by including revenue from Elon Musk's other businesses, including Space Exploration Technologies Corp. and Neuralink Corp., an approach that would significantly increase the potential penalties for violating content moderation rules.

Under the EU's Digital Services Act, the bloc can slap online platforms with fines of as much as 6% of their yearly global revenue for failing to tackle illegal content and disinformation or follow transparency rules. Regulators are considering whether sales from SpaceX, Neuralink, xAI and the Boring Company, in addition to revenue generated from the social network, should be included to determine potential fines against X, people familiar with the matter said, asking not to be identified because the information isn't public.

See, you're not really supposed to do that: X is its own company, with its own corporate structure and owners; 6% of X's revenue is 6% of X's revenue, not 6% of the revenue of Musk's other companies. But if everyone thinks of the Musk Mars Conglomerate as a single company, then there's a risk that it will be treated that way.

A meme coin

I'm sorry about this but one important fact about financial markets in 2024 is that dumb weird stuff is valuable. What we have learned over the past few years, in the crypto market and the stock market, is that *memes* can be directly translated into dollars. You get a lot of people online interested in a stock or a crypto token, the price goes up, you get rich. What gets people online interested in something? "Strong fast-growing cash flows"? Maybe, but that's hard. Whereas "stupid meme stuff" also works, and is easier to accomplish.

So Dogecoin has a market capitalization of almost \$18 billion, because its logo is a picture of a dog and it's kind of funny and Elon Musk makes jokes about it. But that's a proof of concept, not a one-off: "The total value of all memecoins is more than \$50 billion," reported Bloomberg's Muryao Shen in March. Or AMC Entertainment Holdings Inc., which is both a real movie-theater company and also a meme stock, bought a gold mine in 2022, because that's hilarious, and also its chief executive officer famously did a YouTube interview with no pants on. Traditional corporate finance textbooks will not tell aspiring CEOs "do interviews with no pants because Reddit posters love weird stuff online and they drive a lot of stock prices," but I might.

I don't really like it any more than you do but here we are. You can make a stunt, associate a memecoin with it, and maybe it'll be worth a lot of money. The more complicated the stunt is, the better your chances. Here's one, via this Twitter (now X) thread and this Nate B. Jones YouTube explanation. Let me try to describe this one:

1. A guy built a somewhat autonomous AI agent, a large language model bot, that posts a lot on Twitter.
- 2. This bot, for mysterious reasons of its own, got really into the early internet shock meme "Goatse.cx." DO NOT GOOGLE THIS. Here's the Wikipedia link but honestly don't even click that. Either you know what it is or, I promise, you don't want to.
- 3. Marc Andreessen interacted with the bot on Twitter and ended up giving it \$50,000, because venture capitalists love getting up to nonsense on Twitter. (Sensibly! Nonsense on Twitter is a source of value!)
- 4. Someone — the bot? someone associated with the bot? or just people online who saw this stuff and thought it was funny? — launched a crypto memecoin called Goatseus Maximus, which the bot apparently (1) bought into and (2) promoted on Twitter.
- 5. Others saw all this, found it funny, and started buying Goatseus Maximus. As of noon today its market capitalization was about \$300 million, and the bot is, in Jones's words, on its way to being the first AI bot millionaire.

I suppose this is an interesting AI story: How autonomous is the bot? How did it develop these goals? How impressive is it that it accomplished them? Is this how humanity will go extinct, people sending money to AI bots because they think it's funny?

But it's also an important, but stupid, financial markets story. Not so long ago, you could be like "I've created a crypto token that is distinguished by having a picture of a dog," and it could capture a ton of attention and gain a lot of value. Now the barriers to entry are higher — there are a *lot* of memecoins with pictures of Shiba Inus — but you can still break through. You have to be a bit more, like, internet-culture-savvy. You have to be like "my crypto token is about a graphic early internet meme" — good! — "and also it is promoted by an autonomous AI bot" — better! — "that got its seed capital through a Twitter conversation with Marc Andreessen" — amazing! There's like three crazy meme things going on here, which creates \$300 million of value, I don't have an Excel spreadsheet working this out but you get the idea.

World Liberty

I wrote last month about World Liberty Financial, the crypto project that is affiliated with the Trump family. I said that there were two opposing positions on crypto in US politics: "Crypto is good so regulators should be friendlier to it" and "crypto is for scams so regulators should crack down on it." World Liberty, I wrote, staked out a novel third position: "Crypto is mostly for scams, and US regulators should allow it, so I can do scams."

This strikes me as a very *bad* case for a politician to make about crypto, both for the politician (why would we want our politicians doing scams?) and for crypto (why would crypto boosters want politicians to highlight the scammiest bits of crypto?).

Here's a Financial Times article about how crypto boosters don't like World Liberty because it highlights the scammiest bits of crypto:

A new digital assets venture promoted by Donald Trump is being shunned by much of the crypto industry, as executives fear the project will undermine efforts to rebuild trust with consumers after years of high-profile collapses and frauds. ...

"He said nice things about crypto but he immediately wants to extract value," said Nic Carter, general partner at Castle Island Ventures. "None of this is liberalising or democratising access to finance." ...

"When you see a project like this that doesn't have clear investor protections built in and you see everyday citizens getting excited about it because of who's endorsing it, it's really hard for us," said the head of one crypto hedge fund.

"It's scary for us in the industry who have worked really hard to keep regulation and compliance at the forefront," they added. ...

Crypto executives also point to the business records of two of the co-founders of World Liberty Financial as a potential problem for an industry trying to revive its reputation.

The two, Chase Herro and Zachary Folkman, have faced a number of lawsuits across the US over the years.

“These guys are total losers with very questionable business track records and not at all equipped to build an ironclad [decentralised finance] company,” Carter added. “Nobody knows them in crypto . . . they’re not like seasoned entrepreneurs in crypto at all.”

So, one: Yes, hahahaha. *Of course* Donald Trump’s crypto project was outsourced to guys with somewhat questionable track records — “One of them previously ran classes teaching men how to pick up women and the other faced allegations of fraud and illegal drug sales” — and will raise money on the back of Trump’s endorsement. *Of course* if you want the conversation around crypto to be about innovative technology that provides real benefits to people, you will be suspicious of this. Obviously crypto does a certain amount of this stuff — Donald Trump didn’t invent Goatseus Maximus! — but you want the focus to be on the real stuff, not the memes.

However. It is also true that meme finance has colonized the stock market too. World Liberty Financial is not the first, or largest, vaguely Donald Trump-themed financial product sold to retail investors by promoters with odd pasts. Trump Media & Technology Group Corp. is a meme stock that is listed on the Nasdaq, has a \$6 billion market capitalization and lost \$344 million on \$1.6 million of revenue in the first half of this year. It is plausible that Trump’s crypto token is about extracting value from investors rather than creating long-term value for them, but it’s plausible that that’s true of his stock too. Crypto can’t take all of the blame here.

Citadel

I say sometimes that the mark of success of a hedge fund manager is continuing to manage a hedge fund, but that’s not really right. That’s the second-best outcome. You could do better. The mark of true success as a hedge fund manager is to *stop* managing a hedge fund and convert it into a family office, in the good way. There are two ways to convert your hedge fund to a family office:

1. The bad way is that you have a run of bad performance or compliance problems, so your outside investors all leave and you’re stuck managing only your own money.

- 2. The good way is that you have a run of good performance, so you keep collecting 20% (or more) of your investors’ gains as incentive fees, so your own money keeps increasing as a percentage of the assets you manage. Eventually you manage enough of your own money that you cash out the outside investors, simplify your life and manage only your own money.

That’s roughly the Renaissance Technologies exit; the ultimate goal of running a hedge fund is to make enough money that you can replace the investors’ money with your own.

There are intermediate stages:

Citadel employees' investment in its \$45 billion flagship hedge fund surged during the past several years, driven by robust returns and lockups that the firm imposes on a big chunk of their annual compensation.

The assets held by principals and staff in the Citadel Wellington fund jumped to 20% as of Dec. 31 from 12% at the end of 2019, filings show. In dollar terms, the value of their combined stake, including that of founder Ken Griffin, more than tripled to about \$9 billion during that span.

The figures offer a rare glimpse into how Citadel is balancing divvying up the spoils of a stellar investing run and retaining the portfolio managers that produced it. Much of the increase in the employee share is attributable to the performance of Wellington, which generated annualized returns of 25.9%. That resulted in higher payouts for Citadel traders and portfolio managers, who are required to leave roughly half of their incentive awards, over a hurdle, in the fund for 3 1/2 years.

Incidentally, "family office" is the conventional name given to the exit vehicle — a firm that manages its founder's and employees' money — for a hedge fund that gets too rich. But you can think of the big multimanager hedge funds like Citadel and Millennium Management as being in competition, not only with each other, but also with another group of firms like Jane Street or Hudson River Trading. Those firms are normally called "proprietary trading firms," and they tend not to run outside investors' money; their equity is normally owned mostly by their founders and employees. There are broad differences between multimanager hedge funds and prop firms — the prop firms' portfolios usually turn over faster than the hedge funds' — but there is some convergence in strategies and employees; we've talked about how Millennium controversially hired some Jane Street traders to move their strategy to Millennium.

You can imagine these firms converging on a similar business model — using leverage and technology to rapidly provide liquidity and price discovery in public markets — from different starting points: The prop firms grew out of small partnerships whose basic business model was "do rapid trading with our own money," while the multimanager funds grew out of single-manager hedge funds whose basic business model was "invest money for clients." But if you do either of those things well for a long time, you might end up in the same place, running similar collections of strategies and not even needing client money.

Should index funds be illegal?

No, I'm kidding, this isn't about index funds at all. The basic idea of "should index funds be illegal" is that an investor that owns shares of every company in a sector — like an index fund — will not want too much competition in that sector. Fierce competition will create winners and losers, but the investor will own all of them, so its losses on the losers will offset its gains on the winners. Whereas if everyone just contentedly raises prices then the investor makes money on all of them.

That's controversial, but if you like it you can extend the idea to new areas. "Common ownership of different companies reduces labor market competition," for instance, or even "increases tax evasion." Or you could extend it beyond equity ownership: What happens if one *lender* lends to all the companies in a sector? Here is a fun Bank for International Settlements working paper by Hans Degryse, Olivier De Jonghe, Leonardo Gambacorta and Cédric Huylebroek on "Bank specialisation and corporate innovation":

Theoretical models offer conflicting predictions on how lenders' sectoral specialisation affects firms' innovation activities. On one hand, banks specialising in particular sectors may develop unique expertise, enabling them to better assess and support the opaque and risky investments essential for innovation. On the other hand, innovation can create spillovers where one firm's technological advancements negatively impact the value of other firms' existing assets. Specialised banks, which are more exposed to these potential spillovers, may be more inclined to impede innovation, especially in sectors where the risk of such spillovers is high. ...

Our findings reveal a nuanced relationship that varies with the degree of "asset overhang" – the risk that an innovation will negatively affect banks' existing loan portfolios through technological spillovers. Bank specialisation fosters innovation in sectors with low asset overhang, where banks can use their expertise to support innovation without fearing negative impacts on their existing assets. In contrast, in sectors with high asset overhang, specialised banks tend to constrain innovation due to perceived risks of technological spillovers eroding the value of their current loan portfolios.

That is: If a bank lends to every company in a sector with "high asset redeployability and low product market rivalry," it will happily fund one company's innovative research, because those innovations are unlikely to drive competitors into messy bankruptcies. If it lends to every company in a more competitive industry, though, it will be more skeptical of innovation. Innovation for one company could be bad for the others.

Consulting

The basic way to pay bribes — not legal advice! — is:

1. You want to sell some very expensive product to the government of Ruritania.
- 2. The Ruritanian government official in charge of buying the product is amenable to bribery.
- 3. He has a friend, or a nephew, who runs a consulting business that advises foreign companies on doing business in Ruritania.
- 4. You hire the consultant to help you get Ruritanian government business.
- 5. The consultant's advice is "give me a bag of money, I'll take 10% and give the rest to my uncle, and he'll give you the contract."
- 6. You do that.
- 7. The consultant's invoice says "for advice on Ruritanian business landscape and regulatory regime," etc., so you can justify the bag of money you gave him.

