

Purdue Pharma Seeks More Time for Settlement Talks With Sacklers

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- Purdue says progress made since last mediation extension
- Mediation at 'fluid and critical juncture,' Purdue says

Purdue Pharma LP has asked to extend to early December settlement talks with members of the Sackler family who own the company after its prior bankruptcy plan was shot down by the US Supreme Court in June.

With mediation at a "fluid and critical juncture," extending the talks, as well as a preliminary injunction protecting Sackler family members from opioid-related litigation, for 35 more days will prevent jeopardizing the ability to achieve a broad consensus, Purdue said in a motion filed Monday in the US Bankruptcy Court for the Southern District of New York.

"Simply put, the complexities of crafting a broadly supported consensual resolution are immense and require the undistracted focus of all stakeholders," Purdue said.

Purdue in September won a similar extension to Nov. 1 from Judge Sean Lane, despite opposition from Rhode Island, Washington and Maryland, which are among many states that sued the OxyContin maker over its role in pushing opioid sales.

Since the last mediation extension, "material progress" has been made but details can't be revealed under a confidentiality agreement, Purdue said. The company seeks to extend mediation to Dec. 6.

The preliminary injunction protecting Sackler family members from civil suits was approved after Purdue filed for Chapter 11 in 2019 under the weight of litigation accusing them of fueling the national opioid epidemic.

If the preliminary injunction were lifted, more than 500 civil suits brought by government entities could resume, as well as roughly 675 suits against Purdue's related parties that include the Sacklers, the company said.

A \$6 billion deal that would have settled suits against Purdue and Sackler family members was approved by the bankruptcy court, but the Supreme Court rejected the deal in June.

Sackler family members have denied wrongdoing and have previously said they would support a deal that "provides substantial resources to help combat a complex public health crisis."

Purdue is represented by Davis Polk & Wardwell LLP.

The case is Purdue Pharma LP , Bankr. S.D.N.Y., No. 19-23649, 10/21/24 .

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Oct. 21, 2024, 1:05 PM PDT

Volta Gets Investors' Amended Securities Fraud Complaint Tossed

By Bernie Pazanowski

- Revenue, stock compensation statements were allegedly untrue
- Investors failed to prove statements by company were fraud

Bloomberg Law News 2024-10-22T10:33:36856024398-04:00**Volta Gets Investors' Amended Securities Fraud Complaint Tossed****By Bernie Pazanowski 2024-10-21T16:05:16000-04:00**

- Revenue, stock compensation statements were allegedly untrue
- Investors failed to prove statements by company were fraud

Volta Inc. isn't liable for making allegedly fraudulent statements to its investors about its business, a federal court said Monday.

The case was previously dismissed by Judge Jon S. Tigar of the US District Court for the Northern District of California, but he gave the investors an opportunity to file an amended complaint. That complaint also failed to adequately state securities claims against the company, which places charging stations for electric cars in parking lots, he said.

Volta said that it was worth \$1.4 billion dollars, but after two of its officers left, it was sold to Shell Plc for \$169 million.

The investors' claims were premised on dozens of statements made before and after Volta's merger with Tortoise Acquisition Corp. II. The statements were false or misleading because they concealed the true state of Volta's business, they said. Volta "failed to disclose substantial flaws" in its business and they "covered up" those flaws by "engaging in serious accounting violations and other financial improprieties" before and after the merger, they said..

Looking at allegedly false statements concerning premature revenue recognition, Tigar said that the investors failed to allege facts showing that they were widespread or significant. Regarding statements concerning the company's financing needs, the investors relied on the testimony of a confidential witness, but failed to allege any basis showing their reliability, the judge said.

The investors alleged that Volta failed to disclose that it couldn't pay its site hosts. But they failed to adequately allege that their statements they highlighted were false, Tigar said.

And the investors failed to show that statements Volta used to support its revenue and installation guidance projections were plausibly false or misleading, Tigar said.

Tigar also rejected the investor's arguments that Volta's statements about premature revenue recognition and the scale of its operation and contractual obligations in its offering documents were false.

Tigar noted that he previously dismissed the investors' "complaint without prejudice and gave Plaintiffs specific directions to add to any additional factual allegations demonstrating falsity." Because they didn't correct those deficiencies, it's likely they don't have any additional facts to plead and "any further leave to amend would be futile," he said, dismissing the case with prejudice.

Glancy Prongay & Murray LLP and Pomerantz LLP represent the investors. Proskauer Rose LLP and Wachtell, Lipton, Rosen and Katz represent Volta.

The case is *Kampe v. Volta Inc.*, N.D. Cal., No. 4:22-cv-02055-JST, 10/21/24

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Wells Fargo Prevails in \$500 Million Investors' Suit Appeal (1)

By Martina Barash

Documents



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- Bank, in services role, allegedly forced funds' liquidation
 - Fund investors failed to allege duties, wrongs, court says

Bloomberg Law News 2024-10-22T10:31:56465016267-04:00

Wells Fargo Prevails in \$500 Million Investors' Suit Appeal (1)

By Martina Barash 2024-10-21T11:08:11000-04:00

- Bank, in services role, allegedly forced funds' liquidation
- Fund investors failed to allege duties, wrongs, court says

Wells Fargo Securities LLC defeated an appeal Monday by investors seeking to revive their lawsuit blaming the financial services firm for at least \$500 million in losses from a 2018 portfolio liquidation.

The investors said Wells Fargo caused those losses when, acting as a futures commission merchant to LJM Investment Fund LP and LJM Partners Ltd., it forced the funds to liquidate their entire portfolio in response to temporary market volatility.

But those allegations don't support proposed class claims for negligence, interference with a contract or business relations, or aiding a fiduciary breach by LJM, the US Court of Appeals for the Second Circuit said. The ruling affirmed a dismissal by the US District Court for the Southern District of New York.