This is better than you giving the bag of money directly to the government official; this way, you can say "oh no we were paying for useful legitimate consulting, not just bribes." But it is not always much better. You have to, you know, make it look real. If the consultant-nephew is 17 and has never done any work in your industry, that looks bad. If he sends you emails that are like "I need that bag of money for my uncle now," bad. You want to be able to say with a straight face "no it was a legitimate consultant, we had no idea he was paying bribes."

Yesterday the US Department of Justice and Securities and Exchange Commission fined RTX Corp. (formerly Raytheon Technologies Corp.) \$950 million for a couple of unrelated things. One is “defective pricing” on some US government contracts — Raytheon “provided untruthful certified cost or pricing data when negotiating prices with the [Department of Defense] for numerous government contracts and double billed on a weapons maintenance contract.” The other is bribery in Qatar:

According to the SEC’s order, Raytheon used sham subcontracts with a supplier to pay bribes of nearly \$2 million to Qatari military and other officials from 2011 to 2017 to obtain Qatari military defense contracts. Additionally, the order finds that from the early 2000s into 2020, Raytheon paid more than \$30 million to a Qatari agent who was a relative of the Qatari Emir and who, despite being retained as Raytheon’s representative in Qatar, had no prior background in military defense contracting. Raytheon obtained additional defense contracts through the agent under circumstances with significant corruption risks. The order finds that Raytheon continued working with the agent even after numerous Raytheon employees raised concerns about risks of corruption and despite a lack of adequate documentation of the agent’s services.

The thing you are supposed to do is make the consulting look good, and they didn’t. From the SEC order:

In February 2014, Raytheon awarded Supplier A [the consultant] the first of the two subcontracts for the defense studies. According to the subcontract, Supplier A was to draft defense studies in Arabic and deliver them to ... Qatari Military Official A [in charge of procurement].

At the direction of Qatari Military Official A, Raytheon employees and managers agreed to draft the defense studies called for under the subcontract. A Raytheon technical director drafted three defense studies in Arabic and passed them off as studies conducted by Supplier A, using his Raytheon computer in the U.S. Numerous red flags of the bribery were present, including the fact that the studies were substantially similar to studies outlined and drafted by the employee a year before Raytheon entered into the sham contract with Supplier A. The technical director and a Raytheon program manager also falsely certified that Subcontractor A had completed milestones in accordance with the terms of the subcontract to justify payments to Supplier A, including providing study outlines and drafts to Raytheon for review. Despite paying nearly \$975,000 for the studies, Raytheon did not retain a copy of the studies. In fact, Raytheon employees did not review the studies because they were written in Arabic, and only the employee who drafted the studies was fluent. Between May and September 2014, Raytheon falsely recorded the payments to Supplier A for the sham defense studies as legitimate subcontractor services.

Yes, right, if you hire a consultant to draft a study for you, the best look is for the consultant to draft the study, and for you to then read and refer to it, because it is valuable consulting and not just a conduit for bribes. It looks bad if somehow (1) you draft the study *and* (2) you don’t read it.

Meal allowance

"Like most big tech companies," says this Financial Times article, Meta Platforms Inc. "offers free food to employees based out of its sprawling Silicon Valley headquarters as a perk." Thus there is an expectation that your pay at Meta includes not only salary, bonus, equity and other benefits, but also free food whenever you're at the office. But Meta has a lot of offices, some of which don't have the same wealth of dining options. If you work at one of those offices, they still feed you: "Staff are given daily allowances of \$20 for breakfast, \$25 for lunch and \$25 for dinner" to order food delivered to the office.

Now, most people who work at Meta will not eat all of their meals at the office. Sometimes they will have dinner with their families, or go to restaurants. If they work at the headquarters this is pretty straightforward: If you're at the office for the meal, you eat it at the office; if you're not, you don't.

But if they work at the smaller offices, the benefit does not exactly consist of food. It consists of *money* for food. The benefit is not "let's go down to the cafeteria and see what they're offering for dinner"; it's a credit for \$25. If you're not working late, you might ... collect the money anyway?

In one post on anonymous messaging platform Blind, seen by the Financial Times, one former Meta staffer wrote they had used \$25 credits on items such as toothpaste and tea from the pharmacy Rite Aid, adding: "On days where I would not be eating at the office, like if my husband was cooking or if I was grabbing dinner with friends, I figured I ought not to waste the dinner credit."

The person, who indicated they had a salary of about \$400,000 at Meta and worked "nights [and] weekends", wrote that they had admitted to the oversight when human resources investigated the practice, before later being unexpectedly fired. "It was almost surreal that this was happening," the person wrote.

Yeah the article is about how Meta went and fired "about two dozen staff in Los Angeles for using their \$25 meal credits to buy household items including acne pads, wine glasses and laundry detergent." "I ought not to waste the dinner credit"! Imagine working at headquarters and thinking this! "I was going out to dinner, so before I left I went to the cafeteria, boxed up a bunch of food and resold it on the street for cash."

You see stuff like this at big banks from time to time. There I suppose the employees get fired because an employee who abuses the meal allowance too egregiously is a compliance risk. I'm not sure that's so true at Meta, though maybe it is. Still making \$400,000 and buying toothpaste on Meta's dime to not "waste the dinner credit" seems like it might signal other problems.

Things happen

Wall Street banks enjoy bumper fees as debt issuance and deals activity rebound. CLOs Are So Hot Right Now, They're Getting ETF'd. Santander Plans Risk Transfer Linked to £1 Billion of UK Consumer Loans. McKinsey Cuts Hundreds From China Workforce. Blackstone is "preparing to take some portfolio companies public." Neuralink Co-Founder's New Startup Sells a Brain Computer Toolkit. CFA Final Exam Pass Rate Falls to 48%, Below the Decade Average.

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- 1. “Mr. Musk has told people that he bought X, the social media platform, partly to help test how a citizen-led government that rules by consensus might work on Mars,” reported the New York Times.
- 2. I’m sorry, this whole story is too online for me to call it “X.” I do my best to say “X” in the ordinary course of business but this is about an AI bot pumping a Goatse-themed memecoin.
- 3. The most notable compliance problem examples are probably SAC Capital (which converted to a family office, Point 72, but later came roaring back as a hedge fund) and Tiger Asia Management (which became Archegos).

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Crashes Involving Tesla's Full Self-Driving Prompt New Federal Probe

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The National Highway Traffic Safety Administration opened an investigation into four crashes in which the system was engaged.

By Aaron Gregg and Ian Duncan

(Washington Post) -- Federal car safety regulators have opened an investigation after reports of four crashes involving Tesla's Full Self-Driving software - including one that killed a pedestrian in November 2023 - an inquiry that raises questions about whether the system is safe in low-visibility conditions.

The investigation marks another step in the National Highway Traffic Safety Administration's long-running effort to scrutinize Tesla's driver-assistance systems, which have been linked to numerous crashes and multiple deaths. The new probe's focus on bad visibility could test Tesla chief executive Elon Musk's assertion that cameras are enough to guide its vehicles without the aid of other kinds of sensors, such as radar or lasers.

Most of the federal agency's previous work on Tesla's software has focused on the less-sophisticated Autopilot system. The new examination targets Full Self-Driving software that the automaker advertises as allowing vehicles to drive themselves "almost anywhere with minimal driver intervention."

NHTSA said in a statement that the investigation would scrutinize "the system's potential failure to detect and disengage in specific situations where it cannot adequately operate, and the extent to which it can act to reduce risk." Tesla did not immediately respond to a request for comment.

Full Self-Driving is available in most Teslas in the United States, about 2.4 million vehicles, according to regulators, though not all of their owners have opted to buy the FSD package. About half of Tesla owners were using the FSD system in the first quarter of this year, and that figure was still increasing, Musk said in April. The package costs \$8,000, or \$99 a month.

Neither Autopilot nor Full Self-Driving is designed to make a vehicle fully automated. Both require human drivers to remain ready to intervene. Autopilot, which comes standard on most Tesla vehicles, provides an advanced form of cruise control and can steer on well-marked roads. Full Self-Driving allows the vehicle to navigate itself, change lanes on highways, steer on city streets and can handle stop lights.

The four reported crashes involved Tesla vehicles that entered areas where visibility on the roadway was poor, stemming from glare, fog or airborne dust, and Full Self-Driving was found to be active, NHTSA said. In addition to the pedestrian's death, another of the crashes involved an injury, the agency said. The investigation covers Tesla Models S and X from 2016 to 2024, Model 3s from 2017 through 2024, Model Y vehicles from 2020 through 2024, and Cybertruck vehicles from 2023 or 2024.

Matthew Wansley, a professor at Yeshiva University's Cardozo School of Law in New York who specializes in emerging automotive technologies, said the new investigation could be linked to Tesla's decision to prioritize cameras in its automated systems. Other kinds of sensors like radar and the laser-based lidar can help keep a vehicle moving safely when visibility is poor. Musk has previously said that lidar was unnecessary and that automakers who relied on it were "doomed."

"Tesla made this decision when lidar was really expensive, and for whatever reason they seem to be sticking with it," Wansley said. "Tesla's position on sensors has always been a bit of an outlier, so it's definitely worth investigation."

NHTSA has little power to review technology on vehicles before they are sold to the public, relying instead on its authority to investigate safety problems and order automakers to make fixes. The agency gathered information about the four Tesla crashes under a 2021 order that requires automakers to submit details about incidents involving advanced driver-assistance technology.

The records that NHTSA publicly releases are heavily redacted. But they show the pedestrian was killed in November 2023 in the town of Rimrock, Ariz., about an hour and a half north of Phoenix, in a crash involving a Tesla Model Y.

Tesla has issued recalls for Full Self-Driving at least twice in the past. In one case in 2023, it issued an update to the system to tackle cases of vehicles speeding and behaving unpredictably or illegally at intersections. NHTSA said Friday that the recall was linked to an earlier federal investigation into Tesla's systems.

Autopilot has also been the subject of scrutiny by federal regulators. Tesla recalled more than 2 million vehicles in December after a lengthy investigation by NHTSA. But in April, the agency said it had opened a new probe into whether the recall had worked. Just months after the recall, a Tesla Model S using Autopilot hit and killed a motorcyclist outside of Seattle. NHTSA said Friday that it was "working as quickly as possible to bring this investigation to a conclusion."

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Elon Musk Changes X Terms To Push All Disputes Toward Tesla-Investor Federal Judge

A abovethelaw.com/2024/10/elon-musk-changes-x-terms-to-push-all-disputes-toward-tesla-investor-federal-judge

Joe Patrice

October 18, 2024

Courts

When you clicked 'accept' you agreed to a new courthouse.

By Joe Patrice

on October 18, 2024 at 12:12 PM

Elon Musk didn't get where he is without taking risks. And "where he is" involves having epically botched a merger agreement requiring him to drop roughly \$44B of his own (and Diddy's!) money into a company while driving up the legal expenses he would eventually own and then proceeding to obliterate almost 80 percent of the company's value. But you can't make an omelette without inviting Nazis to help you break some eggs!



(Photo by Apu Gomes/Getty Images)

However, one risk Musk isn't taking is in handling the legal fallout of his tenure as self-described Chief Twit.

Wow: Twitter's new ToS says all disputes will be heard in U.S. District Court for the Northern District of Texas located in Tarrant County (Tesla investor Reed O'Connor's court)

Truly remarkable, considering Twitter's new HQ is NOT in this district, but in western Texas. pic.twitter.com/loJgrVgytq

— Bobby Allyn (@BobbyAllyn) October 17, 2024

For those playing along at home, due to the Northern District of Texas's one-stop-forum-shop rules — which they've defended even as the rest of the federal judiciary urged them not to drag the credibility of the courts into the mud — a case filed in the Tarrant courthouse has a massively good chance of ending up in front of O'Connor. That said, the language did NOT choose to send everything to Wichita Falls, the courthouse that would *guarantee* O'Connor heard the case. I'm assuming X's lawyers didn't want to have to drive the extra hour and a

half every time. In Tarrant County, there's an equal chance (45 percent) that the matter would draw Judge Mark Pittman — also appointed by Trump — and a small chance of getting Senior Judge Terry Means — a George H.W. Bush appointee.