Investors Todd and Joseph Kafka didn't show the sort of duties and wrongful actions needed for their claims, the Second Circuit said in an unpublished, unsigned opinion.

The three-judge panel ruling follows a pair of Illinois federal court decisions earlier this month denying efforts by the US Securities and Exchange Commission and Commodity Futures Trading Commission to obtain summary judgment rulings in lawsuits alleging LJM and its managers lied to investors about the worst-case scenario for their trading strategy and about their maintenance of consistent risk levels.

Estimated investment losses in those cases, stemming from the same events at issue in Kafkas' case, total more than \$1 billion. LJM principal Anthony Caine said he personally lost more than \$100 million.

Underlying Allegations

The market suffered a steep decline on Feb. 5, 2018, the Kafkas said in their 2022 class action complaint, but the LJM portfolio had successfully countered market volatility with risk management protocols in the past. When the Wells Fargo & Co. unit demanded the next day that LJM liquidate its portfolio, it was acting purely in its own interest, rather than to benefit portfolio investors, the plaintiffs alleged.

LJM had completely unwound the portfolio by the end of that day pursuant to Wells Fargo's instructions, resulting in losses between \$500 million and \$800 million to the Kafkas and potential class members, according to their filing.

US District Judge Laura Taylor Swain dismissed the Kafkas' suit in its entirety, ruling that Wells Fargo didn't owe a duty of care to investors, but to its customer, LJM, for which it provided clearing and execution services. She also found that the investment firm was entitled to act in its own economic interest when liquidating the portfolios, and that plaintiffs didn't show Wells Fargo intentionally induced LJM's breaches of contract to investors.

The Kafkas, investors in an LJM options-oriented mutual fund and various LJM commodity pools, had no contract with Wells Fargo directly, which undermined several other allegations that the clearing broker breached its contractual or fiduciary duties, Swain said in her 2023 ruling.

The Kafkas appealed.

Appellate Affirmation

For a negligence claim, a plaintiff must show the defendant owed the plaintiff a duty, but the Kafkas didn't adequately allege "that Wells Fargo owed them, or any putative class members, any duty," the appeals court said.

"If Wells Fargo had a duty to avoid financial harm to all downstream investors in its conduct, the scope of potential liability would be enormous and would severely restrict Wells Fargo's ability to protect its own financial wellbeing," the three-judge panel said. "The law would not impose such an immense burden."

The Kafkas didn't claim that Wells Fargo desired that LJM breach its contract with them, the panel said. That sinks their claim for tortious, or wrongful, interference with contract—and their claim for tortious interference with business relations merely duplicates their contract interference claim, it said.

Wells Fargo isn't on the hook for aiding and abetting a breach of fiduciary duty by LJM because the investors didn't allege such a breach, the court said.

And the investors' contract-based claims fail because the provisions in the agreements between LJM and Wells Fargo "leave no doubt that the parties intended to preclude any benefit from flowing to a third party," the judges said.

Judges Guido Calabresi and William J. Nardini, along with Judge Paul A. Engelmayer of the Southern District of New York, who sat by designation, served on the panel.

Wolf Haldenstein Adler Freeman & Herz LLP represented the investors. Mayer Brown LLP and Shook, Hardy & Bacon, LLP represented Wells Fargo.

The case is *Kafka v. Wells Fargo Sec., LLC*, 2d Cir., No. 23-01281, unpublished 10/21/24 .

(Updated with additional context and court analysis beginning in fourth paragraph.)

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Rent the Runway Faces Another Investor Suit Over IPO Statements

By Quinn Wilson

- **COURT:** E.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-07321](#)

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Rent the Runway Faces Another Investor Suit Over IPO Statements

By Quinn Wilson 2024-10-21T17:01:58000-04:00

- **COURT:** E.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-07321](#)

Rent the Runway Inc. omitted information about its costs and “unsustainable” business strategies before its initial public offering, an investor claims in a shareholder derivative lawsuit filed at the US courthouse in Brooklyn, NY.

The lawsuit comes as Rent the Runway defends itself from an investor proposed class action over misleading statements it made before its initial public offering about its shipping costs, thefts, and insurance coverage.

The internet clothing rental company and its current and former officers and directors breached their fiduciary duties, aided and abetted the breach, were unjustly enriched, wasted corporate assets, and violated the Securities Act, according to Rangan Bandyopadhyay’s Oct. 18 complaint. Bandyopadhyay is seeking compensatory and punitive damages, an accounting of the defendants’ unjust enrichment, court costs, and attorneys fees.

Rent the Runway is alleged of “issuing a false and misleading registration statement and prospectus, failing to correct the misleading statements and omissions contained therein, and additional misleading statements made subsequent to the IPO,” Bandyopadhyay’s complaint said.

The Brooklyn-based company didn’t immediately respond to a Monday request for comment.

At the onset of the COVID-19 pandemic, Rent the Runway's demand was significantly decreased because its customers had been reliant upon its rental service for social and business events, according to the complaint.

Despite losing two-thirds of its subscribers and taking out a loan secured on substantially all its assets, Rent the Runway painted a different picture in its offering documents, according to the complaint. The company purported that it had momentum and had "emerged" from the pandemic, claiming it had had a "minimal impact" its business or financial performance.

With efficient shipping being critical to the company's business model, Rent the Runway began facing "runaway" shipping costs that rendered its fulfillment business strategy "utterly unsustainable," Bandyopadhyay said. The company flip-flopped between UPS and FedEx as their shipping vendor due to both increased costs and customer complaints.

Rent the Runway was also facing increasing customer theft of its rented products, leading to the loss of millions of dollars in revenue, according to the complaint. The thefts were allegedly due in part to the company's introduction of return drop boxes intended to decrease shipping expenses.

Stuck in a "dire situation," Rent the Runway announced a restructuring plan just a year after its IPO that fired 24% of its corporate employees, Bandyopadhyay said. Rent the Runway's stock fell from its offering price of \$21 per share to close at \$1.58 on Nov. 14, 2022.