Judge Reed O'Connor owns a whole lot of Tesla stock, a functional meme stock tied to Musk's persona. Lest there be any doubt that Tesla functions as an empty signifier for investors betting on Musk as an individual, he's managed to convince the shareholders to award him a compensation package so divorced from Tesla's worth as a company that it amounts to roughly half the company's total assets. Delaware courts aren't so sure about that one.

In Musk's SLAPP suit against Media Matters, the advocacy group challenged X's certification of financially interested parties for not including Tesla — the public company whose fortunes rise and fall with Musk's private travails. An agitated O'Connor dismissed the notion out of hand and then ordered Media Matters to cover the attorneys' fees involved in lieu of missing an opportunity to preside over a case between Musk and progressive fact checkers.

To be clear, O'Connor has recused himself from another X case after the public learned of his Tesla investment... he just doesn't seem to want to let go of *this* one.

O'Connor has had a busy week in the headlines, because he's also held up the DOJ's plea agreement with Boeing over the airline's deadly accidents because — despite no challenge by any party — he wants to confirm that the independent monitor won't be a DEI hire... whatever the hell that means.

The Media Matters case is one that only a hack could love. After promising advertisers that the service could prevent their brand from *ever* appearing next to white supremacist content, Media Matters proved that it was entirely possible that respectable brands could appear next to white supremacist content. Musk's company claims that Media Matters had to create some really racist profiles to get those results, which is true but sort of misses the point that (a) there are real people with really racist profiles, (b) X promised that mainstream advertisers wouldn't be visible in those feeds, and (c) MAINSTREAM ADVERTISERS WERE TOTALLY VISIBLE IN THOSE FEEDS.

One of the big requirements of all the causes of action in this case is that the statement be, you know, *false*.

When making unequivocal promises that the platform will prevent advertisers from being featured next to this content, it's not really sufficient to say it "probably won't" happen. That would be like unequivocally promising a self-driving car that's only probably won't veer into a wall or burst into flames.

But putting aside the merits of O'Connor's decision at the time, the revelation that X has rearranged its terms of service to stack the deck toward getting him as their judge should be worth... something.

Even if a judge didn't think his growing portfolio of Tesla stock equated to a personal financial stake in Elon's X/Twitter vanity project, learning that *X itself* appears to believe the judge is sufficiently in the tank to rewrite the terms of service to place most of their chips on ending up in his courtroom — *even though X is not even headquartered in that district* — should give pause that, at the very least, there's an appearance of impropriety.

It doesn't matter if the appearance of impropriety is the fault of a party and not the judge. The fact that we're even talking about this crazy change to the terms of service has created an indelible appearance of impropriety.

Let's not hold our breath though.

Earlier: Media Matters Isn't Saying Judge Reed O'Connor Is Conflicted. They're Just Saying That He Stands To Financially Benefit From Twitter SLAPP Suit.

Judge Reed O'Connor Seems To Own Too Much Tesla To Rule Against CVS, Just Enough To Rule Against Liberal Fact-Checkers



Joe Patrice is a senior editor at Above the Law and co-host of Thinking Like A Lawyer. Feel free to email any tips, questions, or comments. Follow him on Twitter or Bluesky if you're interested in law, politics, and a healthy dose of college sports news. Joe also serves as a Managing Director at RPN Executive Search.

Topics

Courts, Elon Musk, Reed O'Connor, Technology

Musk's X seeks to steer lawsuits to conservative court in Texas

 [reuters.com/legal/musks-x-seeks-steer-lawsuits-conservative-court-texas-2024-10-17](https://www.reuters.com/legal/musks-x-seeks-steer-lawsuits-conservative-court-texas-2024-10-17)

Nate Raymond

Item 1 of 2 Elon Musk, Chief Executive Officer of SpaceX and Tesla and owner of X, formerly known as Twitter, attends the Viva Technology conference dedicated to innovation and startups at the Porte de Versailles exhibition centre in Paris, France, June 16, 2023.

REUTERS/Gonzalo Fuentes/File Photo

[1/2]Elon Musk, Chief Executive Officer of SpaceX and Tesla and owner of X, formerly known as Twitter, attends the Viva Technology conference dedicated to innovation and startups at the Porte de Versailles exhibition centre in Paris, France, June 16, 2023.

REUTERS/Gonzalo Fuentes/File Photo [Purchase Licensing Rights](#) , opens new tab

- Platform X tells users to direct any lawsuits to Northern District of Texas
- Northern District is favored by conservatives for blocking Biden's agenda
- X's lawsuits against Media Matters and advertisers filed in Northern District

Oct 17 (Reuters) - Elon Musk's X has updated its terms of service to steer any disputes by users of the social media platform formerly known as Twitter to a federal court in Texas whose judges frequently deliver victories to conservative litigants in political cases.

New terms of service that will take effect on Nov. 15 specify that any lawsuits against X by users must be exclusively filed in the U.S. District Court for the Northern District of Texas or state courts in Tarrant County, Texas.

It is common for companies to include venue clauses in their terms of service directing what forum would hear any disputes filed against them. But the choice of the Northern District of Texas stands out because X is not even located in the district.

Following a move from San Francisco, X is today headquartered in Bastrop, Texas, near Austin, whose federal court is in Texas' Western District. The Western District has far fewer Republican-appointed judges than the Northern District.

The Northern District has become a favored destination for conservative activists and business groups to pursue lawsuits seeking to block parts of Democratic President Joe Biden's agenda, a tactic Democratic lawmakers say smacks of "judge-shopping."

"It's hard to imagine that's unrelated to this new language," said Stephen Vladeck, a law professor at Georgetown University.

X did not respond to a request for comment.

Musk, the world's richest man, has increasingly embraced conservative causes and has become a major financial supporter of Republican former President Donald Trump in his campaign to win the Nov. 5 presidential election.

Texas' Northern District already is the host of two lawsuits X has filed after several brands pulled ads from Musk's platform, including one against liberal watchdog group Media Matters after it published a report that said ads appeared next to posts supporting Nazism.

X, which billionaire Musk bought in 2022, sued Media Matters last year, alleging the group defamed the platform. The lawsuit is set for trial in Fort Worth, Texas, next year. Media Matters has called the lawsuit meritless.

X has also filed an antitrust lawsuit accusing several advertisers of conspiring to stage a boycott, causing it to lose revenue.

Both of X's lawsuits were initially assigned to U.S. District Judge Reed O'Connor, a Fort Worth judge who once declared the Obamacare health insurance law unconstitutional in a ruling that was later overturned. He has since blocked Biden administration policies on gun control and LGBTQ rights.

The judge, an appointee of Republican former President George W. Bush, stepped aside from X's antitrust case in August after National Public Radio reported that financial disclosure reports showed O'Connor had owned shares of another Musk company, Tesla (TSLA.O) [↗](#), opens new tab.

But the judge has declined to recuse himself from the Media Matters case.

O'Connor is one of two active judges in Fort Worth's federal courthouse. The other is Mark Pittman, a Trump appointee.

Reporting by Nate Raymond in Boston, Editing by Alexia Garamfalvi and Matthew Lewis

Nate Raymond
Thomson Reuters

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<https://www.wsj.com/business/autos/teslas-self-driving-tech-facing-probe-after-fatal-accident-52bf2159>

BUSINESS | AUTOS

Regulator Investigates Tesla's Automated-Driving Feature After Fatal Crash

NHTSA says probe will examine the system's ability to function in reduced-visibility conditions

By [Ben Glickman](#) [Follow](#) and [Don Nico Forbes](#) [Follow](#)

Updated Oct. 18, 2024 11:09 am ET



A Tesla Model 3 using 'Full Self-Driving' technology. PHOTO: MIKE BLAKE/REUTERS

Federal auto-safety regulators are investigating Tesla's **TSLA 0.14% ▲** automated-driving software after the system was linked to several crashes, the latest probe into the safety of the electric-vehicle maker's technology.

The National Highway Traffic Safety Administration said Friday that it had identified four crashes involving Tesla's driver-assistance system, which the company markets as "Full Self-Driving," including one in which a Tesla vehicle fatally struck a pedestrian.

The agency said the crashes occurred in reduced-visibility conditions, often caused by sun glare, fog or airborne dust. It is looking into whether the Tesla system can appropriately respond in such scenarios.

The probe, described by NHTSA as a preliminary evaluation, represents a new round of scrutiny of Tesla's automated-driving technology, which Chief Executive Elon Musk has said is critical to the company's growth prospects. Tesla last week unveiled ambitious plans for a driverless robotaxi, which would have no steering wheel or accelerator pedal.

This new action by NHTSA, the U.S.'s top auto regulator, underscores the regulatory hurdles that Tesla will face as it seeks to roll out driverless robotic cars on the roads. Tesla had previously recalled millions of vehicles after officials scrutinized its Autopilot driver-assistance software following a yearslong investigation.

The investigation announced Friday covers an estimated 2.4 million vehicles, NHTSA said. That includes all Tesla models that can come equipped with the optional driver-assistance software, such as certain versions of Model 3, Y, X and S, as well as the Cybertruck.

The agency said the probe will assess whether any other crashes have occurred in similar circumstances, as well as any updates to Tesla's FSD system that may affect its performance in low-visibility conditions.

Tesla didn't respond to a request for comment.

Shares of the EV manufacturer were roughly flat in morning trading Friday. The stock is off about 11% this year, compared with a 23% rise in the S&P 500.

The company's driver-assistance technology has previously sparked at least a dozen lawsuits against Tesla. Musk has said repeatedly in recent years that the company was close to fully autonomous vehicles, though the automaker's system still requires drivers to actively monitor the road while the software is engaged.

The probe from NHTSA comes a week after Tesla's long-awaited robotaxi event, meant to lay out the company's path to becoming primarily a robotics and artificial intelligence-focused business. That event, though, largely disappointed investors, who were looking for more financial details on Tesla's plan.

Musk said the company would offer its driverless-taxi service only where it was allowed, but didn't give details on how the company would approach regulatory hurdles.

Write to Ben Glickman at ben.glickman@wsj.com and Don Nico Forbes at don.forbes@wsj.com

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China ETFs Join Cathie Wood's as Biggest Wealth Destroyers in US

By Ye Xie and Isabelle Lee

- KWEB's assets are almost \$5 billion less than net inflows
- Long-term track record underscores risks in Chinese stocks

Bloomberg Law News 2024-10-18T10:37:27537210936-04:00

China ETFs Join Cathie Wood's as Biggest Wealth Destroyers in US

By Ye Xie and Isabelle Lee 2024-10-17T10:09:29047-04:00

- KWEB's assets are almost \$5 billion less than net inflows
- Long-term track record underscores risks in Chinese stocks

A word of warning for traders who've been pouring billions into Chinese-stock ETFs like never before: The strategy is not only prone to big reversals, it has also lost a cohort of ill-timed investors a fortune over the past decade and counting.

While these exchange-traded funds have rallied at times, creating short-term trading opportunities, their performance over the long haul has made them some of the biggest wealth destroyers among US ETFs. Over the past decade in fact, Chinese ETFs rank alongside the flagship fund of **Cathie Wood** — the onetime star money manager whose stock bets have floundered since the pandemic — in producing the biggest erosion of asset value for US ETF investors, according to data compiled by Bloomberg.

"They're trading vehicles, rather than investing vehicles," said **Todd Sohn**, an ETF strategist at Strategas. "So if you wanted to play China and chase this move, just be aware that historically it's one of the most volatile equity markets out there and it has a history of giving back a lot of the gains."

The KraneShares CSI China Internet Fund (ticker KWEB) has taken in more than \$12 billion since its inception in 2013 on a net basis. Typically, inflows like these would be accompanied by rising asset values from increased investment and price appreciation. But in this case the underlying value of holdings deteriorated so much that the fund was worth just \$7.7 billion as of Friday — almost \$5 billion less than what investors put into it.

The KWEB valuation gap trails only Wood's ARK Innovation ETF (ARKK) among 415 of the largest US-listed stock ETFs, the data show. By contrast, the SPDR S&P 500 ETF Trust (SPY) has rewarded investors the most by this measure, with \$159 billion net inflows turning into \$593 billion in assets.