The defendants owe the company and its shareholders the fiduciary duty to exercise good faith and diligence and are liable for the misstatements and omissions, according to the complaint.

The Rosen Law Firm PA represents Bandyopadhyay.

The case is Bandyopadhyay v. Hyman , E.D.N.Y., No. 1:24-cv-07321, 10/18/24 .

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Starbucks Brass Sued Over Selloff Following Lackluster Earnings

By Ben Miller 2024-10-22T13:05:58000-04:00

- **COURT:** W.D. Wash.
- **TRACK DOCKET:** [2:24-cv-01720](#) (Bloomberg Law subscription)

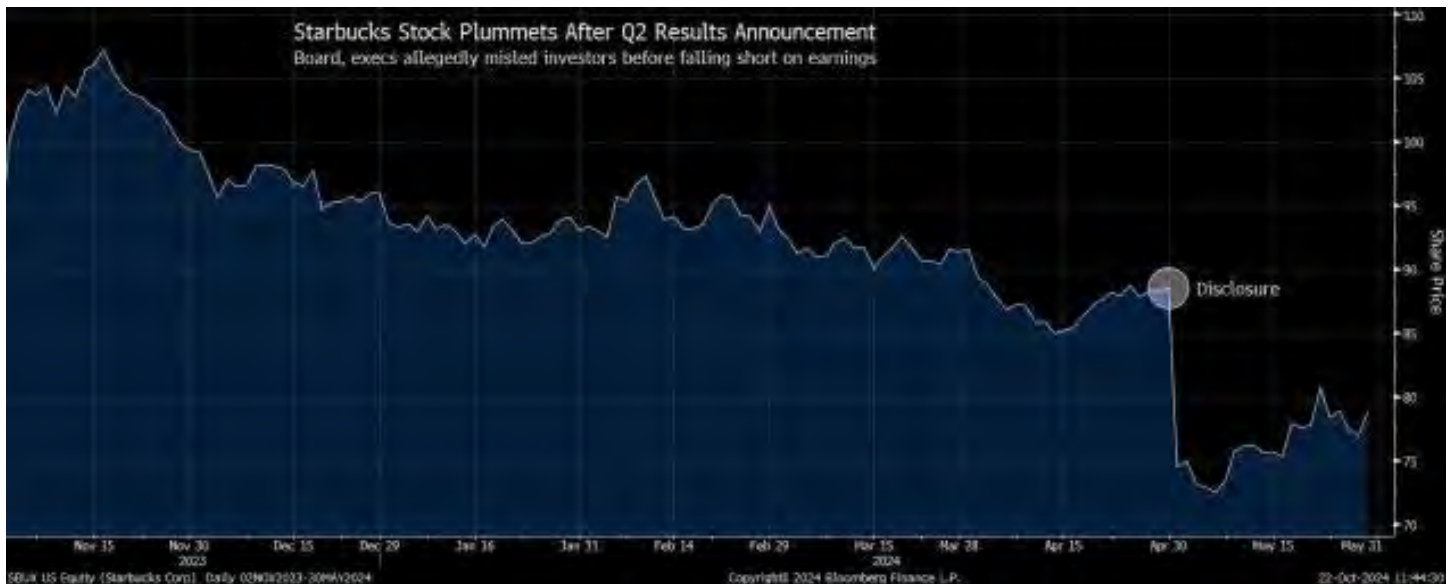
Starbucks Corp.'s leadership created false impressions about revenue before reporting lower results for the second quarter of fiscal 2024, according to a shareholder derivative suit against the coffeehouse chain.

The new suit, which follows a [proposed class action](#) filed against Starbucks in August, alleges the company's officers and board misled investors for more than five months, downplaying risks related to seasonality and growth in foreign markets, especially in China.

Starbucks issued a press release on April 30 revealing the company's poor financial performance in the second quarter. It showed a 4% drop in store sales globally and a 2% decline in new revenue, according to the derivative complaint.

The company failed to meet goals leadership had set out for revenue growth and margin expansion, despite then-CEO Laxman Narasimhan "boasting of Starbucks's purported success in its Reinvention plan and growth in China," the complaint said.

Starbucks' stock price fell more than 15% to close at \$74.44 per share on May 1, according to the suit and data compiled by Bloomberg.



During the period of alleged misrepresentations, board members and executives caused Starbucks to repurchase 8.9 million shares of its own stock at artificially inflated prices, resulting in a \$227.5 million overpayment, according to the complaint filed Monday in the US District Court for the Western District of Washington.

“The allegations in the complaint are without merit,” a Starbucks spokesman said in an email. “Starbucks takes great care in communicating transparently and authentically with its stakeholders, including its investors, partners, customers, and community.”

Starbucks announced Narasimhan would step down immediately on Aug. 13, with former Chipotle Mexican Grill Inc. CEO Brian Niccol stepping into the role in September.

The derivative suit alleges the officers and directors violated the Securities Exchange Act. It seeks to recover the overpayment as damages for the company, as well as interest and legal fees.

The plaintiff also seeks to require that Starbucks put forward for a shareholder vote proposals to strengthen board supervision and incorporate more shareholder input, including a provision for shareholders to nominate at least five director candidates.

The Brown Law Firm PC and Badgley Mullins Turner PLLC represent the plaintiff.

The case is [King v. Narasimhan](#) , W.D. Wash., No. 2:24-cv-01720, complaint filed 10/21/24 .