This way of looking at fund performance — which follows a similar methodology as was used in a study by Morningstar earlier this year — isn't as intuitive as tracking total returns, but it can provide powerful insights. By comparing fund flows and the value of assets under management, one can have a better understanding of how many investors have fared. An ETF may have a positive, say 100%, return, over 10 years, but if most investors buy at the top, they could still suffer steep losses.

Three of the four largest China ETFs have had assets fall below accumulated inflows. One, the iShares MSCI China ETF (MCHI), has fallen short by \$1.7 billion, putting it among seven of the biggest ETFs that saw losses of more than \$1 billion, according to data compiled by Bloomberg. Meanwhile, the iShares China Large-Cap ETF (FXI), the largest of its kind in the US, barely managed to avoid a loss over its two decades of existence, with its current assets of \$10.9 billion slightly outpacing the \$10.7 billion inflow, the data show.

To a large degree, the gap between accumulated inflows and assets in Chinese ETFs is about timing. These funds have exhibited swings, often tempting investors to pile in at what later turned out to be just the wrong time.

"Timing China's rebound and stimulus has been difficult, though investors' patience is finally being rewarded," said **Brendan Ahern**, chief investment officer at Krane Funds Advisors LLC, which oversees KWEB fund.

A spokesperson at BlackRock, which oversees the two iShares China ETFs – FXI and MCHI — didn't respond to a request for comment, nor did a representative for ARKK.

A majority of KWEB's inflows happened in 2021, when Chinese shares surged at first amid optimism that China's economy was on track for a swift recovery from the 2020 pandemic. Then, a deepening housing crisis and President Xi Jinping's crackdown on various industries sent the market reeling. As Chinese share prices cratered, dip-buying investors kept adding to KWEB, only to see holdings losing value further. That year, the ETF tumbled 52%, even as investors poured in a record \$7.4 billion.

The crowds buying in to the Chinese ETFs mimicked those investing with Wood, who catapulted to fame amid the Covid-19 lockdowns for her bold calls on popular pandemic plays like Tesla Inc. ARKK, her flagship fund, took in \$4.6 billion in 2021 and has seen some 70% of its value wiped out from its peak since then.

"People entered the trade at bad levels," said **Brent Donnelly**, president of Spectra Markets.

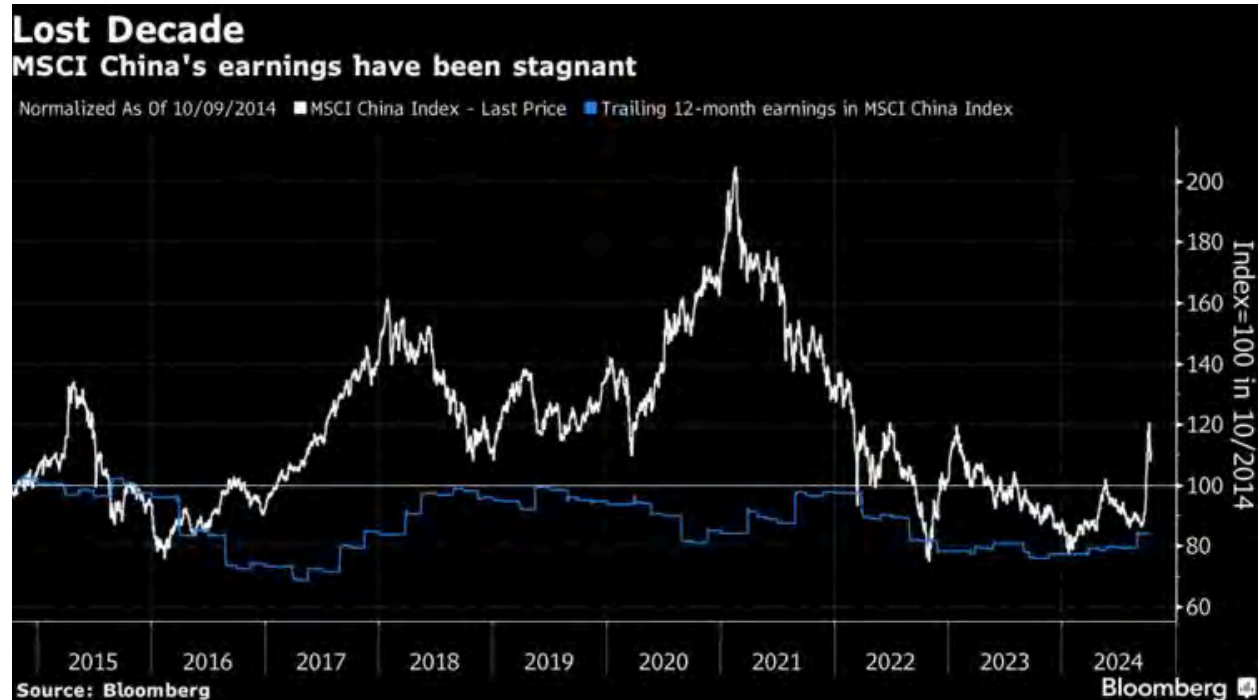


Fast forward to today. Beijing's stimulus blitz starting in late September – including interest-rate cuts and the central bank's pledge to provide liquidity to the stock market – prompted the MSCI China Index to shoot up 36% in less than three weeks.

The enthusiasm also sparked record inflows into Chinese funds. Investors plowed \$6 billion into the FXI fund over the past month, the fourth-most among all ETFs in America. The KWEB fund, which follows tech and internet companies, attracted \$2 billion.

The rally in Chinese shares has already lost some steam, though, in the face of the significant challenges still ahead in addressing the headwinds facing China's economy.

Even after the recent market surge, China stocks remain one of the biggest laggards among global markets over more than a decade. Including dividends, the MCHI fund returned 25% since its debut in 2011, compared with 467% in the S&P 500. Prior to the 27% jump over the past month, the KWEB fund gained only 14% since its launch in 2013.



Whether the Chinese rally can keep going depends on Beijing's willingness to dole out more fiscal stimulus. Donnelly said he's skeptical that Beijing will do whatever it takes to salvage the economy and keep the stock rally going.

"It's ultimately a fear-of-missing-out trade," said Donnelly, a veteran Wall Street trader with previous stints at Lehman Brothers and Citigroup, about the Chinese stock market rally. "It's an opportunity to make money and chase it and hope they can get it out before anyone else."

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<https://www.wsj.com/health/healthcare/cvs-names-david-joyner-as-new-chief-executive-a0a73b27>

HEALTH | HEALTHCARE

CVS Shares Fall After Earnings Warning, CEO Ouster

The company says third-quarter results will fall well below expectations

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

Updated Oct. 18, 2024 9:58 am ET



CVS has repeatedly cut its forecasts for this year's financial performance. PHOTO: RICHARD B. LEVINE/ZUMA PRESS

CVS Health **CVS -6.42%** ▼ replaced its top executive as it warned that its coming earnings will once again fall short of Wall Street expectations, sending shares of the company down around 7% in early trading.

David Joyner is taking over as the new chief executive of the struggling healthcare giant, succeeding Karen Lynch, the company said Friday after The Wall Street Journal first reported the news.

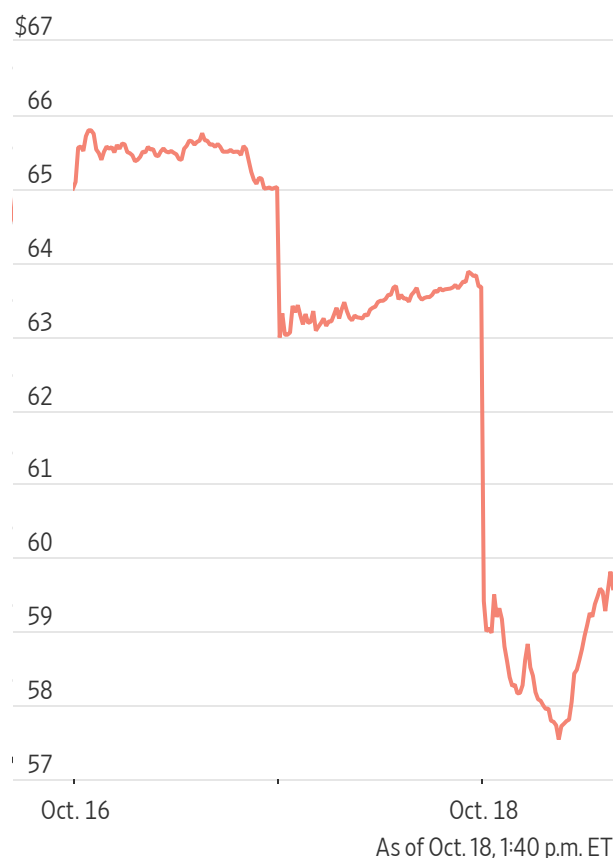
Joyner has been president of CVS Caremark, the company's pharmacy-benefit manager, as well as an executive vice president of CVS.

Roger Farah, chairman of CVS's board of directors, will also become executive chair.

CVS is making the changes after repeatedly cutting its forecasts for this year's financial performance, moves that led to a 19% decline in its share price this year as of Thursday's close, a push for changes by a major hedge fund and a board review of strategy that included the option of breaking up the company.

Stock-price performance

CVS Health



Source: FactSet

CVS is now planning to announce third-quarter results that will fall well below Wall Street expectations, largely due to continued issues at its Aetna insurance unit, and to back away from its most recent full-year earnings projection for 2024, issued in August. A new downgrade would represent the fourth since the company's investor day in December 2023.

Joyner and Farah said in an interview with the Journal that CVS will now move forward intact.

"We believe that we have a really important part to play in terms of simplifying and delivering a better healthcare experience for this

country," Joyner said. CVS's assembled assets will allow it "to actually deliver on the promises that we've made, and now it's all about execution."

Joyner will face a difficult task. Not only must he turn around CVS's Aetna health-insurance business, but he must also contend with Federal Trade Commission scrutiny of pharmacy benefit giants including Caremark. CVS also faces longstanding challenges in the retail pharmacy business.

Best known for its namesake pharmacies, CVS is one of the biggest healthcare companies in the U.S. Last year, it notched about \$358 billion in revenue.

In addition to filling prescriptions at its drugstores, CVS furnishes health insurance through Aetna, treats patients at its senior-focused Oak Street clinics, and pays for drugs through its Caremark unit.

The company combined the disparate functions with the promise that it would smooth patients' experiences, improve their healthcare and bring down costs.

But CVS has fallen short of its original goals for growth and transformation.

Especially problematic has been the company's recent bet on Medicare health-insurance coverage. CVS's Aetna expanded enrollment in its Medicare plans just as medical costs were rising and the federal government was changing rules around certain industry billing practices.

Aetna's Medicare woes have been at the heart of CVS's financial difficulties this year, including the expected issues with the third-quarter earnings. Other insurers have recently reported similar problems.

Joyner said he would focus closely on the performance of Aetna. He pointed to recently announced improvements in the insurer's Medicare quality ratings, as well as efforts by CVS to roll out new payment models for its retail pharmacy and pharmacy-benefit businesses.

"The overall company performance is disappointing," Farah said. "As the year began to unfold and we struggled to deliver on our one-year and three-year commitments, we really just came to the conclusion that it was time for a change."

Joyner, 60 years old, has worked at CVS or predecessor companies nearly his entire career, including an early stint at Aetna and then at Caremark before CVS acquired the pharmacy benefit manager, or PBM, in 2007.

After the combination, Joyner worked on the integration of Caremark and CVS, which he said prepared him to help bring together CVS's current units. He retired from CVS in 2019, returning last year to take over leadership of the PBM.

The board chose Joyner partly because his history at the company meant he could start having an impact immediately, Farah said. "It would be very difficult

for an outside executive to have the expertise in all phases of health care,” he said.

Farah said the board voted unanimously for the management shift, though he said it was a difficult decision.

Lynch, 62, is a longtime managed-care executive who ran Aetna before becoming CEO of CVS in 2021. She helped preside over the company’s response to the Covid-19 pandemic and wrote a book on leadership.