Super Micro Hit With Fraud Suit Over Russia Exports, Stock Drops

By Ben Miller

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [5:24-cv-07274](#) (Bloomberg Law subscription)

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Super Micro Hit With Fraud Suit Over Russia Exports, Stock Drops

By Ben Miller 2024-10-21T15:18:58000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [5:24-cv-07274](#) (Bloomberg Law subscription)

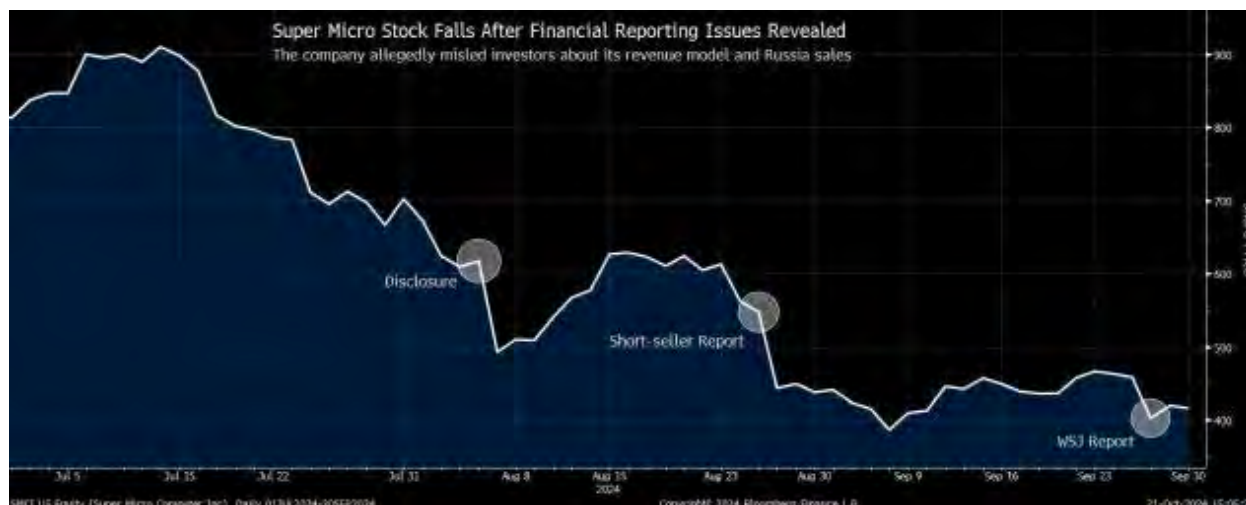
Super Micro Computer Inc. misled investors about its finances and compliance with trade control regulations before the server manufacturer reported declining margins and a short-seller revealed millions in sales to Russia from 2022 to 2024, according to a shareholder complaint.

The company's stock price was artificially inflated up to \$1,299 per share during the alleged period of misrepresentations, which lasted more than three years, said the proposed class action filed in the US District Court for the Northern District of California.

Super Micro allegedly misstated financial figures, including a scheme involving delivery of unfinished or defective products, which caused the company to overstate revenue and understate costs. Related party transactions and exports to Russia were also concealed from investors during the proposed class period, according to the complaint filed Oct. 18.

After Super Micro issued a press release on Aug. 6 disclosing its fourth quarter and full year results, investors became aware that its gross margin for the quarter was significantly lower than the previous quarter and the same quarter last year. The company attributed the lower gross margin to increased production costs, according to the complaint.

The following day, Super Micro's share price fell more than 20% to close at \$492.70 per share, the stock's biggest drop in over three months, according to data compiled by Bloomberg.



Three weeks later, the short-seller report from Hindenburg Research was published, highlighting a fraudulent revenue recognition scheme and the alleged shipping of faulty products to customers.

The report also claimed that Super Micro had violated US export controls. Despite the company's assertion that it had stopped selling products to Russia following the 2022 invasion of Ukraine, the Hindenburg report pointed to approximately \$210 million in exports from February 2022 to June 2024.

The day after the short-seller report was published, Super Micro disclosed it would be delaying the release of its annual report to complete an assessment of its internal controls over financial reporting. Super Micro's share price fell more than 19% that day to close at \$443.49 per share on Aug. 28.

Then on Sept. 26, the Wall Street Journal reported the Justice Department had initiated an investigation into Super Micro related to alleged accounting violations. That same day, the stock price dropped another 12% to close at \$402.40 per share, according to the complaint.

Two separate complaints filed in late August are also pending in the Northern California district court, alleging similar stock drops in the wake of the same Hindenburg report. All three cases seek damages for the proposed classes over alleged securities fraud.

Super Micro didn't immediately respond to a request for comment.

Bleichmar Fonti & Auld LLP represents the investor plaintiffs.

The case is Covey Financial Inc. v. Super Micro Computer Inc., N.D. Cal., No. 5:24-cv-07274, complaint filed 10/18/24.

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Surgical Tool Maker Paragon 28 Sued Over Accounting, Stock Drops

By Martina Barash

- **COURT:** D. Colo.
- **TRACK DOCKET:** [1:24-cv-02898](#) (Bloomberg Law subscription)

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Surgical Tool Maker Paragon 28 Sued Over Accounting, Stock Drops

By Martina Barash 2024-10-21T18:03:03000-04:00

- **COURT:** D. Colo.
- **TRACK DOCKET:** [1:24-cv-02898](#) (Bloomberg Law subscription)

Paragon 28 Inc. understated losses and overstated surgical product inventory and profit metrics, before executives' departures and revised financials caused a series of three stock-price declines, an investor alleges.

The company said Aug. 8 that it had identified weaknesses in its accounting controls, Nicholas Tiedt says in a proposed class action filed Oct. 18 in the US District Court for the District of Colorado. The ankle and foot surgery tool maker acknowledged that for the year ending Dec. 31, 2023, it understated an earnings loss by \$8.4 million or 86%; overstated its gross profit by \$8.4 million or 5%; and understated its net loss by \$9.7 million or 20%, among other misstated metrics, Tiedt says.

Share prices fell 20% the following day, closing at \$6.64. The selloff was the largest percentage drop in the stock's history, according to data compiled by Bloomberg.