Under her watch, CVS spent \$10.6 billion on the Oak Street clinics business and an additional \$8 billion on home-visits company Signify Health, which focuses on Medicare.

CVS now expects its third-quarter earnings, set to be unveiled Nov. 6, to be in the range of 3 to 8 cents a share, or between \$1.05 and \$1.10 a share on an adjusted basis. Analysts had expected adjusted earnings per share of \$1.69, according to FactSet.

The nonadjusted results will include a charge related to store closures and some cost-cutting moves the company is making. The results will also incorporate a charge to record premium deficiency reserves.

CVS will also report that medical costs are still running higher than expected, an issue that has come up in other insurers’ recent reports. Aetna’s medical loss ratio, or the share of premiums spent on healthcare costs, will be around 95.2%, compared with analysts’ expected 91.1%.

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Securities Law News

Oct. 17, 2024, 3:26 PM PDT

Trump-SPAC Insider Trading Sends Second Brother to Prison (1)

By Chris Dolmetsch

- Michael Shvartsman gets 28 months after brother got 22 months
- They made millions illegally trading in Trump Media vehicle

Bloomberg Law News 2024-10-18T10:47:50951676776-04:00

Trump-SPAC Insider Trading Sends Second Brother to Prison (1)

By Chris Dolmetsch2024-10-17T18:26:11386-04:00

- Michael Shvartsman gets 28 months after brother got 22 months
- They made millions illegally trading in Trump Media vehicle

A scheme to make millions of dollars on a deal to take Donald Trump's social media startup public ended badly for a pair of Florida brothers, with both sentenced to prison for insider trading.

Michael Shvartsman, 53, was ordered on Thursday to spend 28 months behind bars by US District Judge Lewis Liman, a day after the judge gave his younger brother Gerald 22 months for his role in the conspiracy. Liman also imposed a \$1 million fine.

The brothers were charged by federal prosecutors in Manhattan in June 2023 with making more than \$22 million through their trading in a blank check company, Digital World Acquisition Corp., along with another Florida man, **Bruce Garelick**. The Shvartsmans pleaded guilty to securities fraud in April, while Garelick was convicted in a jury trial in May and is set to be sentenced next month.

The judge said a lengthy term of incarceration was appropriate in the case of Michael Shvartsman given that his crime was "undoubtedly a serious one," adding that insider trading "undercuts and corrodes the public's trust in the markets."

"He did not need to do it, he was already a wealthy man," Liman said. "He was not desperate, he was not young and unsophisticated."

'Deeply Embarrassed'

Shvartsman and his wife, who have three young children, both addressed the court before sentencing, asking the judge to show mercy.

"I'll never forgive myself for the position I've put them in," Shvartsman said, dabbing his eyes with tissues as his brother looked on from the first row of the gallery. "I'm deeply embarrassed and ashamed for what I've done."

The US had asked Liman to impose a punishment in line with federal sentencing guidelines, which called for Michael Shvartsman to spend 46 to 57 months behind bars, saying his conduct was "flagrant, manipulative and motivated by sheer greed."

Prosecutors said he was entrusted with confidential information about the merger through a special purpose acquisition company, or a SPAC. They say he arranged for Garelick, an employee of one of his businesses, to serve on the SPAC's board and made about \$18 million trading on the information personally. He is the founder of Rocket One Capital LLC, a Miami-based venture capital firm where Garelick was the chief strategy officer.

"His co-conspirators made millions more," the government said in a court filing. "And he moved portions of the proceeds of his crimes through a series of corporate payment processing accounts he controlled and used the rest to purchase a luxury yacht layered through shell companies and straw owners."

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

Read More: Trump Social Media Investor Gets Prison for Insider Trading

Michael Shvartsman was more culpable than his brother because he devoted more money to the scheme, ensured one of his employees was on the SPAC's board and tipped more, a prosecutor told the judge on Thursday. Trump himself wasn't accused of any wrongdoing in the case.

Defense lawyers urged Liman to impose a punishment below the guidelines, asking for 26 months. They said their client has "paid a steep price" for his conduct, has "lost his reputation and suffered humiliation both personally and professionally," and has lost "significant amounts of business."

The brothers, the sons of Ukrainian immigrants, both face deportation after they serve their sentences.

The Shvartsmans and Garelick were early investors in Digital World and had signed nondisclosure deals with the company that gave 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.

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

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

(Updates with comments by judge, Shvartsman, background on case.)

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Zoox Investors Battle Amazon Sale Suit Toss In Chancery

By **Jeff Montgomery**

Law360 (October 17, 2024, 8:14 PM EDT) -- An attorney for self-driving robotaxi venture Zoox Inc., its directors and Amazon.com told Delaware's chancellor on Thursday that insolvency was days away when Zoox agreed to a \$1.3 billion acquisition by Amazon.com in June 2020, despite conflicting claims from stockholders who challenged the deal.

William Savitt of Wachtell Lipton Rosen & Katz said during case dismissal arguments before Chancellor Kathaleen St. J. McCormick that attorneys for common stockholders failed to show that Zoox, founded in 2014, could have continued as a standalone enterprise or that it had a better offer in hand.

Counsel for the stockholders, Savitt said, also failed to show that directors who approved the deal secured "a personal financial benefit from the transaction that's not shared with other stockholders, or a material, detrimental impact" tied to a conflict of interest.

The four-count amended complaint, filed on behalf of two Zoox stockholders in May 2023, asserted three breach of fiduciary duty counts — one each against the officers, directors and Amazon. Alleged were actions that tilted the deal and compensation to Zoox's preferred stockholders, leaving only about \$100 million — or about 70 cents a share — for common stockholders.

The suit also claimed that deal terms were tainted by allegations of bad faith on the part of Zoox, the directors and Amazon, with the fourth count seeking non-indemnifiable payment of stockholder legal fees by those parties.

"Nobody on the board advocated for the commons [common stockholders] during the entire process," David A. Knotts of Robbins Geller Rudman & Dowd LLP — counsel to lead stockholders James Wei and Yanxin Zhang — told Chancellor McCormick.

"During the Zoox sale process, Zoox fiduciaries focused on their own interests and left the common stockholders with far less," Knotts said, adding later in the hearing: "It is absolutely clear that a majority of directors here received materially different consideration in this merger relative to the commons."

Savitt painted a picture of Zoox as an innovative transport company parked for years on the edge of financial calamity, with one of the strongest alternatives to Amazon's offer carrying "crushing strings" and a requirement for \$200 million from another source.

"Amazon was selected because Amazon was the best deal," Savitt said, noting that a board resolution and term sheet included requirements that preferred shareholders "agree to surrender their unmistakable contract right to demand 100 cents on the dollar," which would have left common stockholders empty-handed.

Among the statements singled out by Knotts were comments by Zoox CEO Aicha Evans to Amazon, allegedly urging the company to boost its offer high enough to cover and clear preferred shareholder equity.

The amended complaint pointed out that Evans told Amazon: "If you were willing to increase your offer to clear the preference stack, [Zoox co-founder Jesse Levinson] and I would be willing to use

every ounce of political capital we have, and fall on a sword, to force the investors to take it."

Knotts told the chancellor that Evans and Levinson "jointly conspired to cut off" an incoming bid by GM Cruise Holdings LLC in part by moving up the start of exclusivity protections for Amazon.

"Two weeks later, when Cruise conveyed its offer — hundreds of millions of dollars higher than Amazon's — Evans instructed the board to snub it," a stockholder brief opposing the suit's dismissal said.

Savitt disputed the claims in the suit, telling Chancellor McCormick that the stockholders accused Amazon of making an offer that barely met preferred investor claims, while the company's proposal actually cleared the line by \$250 million.

Those who sued, Savitt said, were "entitled to well-pled allegations of facts. They're not entitled to unreasonable, contradictory inferences."

Chancellor McCormick said she would take the arguments under advisement.

James Wei, Yanxin Zhang and the proposed class are represented by Joel Friedlander, Jeffrey M. Gorris and David Hahn of Friedlander & Gorris PA, and Randall J. Baron and David A. Knotts of Robbins Geller Rudman & Dowd LLP.

Zoox, Amazon, and the officers and directors of Zoox are represented by Garrett B. Moritz and Benjamin M. Whitney of Ross Aronstam & Moritz LLP, and William Savitt, Anitha Reddy, Adam M. Gogolak and David P.T. Webb of Wachtell Lipton Rosen & Katz.

The case is James Wei and Yanxin Zhang v. Jesse Levinson et al., case number 2023-0521, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.



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Rocket Investors Eye New Cert. Bid After Post-Goldman Denial

By **Katryna Perera**

Law360 (October 17, 2024, 9:20 PM EDT) -- A pension fund has asked a Michigan federal judge for another chance at class certification in a suit alleging Rocket Cos. hid its knowledge of a drop in its mortgage business, saying the new class would be "substantially narrowed" after certification was previously denied in light of a recent U.S. Supreme Court decision.

The Construction Laborers Pension Trust for Southern California, also known as SoCal, filed a **notice** on Wednesday for leave to file a renewed motion for class certification. SoCal argues the new proposed motion for class certification would include a much smaller class, focus only on insider trading claims and cure issues the court previously found.

Last month, U.S. District Judge Thomas L. Ludington **denied class status** to shareholders of Rocket Cos. Inc., who allege the company hid a sharp drop-off in its mortgage business for months until it reported an expected \$18.5 billion decrease in closed loan volume in May 2021.

Judge Ludington gave several reasons backing his decision in an 82-page opinion, including what he said was the lead plaintiff's failure to meet a standard for class certification laid out by the Supreme Court in a **2021 ruling** in [Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System](#).

The plaintiffs didn't cite the Goldman decision in their Wednesday notice, but say one of the additional reasons Judge Ludington denied certification in September was that the investors could not establish the reliance element for their misstatement claims.

However, the pension fund says that would no longer be an issue in the new proposed motion since it wouldn't pursue misstatement claims, only insider trading claims, which don't require a reliance element.

Furthermore, the proposed motion would cure any previously identified ascertainability issues since the class definition is now much more "concrete," the notice says.

"The new proposed class definition resolves any ascertainability concern, as it provides a fixed period of time (four days), and a person's inclusion in the class can be determined based on their trading records," the notice states. "Courts readily permit renewed motions for class certification and doing so is particularly appropriate where the movant seeks to improve a class definition."

According to the notice, the new class definition would include all persons who purchased Rocket Class A common stock between March 29, 2021, and April 1, 2021.

The adequacy issues of SoCal and former class representative Carl Shupe would also be remedied as Shupe would no longer seek to serve as class representative, the notice says. Additionally, SoCal's previously articulated errors in distinguishing between claims would no longer be present since only insider trading claims will be pursued.

"While SoCal's errors in articulating such difference could still be relevant to assessing its overall understanding of the insider trading claims, the significance of being able to articulate that difference [from misstatement claims] would be eliminated," the notice states.

The pension fund further argues that if the court declines to grant it leave to file a renewed motion

for class certification, it should reconsider its prior ruling as an alternative.

The pension fund says reconsideration should be granted because the court erred when it didn't consider certifying a modified class definition limited to the insider trading claims and in finding that the definition of the proposed insider trading subclass was not reasonably ascertainable, as well as applying a knowledge requirement to SoCal that exceeded the relevant legal standards.

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

SoCal is represented by Carol C. Villegas, Christine M. Fox, Jake Bissell-Linsk and David Saldamando of Labaton Keller Sucharow LLP, Shannon Hopkins of Levi & Korsinsky LLP and James Allen of Schenk & Bruetsch PLC.

The defendants are represented by Nick Gorga, Jeremy D. Lockhart and Carsten A. Parmenter of Honigman LLP, Deborah S. Birnbach, Adam Slutsky and Kate MacLeman of Goodwin Procter LLP, Jeffrey B. Morganroth of Morganroth & Morganroth PLLC and Sharon L. Nelles, Jeffrey T. Scott, Julia A. Malkina and Jacob E. Cohen of Sullivan & Cromwell LLP.

The case is Shupe et al. v. Rocket Companies Inc. et al., case number 1:21-cv-11528, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Jessica Corso. Editing by Drashti Mehta.