The announcement of chief financial officer Stephen Deitsch's resignation April 3 and chief accounting officer Erik Mickelson Sept. 20 sent share prices down 15% and 4.3%, respectively, Tiedt says.

"The company does not comment on ongoing litigation matters," the company said in an email Monday.

The proposed class of those who acquired Paragon 28 common stock between May 5, 2023 and Sept. 20, 2024, inclusive, consists of hundreds or thousands of members, the complaint estimates.

Tiedt seeks damages on his securities fraud claims.

Hagens Berman Sobol Shapiro LLP represents Tiedt.

The case is Tiedt v. Paragon 28, Inc. , D. Colo., No. 1:24-cv-02898, complaint 10/18/24 .

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Oct. 21, 2024, 11:49 AM PDT

Trump Media Group Sued Over Merger-Related Financial Documents

By Beth Wang

COURT: N.Y. Sup. Ct.

Bloomberg Law News 2024-10-22T10:32:41652313392-04:00

Trump Media Group Sued Over Merger-Related Financial Documents

By Beth Wang 2024-10-21T14:49:02000-04:00

The company behind Donald Trump's Truth Social failed to disclose financial documents in breach of its contract with RejuveTotal LLC, according to a complaint filed Monday in a Manhattan court.

New Mexico company RejuveTotal, which in March was named the new purchaser representative under a 2021 merger agreement between Trump Media & Technology Group and Digital World Acquisition Corp., says it hasn't been given the financial records, books, and other documents it needs to assess the company's financial performance and stock prices.

RejuveTotal in June sent a demand letter to Trump Media and its CFO Phillip Juhan demanding they provide the information required under their contract, but the company says it has "yet to receive the Earnout Statements, Closing Statement, and other books, records, and documents that it is entitled to."

"One of the most fundamental rights of the Purchaser Representative is its access to certain books, records, and other documents," RejuveTotal says. "Without that information, the Purchaser Representative cannot perform its duties under the Merger Agreement."

RejuveTotal wants the court to require Trump Media to provide the information, and to pay for nearly \$54,000 in legal fees incurred from having to take the issue to court.

Morrison & Foerster LLP represents RejuveTotal.

Trump Media didn't immediately respond to a request for comment.

The case is RejuveTotal LLC v. Trump Media & Tech. Grp. Corp. , N.Y. Sup. Ct., docket number unavailable, complaint 10/21/24 .

Shares of Trump's media company soar as betting odds favor White House win

 [reuters.com/markets/us/shares-trumps-media-company-soar-betting-odds-favor-white-house-win-2024-10-22](https://www.reuters.com/markets/us/shares-trumps-media-company-soar-betting-odds-favor-white-house-win-2024-10-22)

Reuters

The Truth social network logo is seen on a smartphone in front of a display of former U.S. President Donald Trump in this picture illustration taken February 21, 2022. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

- Trump Media shares surge 9%, nearly tripling since late September
- Betting odds favor Trump over Harris despite tight opinion polls

Oct 22 (Reuters) - Shares of former U.S. President Donald Trump's media company surged to their highest since July on Tuesday as betting odds favored the Republican candidate in his bid for reelection to the White House.

Shares of Trump Media & Technology Group (DJT.O) , opens new tab, which operates the Truth Social app, jumped 9% to \$34.17, and the stock has nearly tripled since sinking to an all-time low in late September.

Since its listing, Trump Media has been popular with traders who view it as a speculative bet on Trump winning the Nov. 5 election. He owns 57% of the company, making his stake now worth almost \$4 billion.

Trump Media's revenue in the June quarter was \$837,000 and the company is burning cash. Strategists say its nearly \$7 billion stock market value is detached from its day-to-day business.

As of mid-day, traders had exchanged \$1.1 billion worth of Trump Media shares, in line with a recent surge in trading volume, according to LSEG data.

Trump's odds of beating Vice President Kamala Harris, the Democratic candidate, in election have recently edged higher on betting websites, though opinion polls show the race is a dead heat.

Oddschecker.com, which reflects odds across a number of betting platforms, had Trump at the equivalent of about a 62% chance of winning and Harris at about 38%.

On the PredictIt platform , opens new tab, contracts for a Trump victory traded at 60 cents, with a potential \$1 payout. Harris contracts were at 46 cents.

Polymarket has Trump with a 64% chance of winning and Harris at 36%, with a combined \$2.2 billion in volume. One of four accounts on Polymarket that have fueled speculation over

their large bets on a Trump victory added to its wagers Tuesday, increasing the potential payout if Trump wins to nearly \$44 million, according to Polymarket's activity tracker.

With just two weeks left before the election, Harris held a marginal 46% to 43% lead over Trump in a new Reuters/Ipsos poll. Other polls show the two candidates neck and neck in the seven battleground states that are expected to determine the winner.

Trump Media saw its value briefly balloon to nearly \$10 billion following its March stock market debut through a tie-up with a blank-check company.

Reporting by Noel Randewich in Oakland, California; additional reporting by Michelle Conlin in New York, editing by Deepa Babington

\$2.8B Antitrust Settlement Will Have Long-Term Impacts on Insurance Industry, Say Attorneys Behind Accord

LAW [law.com/2024/10/21/2-8b-antitrust-settlement-will-have-long-term-impacts-on-insurance-industry-say-attorneys-behind-accord](https://www.law.com/2024/10/21/2-8b-antitrust-settlement-will-have-long-term-impacts-on-insurance-industry-say-attorneys-behind-accord)

Mason Lawlor



A recent billion-dollar class action settlement will bring an end to an industry giant's monopolization of health insurance and provider markets in most states and change the industry in the long term, according to plaintiffs attorneys.

Last week, a class of health care providers reached an agreement with insurance agency Blue Cross Blue Shield to settle claims of anticompetitive practices for \$2.8 billion, in what litigators say was the largest antitrust settlement in the history of the U.S. health care industry.

The settlement, announced by co-lead counsel of health care boutique firm Whatley Kallas, ended a 12-year litigation filed by hospital systems, physicians and other health care providers challenging Blue Cross Blue Shield's use of exclusive service areas to fix insurance prices and prevent market competition.

Partner attorneys Edith Kallas and Joseph Whatley Jr. said in a press release that the long term effect of the settlement will outweigh its monetary award, and that most of the money will go to the healthcare providers.

"The \$2.8 billion cash payment, together with the hundreds of millions of dollars in additional investments the [Blue Cross Blue Shield] are making to improve their systems, will benefit providers enormously," Whatley said. "We believe that the actual value to providers is much greater than the total payments."

The 163-page agreement was submitted Oct. 14 and is awaiting court approval from the U.S. District Court for the Northern District of Alabama and U.S. District Judge R. David Proctor.

According to the allegations, the insurance entities colluded to separate coverage from its BlueCard program into exclusive regions where they did not compete with one another, inflating the cost of health insurance and lowering reimbursements for providers.

"When a provider would treat a patient covered by an out-of-area Blue plan (usually an employee of a company headquartered in another state), the Blue plans extended the benefit of those lower rates to each other by requiring providers to accept reimbursement from the out-of-area Blue plan at the same rate as the local Blue plan," Kallas and Whatley told Law.com.

Along with paying \$2.8 billion, the carrier also agreed to make investments in "system improvements for the benefit of providers," plaintiffs attorneys said. Kallas and Whatley said it was important that the settlement include significant reforms to the system.

"For decades, health care providers have complained that BlueCard is a non-transparent program that causes additional costs, inefficiencies, and frustration," Kallas and Whatley said. "Designing relief that improves how providers will be able to deal with the Blues, bringing more transparency, efficiency, and Blue plan accountability, was a painstaking and complicated process."

Included in the settlement's terms are 16 categories of requirements the attorneys said were aimed at improving customer communication, transparency in decision-making and third-party dealings, and timeliness of status updates.

Health care providers will also have increased contracting opportunities with the insurers, the attorneys said. After the district court's official approval, Blue Cross and Blue Shield insurance plans will be overseen by an appointed monitoring committee for five years following the effective date of the settlement.

To usher through the settlement, Kallas said the class gathered a work group of different health care professionals, including representatives of large health care systems, teaching and rural hospitals, physicians, ancillary providers and medical associations. The group gave advice that the attorneys said will ensure the Blue Card Program meets the reforms with accountability and oversight.

"Hospitals located in counties contiguous to another Blue plan's service area can contract with that Blue plan not only for themselves, but certain of their affiliated hospitals," the attorneys said. "In addition, health care providers with so-called contiguous-area contracts will be able to treat all members of the out-of-area Blue plan and submit bills directly to that Blue plan; previously, this procedure was available only for members who lived or worked in the provider's local area."

The carrier will also be prevented from requiring that health care providers join the networks of plans they market without Blue Cross or Blue Shield marks, Kallas and Whatley said.

Jeff Gold, Vice President of Counsel for Managed Care and Insurance of the Hospital Association of New York State (HANYs), said the result goes beyond the financial reward and was a long-time coming for hospital associations pushing for reforms.

"For nearly two decades I have helped lead, through my role at HANYs, a multi-state group of hospital associations attempting to obtain meaningful reforms for hospitals and health care systems, including their doctors and ancillary providers, in the Blue Card Program," Gold stated in the press release. "I have worked closely with Whatley Kallas to continue those efforts in this lawsuit and mediation. This settlement represents a culmination of these necessary, meaningful reforms and will significantly improve the Blue Card Program for all class members."

Counsel for Blue Cross Blue Shield in the multi-district antitrust litigation, Lauren R. Kennedy and Winnifred Lewis of Cravath, Swaine & Moore in New York City, were not available for comment.

How Do You Get Experience Leading an MDL Without Experience Leading an MDL?

[law.com/litigationdaily/2024/10/22/how-do-you-get-experience-leading-an-mdl-without-experience-leading-an-mdl](https://www.law.com/litigationdaily/2024/10/22/how-do-you-get-experience-leading-an-mdl-without-experience-leading-an-mdl/)

Ross Todd



It's hard to fathom how a lawyer might land a first leadership assignment representing plaintiffs in multidistrict litigation where the claims are often complex and the cases can number in the hundreds, if not thousands.

Last week, Litigation Daily chewed on the topic of MDL leadership positions with **Parvin Aminolroaya**, **Shauna Itri** and **Jennifer Scullion**, partners at **Seeger Weiss** who were all recently tapped for leadership in MDLs.

In May, Aminolroaya was appointed as one of four co-lead counsel in litigation alleging Ozempic and similar medications lead to gastrointestinal injuries. Aminolroaya previously served as co-lead of the Elmiron MDL—litigation claiming the makers of bladder pain drugs failed to warn of the risk of permanent vision problems.

In August, Itri was named to the four-member Plaintiff's Executive Committee in the *AT&T Inc Customer Data Security Breach Litigation* to help litigate claims on behalf of about 70 million customers.

Early this month, Scullion was appointed co-chair of the provider track plaintiff's steering committee in the *Change Healthcare, Inc. Customer Data Security Breach*. Just last week, she was appointed to the direct action plaintiffs' executive committee in the MultiPlan MDL in cases alleging a conspiracy to fix the rates paid to healthcare providers for out-of-network services. The firm's name partner **Christopher Seeger** was appointed plaintiffs' coordinating counsel in the case.

The following has been edited for length and clarity.

LitDaily: This is something of a chicken and egg question: how do you get experience leading MDLs without experience leading MDLs? For lawyers who do what you do, how important are these assignments?