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Meta Judge Doubts Investor Suit Over Efforts To Protect Kids

By **Dorothy Atkins**

Law360 (October 17, 2024, 7:33 PM EDT) -- A California federal judge appeared skeptical Thursday of keeping alive an investor's lawsuit claiming Meta Platforms Inc.'s annual proxy statement misled investors about the social media giant's efforts to protect children from sexual predators, telling the investor his economic loss arguments are circular and doubting whether Meta's statements are actionable.

U.S. District Judge Charles R. Breyer's comments came at the start of a hearing held via Zoom on Meta's latest motion to dismiss investor Matt Eisner's lawsuit, which was initially filed in April and amended in July.

Eisner's two-count complaint alleges Meta violated the Securities and Exchange Act and federal regulations by issuing a misleading 2024 annual proxy statement ahead of Meta's annual shareholder meeting in May that touted its child-safety protections with alleged "half-truths" that didn't disclose to investors that Meta's new social media features and subscription services allegedly increase child exploitation on Facebook, Instagram and other platforms.

The complaint also alleges Meta's proxy statement didn't disclose that the company failed to prioritize safeguards and blocked child safety features because they were not profitable, thereby exposing the company to potential liabilities, among other alleged omissions.

But on Thursday, Judge Breyer told Eisner's counsel, Francis A. Bottini Jr. of Bottini & Bottini Inc., that he was having a "very hard time" figuring out what Eisner claims were specific false statements by Meta that are actionable.

"It's the plaintiff's burden to [show actionable statements] ... and I don't think they've met it," the judge said.

Judge Breyer also took issue with the investor's economic loss theory, and called it an "insurmountable problem."

Eisner's amended complaint claims that Meta's 2024 proxy statement caused him economic loss and harm, because Eisner has incurred attorney fees and expenses to file the instant suit to try to correct the alleged false statements and omissions. The complaint also alleges Eisner's voting rights have been interfered with.

But Judge Breyer disagreed with the complaint's suggestion that plaintiff's attorney fees could constitute economic loss to establish standing under Article III of the U.S. Constitution.

"The idea that the economic loss occurred, because [Eisner] went out and hired lawyers and that cost a lot of money? Well yeah, lawyers cost a lot of money," Judge Breyer said. "It would make the requirement of [showing] economic loss meaningless ... You would agree that that's totally a circular argument."

Bottini replied that the suit only seeks injunctive relief, and not damages, and therefore Eisner doesn't need to show economic loss to establish he's been harmed. Instead, Bottini argued, his client is arguing that his individual right to vote on the proxy has been harmed.

"Defendants are trying to misrepresent everything by saying you need to show economic harm, but federal proxy laws allow shareholders to seek injunctive relief," Bottini said.

But Meta's counsel, Charles S. Duggan of Davis Polk & Wardwell LLP, argued that Eisner hasn't alleged any viable theory of economic harm. Duggan noted that Eisner has to establish a direct link between the proxy vote and the harm alleged, but Eisner's claims that his voting rights have been harmed are "too attenuated" to establish a viable securities claim.

"Just pointing to past matters doesn't solve the issue," Duggan said. "Pointing to potential future harms doesn't [solve the issue]."

Duggan added that there's a "fundamental absurdity about this entire lawsuit," because the lawsuit claims that Meta didn't disclose information to investors in its proxy statement, but the complaint is "replete" with information from other sources regarding Meta's business, so Eisner cannot show the information wasn't publicly available to him.

"It's sort of nonsensical on its face," Duggan said.

But in a short rebuttal argument, Bottini argued that the court should consider the requested injunctive relief, and he noted that another district judge found that Meta's statements regarding its "robust" policies to prevent child exploitation were half-truths in light of internal studies showing the escalating problem of child predators on the platforms.

At the end of the hearing, Judge Breyer said he would take another look at his colleague's ruling before deciding Meta's motion, and he took the arguments under submission.

Eisner is represented by Francis A. Bottini Jr. of Bottini & Bottini Inc.

Meta is represented by Charles S. Duggan of Davis Polk & Wardwell LLP.

The case is Matt Eisner v. Meta Platforms Inc. et al., case number 3:24-cv-02175, in the U.S. District Court for the Northern District of California.

--Editing by Jay Jackson Jr.



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Acadia Hid Wrongful Detainment Of Patients, Investor Claims

By **Sydney Price**

Law360 (October 17, 2024, 10:13 PM EDT) -- Behavioral healthcare provider Acadia Healthcare was hit with a proposed securities class action in Tennessee federal court alleging that investors were damaged after The New York Times published an investigative report saying the company detained patients in its psychiatric facilities for financial gain rather than out of medical necessity.

According to the lawsuit, filed by shareholder Anurag Kachrodia in the U.S. District Court for the Middle District of Tennessee on Wednesday, Acadia misled investors about its practices, admissions, length of stay and billing practices. The Delaware-based company is the largest stand-alone behavioral healthcare company in the U.S. and provides behavioral healthcare services in "inpatient psychiatric hospitals, specialty treatment facilities, residential treatment centers and outpatient clinics," the suit said.

An article published by The New York Times last month contended that Acadia held patients against their will when it was not medically necessary, lied to insurers about the medical necessity of keeping those patients and willfully neglected patients, the suit states. For years, Acadia downplayed the regulatory risks associated with these practices, damaging investors, the suit alleges.

In addition to Acadia, the suit's individual defendants include the company's former CEO Debra K. Osteen; current CEO, Christopher H. Hunter; former Chief Financial Officer David M. Duckworth; and current CFO, Heather Dixon.

The suit's class period begins Feb. 28, 2020, the day Acadia published its 2019 annual report. The report's risk disclosures stated that "if one or more of our facilities experiences an adverse patient incident or is found to have failed to provide appropriate patient care...adverse regulatory action could be taken against us." The disclosures were misleading, the complaint alleges, because they failed to state that Acadia was already committing violations against its patients.

For the next several years, Acadia continued to make similar disclosures and statements in financial filings and investor calls. But on Sept. 1, The New York Times reported that in several states "dozens of patients, employees and police officers have alerted the authorities that the company was detaining people in ways that violated the law," according to the suit.

Among other things, the article also noted that 50 current and former executives and staff members reported patients being held for financial reasons rather than medical ones, and facilities often did not release patients until their insurance ran out.

Following the article's publication, Acadia shares declined \$3.72 each, or about 5%, to close at \$78.21 per share on Sept. 3.

A few weeks later, Acadia filed a statement with the U.S. Securities and Exchange Commission noting that it had received a voluntary information request from the U.S. Attorney's Office for the Southern District of New York as well as a grand jury subpoena from the U.S. District Court for the Western District of Missouri, and that it anticipated a documents request from the SEC.

On this news, Acadia's shares declined \$12.38 each, or about 16%, to close at \$63.28 per share on Sept. 27.

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

Acadia said in a statement last month that it was "cooperating fully with the authorities regarding this matter."

"We're committed to taking action on incidents that fall short of our rigorous standards and are making investments necessary to establish Acadia as the leading behavioral healthcare provider for high-acuity and complex-needs patients," said Hunter, the CEO.

Counsel for Kachrodia and a representative of Acadia did not immediately respond to requests for comment on Thursday.

Kachrodia is represented by Paul Kent Bramlett and Robert Preston Bramlett of Bramlett Law Offices, and by Phillip Kim and Laurence M. Rosen of the Rosen Law Firm PA.

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

The case is Kachrodia v. Acadia Healthcare Co. Inc. et al., case number 3:24-cv-01238, in the U.S. District Court for the Middle District of Tennessee.

--Editing by Karin Roberts.



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Amgen Faces Derivative Suit In Del. Over Tax Disclosures

By **Jeff Montgomery**

Law360 (October 17, 2024, 6:52 PM EDT) -- An Amgen Inc. stockholder has sued the company in Delaware's Court of Chancery seeking derivative recoveries for the multinational biopharmaceutical company from its directors and officers based on allegedly false and misleading statements regarding \$10.7 billion in federal tax bills and penalties.

A summary of the full complaint, which was filed under seal late Wednesday, names Amgen CEO and Chairman Robert A. Bradway and Chief Financial Officer Peter H. Griffith among 15 current individuals listed in the complaint.

Sought are recoveries, according to a case disclosure, for "breach of fiduciary duty and unjust enrichment relating to false and misleading statements concerning tax liabilities and penalties assessed against the company as a result of its transfer-pricing strategies."

Stockholder David Hamilton filed the suit less than three weeks after a judge in the U.S. District Court for the Southern District of New York refused an Amgen motion to dismiss a pension fund suit seeking direct damages from the company for allegedly misleading taxpayers about its potential tax liability.

U.S. District Judge John P. Cronin ruled in that suit, led by Roofers Local No. 149 Pension Fund, that the complaint plausibly alleged Amgen disclosure failures could have misled stockholders — and that an amended version of the original complaint "permits a strong inference that the omission of the company's potential multibillion-dollar liability was reckless under the circumstances."

According to the New York complaint, Amgen disclosed the IRS dispute and potential "significant adjustments" that could have a material impact but failed to provide details about the federal agency's \$10.7 billion potential claim and risk to the company.

Delaware's Court of Chancery often handles derivative, equity-based claims triggered by direct stockholder actions seeking to shift the costs of litigation and judgments against a corporation to its fiduciaries and their insurers.

In the New York case, Judge Cronin extended the time Amgen had to answer an amended version of the direct, securities case, originally due Monday, to Nov. 20.

"Amgen made its dispute with the IRS public but for years kept the size of the liability it was facing — more than an entire year of its profits — a secret," Judge Cronin wrote in his Sept. 30 decision. "So when news finally broke that the IRS was seeking \$10.7 billion in back taxes and penalties, plus interest, the company's share price plummeted."

The federal suit dates to March 2023, with an amended version, filed in August 2020, alleging "instead of disclosing these huge contingent liabilities, which arguably could jeopardize the ability of Amgen to continue as a going-concern, defendants improperly concealed the amounts the IRS stated were owed to the U.S. government, minimized the magnitude of the amounts sought and misled investors."

Amgen did not immediately respond to a request for comment.

Stockholder David Hamilton is represented by P. Bradford deLeeuw of deLeeuw Law LLC.

Counsel information for Amgen in the new case was not immediately available.

The case is David Hamilton v. Robert A. Bradway et al., case number 2024-1063, in the Court of Chancery of the State of Delaware.

--Additional reporting by Natalie Olivo and David Hansen. Editing by Philip Shea.

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Apple's \$20M Watch Defect Deal Lacks Info, Judge Says

By **Dorothy Atkins**

Law360 (October 17, 2024, 11:33 PM EDT) -- A California federal judge has declined to preliminarily approve Apple's \$20 million deal to resolve a proposed class action alleging certain Apple Watches have a battery defect that can cause serious injuries, ordering counsel to submit additional information, including details on the lawsuit's maximum value if consumers win at trial.

In a two-page Oct. 15 **order**, U.S. District Judge Haywood S. Gilliam Jr. wrote that the parties have not submitted sufficient evidence on the value of the deal and how it compares to what consumers would be entitled to if they were to win each of their claims at trial.

Under the deal, class counsel plans to seek no more than \$5 million in attorneys' fees, or 25% of the total settlement, plus costs and expenses, while potentially millions of class members could receive between roughly \$20 and \$50, according to the consumers' motion for preliminary approval.

But Judge Gilliam wrote that the motion provides him with "no basis" to determine whether those amounts are reasonable and fair compared to what class members could receive if they won at trial.

Judge Gilliam also noted that the proposed settlement allows Apple to renege on the deal if a certain number of class members opt out, and although the parties agreed to let the court review that threshold number in camera, or in his chambers, Judge Gilliam wrote that the parties haven't provided him with the confidential figure to review.

"Without this information, the court is not able to evaluate the reasonableness of this term," the order said.

The settlement seeks to resolve **litigation** initially launched by Alabama resident Chris Smith and other consumers in December 2021, claiming that Apple's First Generation, Series 1 through 6 and Series SE Apple Watches contain lithium cobalt oxide batteries that can swell, causing the watches' screens to shatter and expose watch-wearers to razor-sharp edges that have allegedly caused burns and deep, long cuts around their wrists and forearms.

The consumers alleged that Apple was aware of the alleged defects but hid them from the public despite selling tens of millions of purportedly defective watches to potential class members, who paid between roughly \$250 and over \$1,000 for the digital watches.

After multiple rounds of pleading, Judge Gilliam trimmed several claims, but in February 2023, he allowed the consumers to amend the remaining allegations.

In May 2023, Apple asked the judge to **throw out the case entirely**, arguing that the consumers had failed three times to plead their claims adequately and their time had run out.

After briefing was completed on the motion, but before the judge ruled, the consumers asked the court for permission to amend their lawsuit again to beef up the allegations with more details on the alleged defect that they had recently learned in discovery.

Apple quickly opposed the request, but Judge Gilliam granted it on Oct. 30. A day later, the consumers filed an amended complaint, and on Nov. 3, the parties told the judge they had reached a settlement in principle. They asked the court to pause litigation deadlines to finalize the terms of the

deal, which Judge Gilliam agreed to do.

In August, the consumers filed their motion seeking preliminary approval of the settlement, which proposes to award class members \$20 for each covered device, or a pro rata share of the net settlement fund if the per-class member amount is less than \$20.

If there's more than \$50,000 remaining in the net settlement fund after \$20 payments are made to all claimants, then the remaining funds will be distributed among claimants evenly up to \$50 per claimant, while any additional funds remaining will go to a cy pres recipient — meaning an organization designated by the court, according to the motion.

Judge Gilliam held a hearing on the motion on Oct. 3 but didn't rule from the bench. On Oct. 15, he issued his order, noting that he had reviewed the motion and the proposed settlement in greater detail since the hearing, and he still needs more information.

He gave the parties until Oct. 22 to submit additional briefing responding to his concerns.

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

The customers are represented by Steven Nicholas and Lucy E. Tufts of Cunningham Bounds LLC, Benjamin H. Kilborn Jr. of Kilborn Law LLC and Michael F. Ram and Marie N. Appel of Morgan & Morgan PA.

Apple is represented by Erin M. Bosman, Claudia M. Vetesi, Penelope A. Preovolos and Alexis A. Amezcua of Morrison Foerster LLP.

The case is Chris Smith et al. v. Apple Inc., case number 4:21-cv-09527, in the U.S. District Court for the Northern District of California.

--Additional reporting by Gina Kim. Editing by Dave Trumbore.



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Burford Again Loses Fight Against Meat Price-Fixing Deal

By **Lauraann Wood**

Law360 (October 17, 2024, 9:03 PM EDT) -- An Illinois federal judge on Thursday refused for a second time to let a Burford Capital LLC unit unbind itself from a global settlement Pilgrim's Pride and Sysco entered to resolve chicken, pork and beef price-fixing claims.

Burford subsidiary Carina Ventures LLC had argued a Seventh Circuit order tossing its challenge to U.S. District Judge Thomas Durkin's order enforcing Pilgrim's Pride Corp. and Sysco Corp.'s global protein price-fixing deal also meant he'd entered an invalid and unenforceable injunction that must be either vacated or reentered correctly under federal procedure rules.

But in rejecting Carina's assertion, Judge Durkin's brief **order** said the Seventh Circuit's dismissal never addressed the substance of his enforcement order. Carina also hasn't pointed to any error warranting vacating the order, he said.

"Pilgrim's originally made a motion to enforce its settlement with Sysco, which the court granted," Judge Durkin said. "To the extent Pilgrim's continues to seek relief from the court, Pilgrim's should file a motion."

The order came a day after a different judge in Illinois handling consolidated turkey price-fixing claims rejected a bid from some of the country's largest producers to challenge a recent order allowing Carina to pursue allegations against them.

Representatives for the parties didn't immediately respond Thursday to a request for comment.

Judge Durkin said in June that the drafted-yet-unsigned settlement between Pilgrim's Pride and Sysco **was enforceable** because the companies' efforts going back and forth in emails to finalize their deal indicate their agreement "is sufficient objective evidence of an agreement to enforce it."

Sysco had assigned its price-fixing claims to Carina after Burford objected to its deal with Pilgrim's Pride, which sought to resolve the broiler chicken case as well as beef and pork price-fixing cases pending in Minnesota federal court. Burford's objection is the reason the settlement documents at issue were never signed, Judge Durkin said then.

Carina appealed within a week, but the Seventh Circuit dismissed the appeal for lack of jurisdiction, saying that although the parties characterized Judge Durkin's enforcement order as an injunction, it lacked the required characteristics of one and was thus "fatally flawed" for that purpose.

Carina argued the Seventh Circuit's dismissal cast doubt on Judge Durkin's authority to enter injunctions affecting cases in other jurisdictions and highlighted the vagueness of which settlement terms he intended to enforce. Carina argued that even if Judge Durkin held to enforcing the global settlement, he should at least issue an injunction complying with the federal rules.

Fighting that argument, Pilgrim's Pride argued Carina hadn't come close to clearing the high standard necessary to vacate the order and instead "grossly" mischaracterized the Seventh Circuit's dismissal order while rehashing arguments the judge had already rejected. The company also argued an injunction was "unwarranted and unnecessary at this point" because the company has already fulfilled its settlement obligations.

Carina is represented by Derek Ho, Travis Edwards, Christopher Goodnow and Mary Charlotte Carroll of Kellogg Hansen Todd Figel & Frederick PLLC and Christopher Seeger and Jennifer Scullion of Seeger Weiss LLP.

Pilgrim's Pride is represented by Michael Bonanno, William Burck, Christopher Michel, Kathleen Lanigan, Debra Bernstein and Michelle Schmit of Quinn Emanuel Urquhart & Sullivan LLP.

The case is In re: Broiler Chicken Antitrust Litigation, case number 1:16-cv-08637, in the U.S. District Court for the Northern District of Illinois.

--Editing by Brian Baresch.

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Former X Exec 'Worst' For Class In Bonus Suit, Judge Says

By Irene Spezzamonte

Law360 (October 17, 2024, 1:19 PM EDT) -- A former X Corp. senior director of compensation is "the worst possible candidate" for the class he proposed in his suit claiming unpaid bonuses after Elon Musk took the reins of the company, a California federal judge said, slamming his bid for class certification.

U.S. District Judge Vince Chhabria **denied** Mark Schobinger's class certification motion Wednesday, saying the former executive for X, previously known as Twitter, is not typical to the class members he sought to represent because he was the one recommending getting rid of the bonuses he is now attempting to retrieve.



A California federal judge slammed a former X Corp. executive's bid for class certification in a suit alleging unpaid bonuses, describing him as "the worst possible candidate" to represent the proposed class. (Photo by Budrul Chukrut / SOPA Images/Sipa USA)

Schobinger's "convoluted explanation for how he could possibly have believed he was entitled to the bonus while simultaneously advocating that the company not pay it" seems untrue, Judge Chhabria said.

"But even if he is telling the truth, that's beside the point for purposes of this motion," Judge Chhabria added. "Because even if he is telling the truth, his conduct makes him the worst possible candidate to serve as a litigation representative for the other Twitter employees who didn't get a bonus."

Schobinger asked the court in August to sign off on a class of **about 2,200 employees** who worked for Twitter in the first quarter of 2023 but did not receive their 2022 bonuses.

X rejected Schobinger's request in a Sept. 16 opposition, saying he was the one who recommended getting rid of the bonuses, adding that his suit **"reflects remarkable hubris."**

Judge Chhabria, who had already seemed **inclined to deny** Schobinger's certification bid during a hearing early in October, said the evidence that surfaced in discovery showed that he "is not an adequate class representative" and his claims are not similar to those of the purported class.

For example, the evidence showed that Schobinger sent a message in November 2022 to Twitter's head of people experience indicating that paying out the bonus was up to Musk and mentioning that he recommended not disbursing the bonuses, Judge Chhabria said.

Then, in a January 2023 meeting, Schobinger directly told Musk that Twitter shouldn't pay the bonus and in a February 2023 "white paper" he said that "not paying the bonus would be prudent," Judge Chhabria added.

"It would be impossible for him to get on the witness stand and adequately represent the interests of Twitter employees who claim that the company wrongfully withheld the bonus," Judge Chhabria said. "He might fit nicely into this case as a defendant, but he cannot possibly fit as a named plaintiff."

Judge Chhabria also rejected Schobinger's argument that he is a good class representative because the company advanced unclean hands and estoppel defenses against the whole class.

"There is no indication that there are any facts to support those defenses against the rest of the class, and it's hard to imagine that any exist that would make the defenses remotely as compelling against the class as against Schobinger himself," Judge Chhabria said.

In the Wednesday order, Judge Chhabria also rejected the request that Schobinger's lawyer, Shannon Liss-Riordan of Lichten & Liss-Riordan PC, advanced during the hearing to swap a new plaintiff in to be the class representative.

"The fact that Schobinger's lawyer thought it was a good idea to file a motion for class certification in the face of this evidence (as opposed to dropping the case or seeking to substitute another plaintiff immediately upon discovering it) shows that she is totally unqualified to serve as class counsel," Judge Chhabria said.

Judge Chhabria also said that the request fails because it disregards the "large number" of class members who signed arbitration agreements and Schobinger points to California law while "Texas law obviously applies."

Shannon Liss-Riordan of Lichten & Liss-Riordan PC, who is representing Schobinger, told Law360 Thursday that she was "very disappointed that a federal judge ignored evidence regarding our client's claim, relied solely on Twitter's one-sided attack on him, and then put into a court ruling a false allegation against our client."

An X spokesman told Law360 on Thursday that the company was happy with the decision.

"Like the numerous other cases this counsel has filed against X, we believe this case is without merit and never should have been filed," the spokesman said.

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

Schobinger is represented by Shannon Liss-Riordan and Bradley Manewith of Lichten & Liss-Riordan PC.

X Corp. is represented by Eric Meckley, Brian D. Berry, Ashlee N. Cherry, Jonathan D. Lotsoff and Kassia Stephenson of Morgan Lewis & Bockius LLP.

The case is Schobinger v. Twitter Inc. et al., case number 3:23-cv-03007, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger. Editing by Neil Cohen.



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NCAA's \$2.78B NIL Deal Still Faces Long Road To Final OK

By **David Steele**

Law360 (October 18, 2024, 8:51 AM EDT) -- The absence of noticeable change to address concerns flagged by a California federal judge about the NCAA's \$2.78 billion name, image and likeness compensation settlement made that same judge's preliminary approval of the deal last week surprising, and experts say those same problematic provisions likely will make final approval an uphill battle.

U.S. District Judge Claudia Wilken **granted preliminary approval** on Oct. 7, just 11 days after the NCAA and the class of athletes suing it had **revised language** regarding limits and controls on future NIL payments that had prompted her to send the settlement **back to them**. What the two sides called "clarification" about oversight on third-party payments to athletes, however, did not substantially change the conflicts with both antitrust and labor law that could endanger its permanent approval, according to experts.

"Leaving aside the question as to whether I was surprised that Judge Wilken approved the settlement. I believed before, and still believe now, that there are meaningful long-term problems with the proposed settlement," Marc Edelman, law professor at Baruch College's Zicklin School of Business, said soon after the preliminary approval was granted.

"Irrespective of whether or not the settlement should have been approved," Edelman continued, "the way it is written still leaves the NCAA member schools to substantial exposure under antitrust law. Despite their lawyers' contention, there is no way for a settlement of this nature to preclude future antitrust challenges to a salary cap — unless, of course, the settlement is collectively bargained, and there is no collective bargaining here."

Neither Edelman nor John T. Holden, business law professor at Indiana University Kelley School of Business, saw anything in the revisions that would obviously sway it from being rejected to approved. But, Holden said, while admitting that he had no knowledge of Judge Wilken's internal reasoning, he could understand her wanting to move the process to the next stage, as opposed to keeping it tied up by sending it back and forth for revisions.

"I think that's kind of where I'm at now — 'We've got this, all right, let's see, are people actually going to object to this, or opt out of the settlement?'" Holden said. "Is there anyone that's going to try and delay this, file some sort of appeal to the Ninth Circuit?"

"It's not a great legal answer, and I'm the first to admit that," he added. "But it's a pragmatic answer."