Shauna Itri: They are important in the sense that you're sort of guiding the litigation. I don't think it just happens. For me at least, I have been mentored by other attorneys at the firm, have done work under their guidance and learned the ropes that way. There's so much more to leading MDLs and class actions than just knowing the law. It's really kind of a 3-D chess game. Learning from some of our more experienced attorneys at the firm who have done this for a bit longer has been helpful. When I've gotten the opportunity to get a leadership position, it was very important not only to have the skills and experience, but also to be able to understand who you are working with as co-counsel.

Jennifer Scullion: The importance of a leadership position is you're a trustee appointed by the court to take people's rights—their claims, their need for redress—and litigate the case on their behalf efficiently, effectively and robustly. Our firm, in particular, looks at these positions as critically important, because we know how well clients can be served when there is very effective leadership and how cases can become mired down and lost—lost in terms of direction, not lost on the merits—when there's just not effective leadership. So it's a critically important role on the plaintiff side to make sure that you know that our clients are all being well served.

Parvin Aminolroaya: Our firm tends to be very aggressive in litigation. It can be very beneficial for our clients in terms of being fast and getting out requests for evidence in pursuing discovery. That, generally, is beneficial for our clients. It advances the litigation. It helps us get the evidence we need to develop the case for trial. And we also bring a broad perspective on what we want the case to look like at the end of it: when we get to the end and we've done all the work to get the evidence to survive motions from the defendants, this is what we know we need to be successful at trial and to have the best chance of getting a verdict for our plaintiffs. So I think that, in particular, makes us effective leaders and effective co-leads in any position that we may have in a leadership group.

How many times did all of you raise your hand before you got picked for one of these leadership positions?

Scullion: I don't know if I have thought about it that way. One of the things implicit in that is the sort of chicken/egg question: how do you get to a leadership position when you don't have a leadership position yet? You do it by effectively leading other parts of MDLs that you're entrusted with. To be honest, when you are doing that, then people come to you and say, "There's a new case. And we think you'd be great to help lead this."

That's the way it should happen. That's the way it has happened. I certainly have made it clear that I would be honored to be given the opportunity to lead in the right case and with the right group. I think that has happened because Shauna, Parvin and I have all demonstrated not only our legal ability, but that we have the right understanding about what it takes to effectively lead a case.

Itri: I wouldn't characterize it as raising your hand. It happens more organically. For the right cases, we always have been raising our hands for leadership within MDLs and certain sections of it—leading and learning as we go, fine-tuning our skills and experience for the next MDL. It just happens a little bit organically with the support of our firm and our leadership.

Aminolroaya: In the MDL world, on the plaintiff side, we have the opportunity to work with our colleagues on different projects and that's the opportunity to show our value-add to the litigation—whether it's on briefing or experts or depositions. The people who already have these positions see that Jen is fantastic at marshaling a great legal writing team and putting together a great brief or that Shauna does a fantastic job at managing discovery—getting everything you want. So the next time litigation comes around, somebody who is working on another case will say, "Well, I definitely want Shauna on my team. Is she available?" Or, "Can Jen head up law and briefing? We know she's going to help us crush it." So you have the opportunity to develop your reputation in other litigations where you may not have a name, but maybe Chris [Seeger] or someone else in the firm has been appointed in leadership, and where we're able to bring a broader number of lawyers into the litigation.

That was one of my questions: Your firm has a leader in the MDL bar who has a number of huge assignments—I'm thinking of Chris's role co-leading the 3M Combat Arms Earplug litigation, first and foremost, and then his appointment to lead the MultiPlan case more recently. How does that affect *your* individual ability to pitch for leadership positions?

Scullion: I would say it absolutely enhances it. Number one, we're learning from the best of the best, right? Chris, in particular, I think is really quite good at not just showing you the ropes and how it works, but then calling and saying, "Let me explain to you my perspective or thinking on why I chose to do it this way." In fact, just as recently as this morning, he did that for me. I greatly appreciated his insight, because he has very, very finely honed skills, instincts, knowledge and experience. So, it's like drinking from a firehose here to learn from him. The *MultiPlan* case is actually an interesting example where I was appointed with others as co-leads for the [Direct Action Plaintiffs] executive committee. And yet, Judge Kennelly said, "Given the nature of this case, I also want Chris Seeger to be in charge, not only of the mass tort aspect of it, but also the class." He's the overarching coordinating counsel. That's a really good example of how those two complement each other: Chris has a role given his years and years and years of experience and success and the trust he's built with courts. That doesn't exclude the availability of leadership for any of us.

Aminolroaya: It's always impressive to me how Chris has always looked out for opportunities for me, despite everything that he's juggling at any given time. He asked me to handle an argument at the JPML quite some time ago, when I was a much more junior lawyer. That was a great opportunity for me to be before this panel of very esteemed judges. Then when

there was a team getting ready to go to trial in a big mass tort case that was before Judge Kennelly in another MDL, Chris asked if I would join the trial team and help out. It ended up being a really great experience for me. It was a segue into mass torts that culminated in me being able to present witnesses at trial, and that just really opened the door to handle more. So he's always been really great at keeping an eye out for where he can bring you in, where he can plug you in and give you that opportunity. You can be there, you can be willing to do the work, but without the opportunities like that, it's hard to continue to develop in that path.

Well, let me ask you, are the barriers to entry for these positions any more or less pronounced for women lawyers in the plaintiffs' bar?

Scullion: I don't think so. I came from a more defense-oriented firm. My perspective is that, if anything, there are more women in leadership in the plaintiffs' bar in general. And that may be because there's less hierarchy within firms: there's less of an idea of having a client that someone hangs on to.

We've talked about Chris and others within the firm and their mentoring, but one of the real highlights for me of being a part of the plaintiffs' bar now is getting mentored and getting information from my colleagues at other firms. So whether that's **Elizabeth Cabraser, Jayne Conroy, Linda Nussbaum**—there's just a ton of folks out there. So I don't think there are particular difficulties in getting leadership because you're a woman. I think, again, the only difficulty is making sure you are consistently doing good work. And also doing it with the right attitude—not letting your ego get in the way of good leadership, good connections with people, not assuming you're always right, listening to other people. That's really, to me, in the end, what drives it.