One other possible reason for the swift turnaround on approving the revised settlement, Edelman suggested, can be seen by looking at Judge Wilken's history, including past decisions in challenges to NCAA operations. Historically, Judge Wilken's method is to write decisions narrowly to reduce the possibility of reversal.

"One of the operative questions here is whether Judge Wilken may have believed that she is less likely to be reversed as a matter of law if she approved the settlement," Edelman said, adding the caveat that no one knows the judge's internal thoughts.

Judge Wilken's swift approval of the revised settlement also changed how Jeremi Duru, professor at

American University's Washington College of Law, perceived the conflict between the NCAA and the athletes. When the judge first denied approval and sent it back, Duru said, he thought there was a decent chance that the settlement would fall apart and the two sides would end up back in litigation.

Now, he said, the clock has accelerated toward approval.

"What exactly that means, it's hard to say," he said. "There are objectors still, and we may have to see the settlement revised again, but it seems to me, based on what we've seen, that there is the appetite on both sides to get this thing settled, sooner than later."

While the motivation for Judge Wilken to move the process forward is open to question, the motivation for the two sides to do whatever is necessary to earn preliminary approval — and to settle, period — is obvious, Duru said. Even with no language in the settlement precluding current or future antitrust court challenges, he said, settling a case of this enormity is preferable to the alternative.

"This one is the existential one," Duru said. "If they get sued by Terrelle Pryor or the N.C. State guys and they lose, then it doesn't feel great, but they're still in business. You lose this one, and based on the damages being sought, that could be a wrap, as they say."

"So, you're right to get this one settled," he continued. "I think there's a relief, but it can't feel good that there's so much that's still out there. It's just such an unsettled space."

Among the remaining unanswered questions are how a revenue-sharing model might work between the NCAA and its players, a framework for which the settlement is intended to lay out. Holden, Edelman and University of New Hampshire Franklin Pierce School of Law professor Michael McCann co-authored an article recently for the Boston College Law Review offering models for revenue sharing that would require the NCAA to **give up some sort of control** by accepting equity for players, collective bargaining, or a combination of both.

Objections and opt-outs to the now preliminarily approved settlement can be filed until Jan. 31, with notice to all potential class members set to be sent out starting this Friday. Responses to the objections and opt-outs are due by March 3, and the hearing for final approval is scheduled for April 7.

The objections that have been filed already, at least one of which has already **been withdrawn**, have illuminated the very limits on compensation and revenue distribution that the revised settlement appeared not to alter. The same conflicts with antitrust and labor law that drove those objections and that drive other antitrust suits still flowing into the legal system will likely surface in the upcoming objections, Edelman said.

"At the end of the day, the bigger issue is whether the NCAA member schools now have legal protection, presuming the settlement reaches final approval, to maintain their collective restraints on college athletic compensation under federal antitrust law," Edelman said. "My conclusion remains that no, the NCAA member schools do not — and thus, irrespective of where the settlement is approved or not approved, future plaintiffs' lawyers should be able to continue to challenge the settlement under federal antitrust law, because, in essence, it continues to exist as a restraint on wages."

The settlement in its current form, awaiting final approval and the process of so many class members deciding whether to challenge it, is still "a large-sized Band-Aid on a big hole," Holden said.

"Maybe we buy peace for a little while," he added, "but it's not forever. This doesn't fix the NCAA's problems."

--Additional reporting by Elaine Briseño, Lauren Berg and Dorothy Atkins. Editing by Jay Jackson Jr.



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Tesla Car's Pedestrian Crash Opens NHTSA Death Probe

By **Emily Field**

Law360 (October 18, 2024, 11:03 AM EDT) -- The National Highway Traffic Safety Administration on Friday said that it is investigating Tesla's self-driving systems after several accidents, including one that struck and killed a pedestrian.

The four accidents involved Tesla's Model 3 and Model S sedans, as well as the Model X and Model Y sport utility vehicles and the Cybertruck. Additionally, one of the reports includes an injury. The investigation also involves how the vehicles operate in certain weather conditions, including sun glare, fog or dust, NHTSA said.



The NHTSA probe into Tesla's self-driving systems comes after four collisions, including one that struck and killed a pedestrian. (AP Photo/Noah Berger, File)

"In particular, this review will assess the timing, purpose, and capabilities of any such updates, as well as Tesla's assessment of their safety impact," NHTSA said.

The review will also look into whether any updates to the technology system would have impacted its ability in reduced road visibility conditions, NHTSA said.

There are about 2.4 million Tesla vehicles in the investigation, going back to ones made in 2016. There were four crashes that NHTSA identified that it was looking into.

In August, the agency said that it was searching for information on a crash that involved a fatality with a

Tesla Cybertruck that happened in Texas.

According to local media, a driver died after the truck left the roadway, hit a culvert and caught on fire.

The metallic trucks went on sale in November, and this death is believed to be the first involving a Cybertruck. There have been four recalls since its introduction to the market, the most recent for trim pieces becoming loose and failing windshield wipers.

Previously, **in April**, NHTSA began another investigation into whether Tesla's software update — meant to more clearly warn drivers to stay alert and attentive while using its vehicles' Autopilot advanced driver-assistance system — effectively addressed the risks of "driver misuse," after a December recall.

Tesla agreed to the recall, "while not concurring with the agency's analysis," and offered the software update as a remedy. The company incorporated additional controls and more prominent alerts into the Autopilot system following NHTSA's concerns that the cars didn't adequately monitor drivers or encourage them to keep their hands on the steering wheel and pay attention to the road when the advanced driver-assistance system was engaged.

NHTSA said that Tesla also "deployed non-remedy updates to address issues that appear related to [the Office of Defects Investigation's] concerns under EA22002 [the Autopilot investigation]." As such, the NHTSA said its "recall query" will consider why Tesla's subsequent updates "were not a part of the recall or otherwise determined to remedy a defect that poses an unreasonable safety risk."

Walkup Melodia Kelly & Schoenberger shareholder Andrew McDevitt, who represented the family of Walter Huang in settling an Autopilot crash lawsuit earlier this year, said in a statement provided to Law360 that "NHTSA continues playing 'whack-a-mole' with Tesla's Autopilot and [Full Self-Driving], with new investigations popping up every year."

"One of the fundamental issues with Tesla's advanced driver-assistance systems is a lack of redundancy," McDevitt added. "Tesla chose to remove radar and ultrasonic sensors from its vehicles years ago and has criticized use of lidar as a 'fool's errand.' Because the company now relies entirely on cameras, any issue with its computer vision has the potential to lead to devastating consequences."

Tesla did not immediately respond to requests for comment Friday.

--Editing by Daniel King.

Update: This story has been updated with additional information and with comment from McDevitt.



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Trump Media Investors Get Prison For Insider Trading

By **Stewart Bishop**

Law360, New York (October 17, 2024, 10:52 PM EDT) -- A New York federal judge on Thursday sentenced a Florida venture capitalist to over two years in prison for insider trading on confidential plans to take the media company behind former President Donald Trump's Truth Social network public, a scheme that netted the investor and his brother nearly \$23 million.

During an hours-long sentencing hearing in Manhattan, U.S. District Judge Lewis Liman sentenced Michael Shvartsman, 53, to two years and four months in prison after he made \$18.2 million from the scheme. The previous day, his brother Gerald Shvartsman, 47, who made \$4.6 million from the same ploy, was hit with a 22-month stretch.

Judge Liman on Wednesday said Michael Shvartsman's conduct was brazen, and a message needed to be sent to other would-be fraudsters who "think they can make a quick buck" by cheating and not get caught.

The judge said he concluded that Michael Shvartsman — who operated credit-credit card payment processing and financial services companies in addition to his Rocket One Capital private investment firm — was just greedy.

"He did not need to engage in the conduct, he was already a wealthy man," Judge Liman said. "He was not young and he was not desperate."

Michael Shvartsman was also fined \$5 million, the statutory maximum. He and his brother in April pled guilty to one count each of securities fraud.

A third defendant, former Rocket One Capital chief investment officer Bruce Garelick, went to trial, and in May was found guilty on four counts of securities fraud and one count of conspiracy for illegal trading that netted him \$49,702 in illegal profits. Garelick has yet to be sentenced.

Prosecutors say the Shvartsmans — both of whom are Canadian citizens — in the summer of 2021 were invited to invest in a special purpose acquisition company called Digital World Acquisition Corp., and after signing nondisclosure agreements, learned that the SPAC was angling to merge with the former president's Trump Media & Technology Group, which operates Truth Social, and take it public.

SPACs are shell companies designed to raise capital through an initial public offering and then acquire or merge with another company.

The Shvartsmans and Garelick recruited a consortium of investors who invested millions of dollars in pre-IPO investments in DWAC, and Michael Shvartsman got Garelick a seat on the SPAC's board of directors. After DWAC went public in September 2021, prosecutors say Garelick passed on confidential information about the status of DWAC's merger negotiations with Trump Media to the Shvartsman brothers.

Despite having signed agreements that barred them from trading in DWAC securities on the open market, the Shvartsmans invested heavily in publicly traded DWAC securities and tipped the inside information to friends, business associates and others.

When the merger of DWAC and Trump Media was publicly announced on Oct. 20, 2021, the price of DWAC securities went from trading for less than a dollar to a high of \$79.22 the next day, and the Shvartsman brothers and others cashed in for millions of dollars.

Trump himself is not a defendant in either case, nor is any employee of Trump Media or DWAC.

Prosecutors had argued for a term of imprisonment in the advisory sentencing guidelines range of 46 to 57 months for Michael Shvartsman and pushed for an incarceratory term for Gerald Shvartsman of at least two years.

Assistant U.S. Attorney Daniel Nessim told Judge Liman Wednesday that Michael Shvartsman's misconduct was very serious, and raises the "specter of corruption throughout the financial system." Nessim said it promotes the idea that people with the right connections and a lot of money are able to profit tremendously from cheating the market.

"Mr. Shvartsman acted in a way that suggests that he does not think the law applies to him in the way that it does to others," Nessim said.

An attorney for Michael Shvartsman, Alan Futerfas, told Judge Liman Wednesday that his client was set to satisfy his forfeiture amount promptly, through a combination of millions of dollars he had already paid and money the government had seized.

"It shows contrition, it shows you accept responsibility and I think that's important here," Futerfas said.

Futerfas leaned hard into the argument that there wasn't much daylight between the conduct of Gerald Shvartsman — who had already been sentenced to 22 months the day before — and that of Michael Shvartsman, despite the fact that he made significantly more money than his brother Gerald.

"Aside from the dollar amount, the conduct is very, very similar," Futerfas said. "He and his brother were pretty much the same all along, but by happenstance, [Michael] invested more."

Attorneys for both brothers also argued that as non-U.S. citizens, they face harsher punishment than U.S. nationals would, given their likely deportation following their prison terms, as well as their ineligibility for low-security prison camps.

Both Futerfas and a spokesperson for the Manhattan U.S. attorney's office declined to comment after Thursday's hearing.

An attorney for Gerald Shvartsman, Roland Riopelle of Sercarz & Riopelle LLP, told Law360 on Thursday that he was personally a little disappointed by the length of his client's sentence, but noted it was well below the guidelines of 37 to 46 months.

The Probation Department had recommended a sentence of a year and a day in prison for Gerald Shvartsman, but said Michael Shvartsman should get a guidelines sentence of nearly 4 years.

"I do think the sentence that Judge Liman imposed was a fair one and a thoughtful one, and I was hoping for a little bit better, but I cannot truly complain about the sentence," Riopelle said. "I wish we had gotten a little less time, but I always come out of a sentencing like that."

The brothers are both due to report to prison on January 3.

The government is represented by Daniel Nessim and Matthew Shahabian of the U.S. Attorney's office for the Southern District of New York.

Michael Shvartsman is represented by Dennis Vacco of Lippes Mathias LLP and Alan Futerfas.

Gerald Shvartsman is represented by Roland Riopelle of Sercarz & Riopelle LLP.

The case is USA v. Shvartsman et al., case number 1:23-cr-00307, in the U.S. District Court for the Southern District of New York.

--Editing by Emily Kokoll.