Itri: My experience has been that the court and colleagues are really looking for a diverse perspective. That includes older and younger attorneys and female and male attorneys, people from different cultures and backgrounds—so different sorts of experiences in the law. My experience has been that there have been plenty of women on leadership teams doing an amazing job.

Aminolroaya: I think things have changed in the last few years. I think our firm has always had a perspective of giving opportunities to all young lawyers and expecting young lawyers to be able to take depositions two years out, if they're willing to do it. We're willing to give young lawyers as much opportunity as they're willing to take, basically, as long as we think they can handle it. But we do see a change in the bar.

In terms of MDLs, it's been led by judges and also MDL leaders themselves. To Judge [Brian] Martinotti's credit, he was one of the first MDL judges in 2021 to put out a call for a very diverse leadership group [in the Elmiron Products Liability Litigation], which our firm heard loud and clear. With Chris's support, I applied for a co-lead position in that case, and that was my first co-leadership position. Then after that, we saw a lot of courts following

Judge Martinotti's lead, and we saw more female co-leads coming out of that. So it's really been a concerted effort, I think, by the MDL judges who really have the power to encourage these changes and the MDL bar, which recognizes and appreciates the need for a broad array of diversity in leadership, that we're really seeing now. I would say the challenge is getting opportunities and experience for younger lawyers. I think our firm does a really good job of making those opportunities and experiences available to lawyers. But then the question is, what is everybody else doing? What kind of a bar is being created as a result? I think where we are today is very different from where the bar was maybe five or 10 years ago.

Mass. Judge Declares Mistrial in Talc Trial: 'Court Can't Accommodate This Case'

 [law.com/2024/10/22/mass-judge-declares-mistrial-in-talc-trial-court-cant-accommodate-this-case](https://www.law.com/2024/10/22/mass-judge-declares-mistrial-in-talc-trial-court-cant-accommodate-this-case)

Amanda Bronstad

What You Need to Know

- The judge declared a mistrial after one juror got sick and another belatedly raised a potential conflict.
- The judge rejected a proposal from plaintiffs lawyer Jessica Dean to impanel additional jurors, given that there was only one alternate, and push the trial's opening statements to Oct. 23.
- The mistrial comes one day after a Connecticut jury awarded a \$15 million talc verdict to another Dean Omar client.

A Massachusetts judge in a talcum powder case against Johnson & Johnson declared a mistrial this month after one juror got sick and another belatedly raised a potential conflict.

Suffolk County Superior Court Judge Jackie Cowin rejected a proposal from plaintiffs lawyer Jessica Dean to impanel additional jurors, given that there was only one alternate, and push the trial's opening statements to Oct. 23.

J&J's lawyers had argued for a mistrial.

"Frankly, I don't know exactly what to do in this situation," the judge told lawyers, according to a live stream by Courtroom View Network of the Oct. 16 proceedings. "I haven't confronted it before."

The planned four-week trial, in a case brought by Janice Paluzzi, 84, diagnosed in 2021 with mesothelioma, faced challenges before it even began. One juror didn't show up for opening statements that were planned for Oct. 15, said Dean of Dean Omar Branham Shirley. The next day, another juror arrived sick.

"And our 13th juror said, 'I thought about what you asked me last night, did anyone in my family have cancer? And I forgot my mom did,'" Dean said. "Between our best-case scenario being 12 [jurors] with [a] potential appellate issue because of her disclosure, I highly suggested we bring the panel back the next day and get three new jurors."

But that would have pushed the trial back several days. And all but seven of the seated jurors said they would have had scheduling conflicts, the judge said. Plus, the delay would force the court to reschedule other trials.

"The court just can't accommodate this case in the immediate future," Cowin said. "This is a bad outcome, and I recognize all the reasons it's a bad outcome, but it is what it is."

A spokeswoman for J&J, represented by King & Spalding partner Bruce Hurley in Houston, declined to comment.

The mistrial comes one day after a Connecticut jury awarded a \$15 million talc verdict to another Dean Omar client, plaintiff Evan Plotkin, diagnosed with mesothelioma in 2021 at 64. Ben Braly, a partner at Dean Omar, said the award was all compensatory damages but that the jury also issued a "punitive conduct finding" that will necessitate a determination by the judge for punitive damages.

J&J said it would appeal the Connecticut verdict.

Dean Omar, based in Dallas, won three prior mesothelioma verdicts this year of \$45 million in Chicago's Cook County Circuit Court, \$260 million in Oregon's Multnomah County Circuit Court and \$63.4 million in South Carolina's Richland County Court of Common Pleas, all against J&J. A fourth trial in Dallas County District Court was settled before jurors got the case.

The mesothelioma trials are not part of J&J's proposed \$9 billion talc bankruptcy, filed last month to resolve thousands of lawsuits alleging its baby powder caused ovarian cancer and other gynecological cancers.

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Carrier reaches \$730 mln settlement over fire protection unit PFAS claims

 [reuters.com/legal/litigation/carrier-reaches-730-mln-settlement-over-fire-protection-unit-pfas-claims-2024-10-21](https://www.reuters.com/legal/litigation/carrier-reaches-730-mln-settlement-over-fire-protection-unit-pfas-claims-2024-10-21)

Dietrich Knauth

A firefighter sprays fire retardant foam on the smoking remains of a house that was destroyed during a wind-driven wildfire in Malibu, California, October 22, 2007. REUTERS/Mario Anzuoni/File photo Purchase Licensing Rights  , opens new tab

Oct 21 (Reuters) - Carrier Global has reached a \$730 million settlement with its fire protection unit Kidde-Fenwal and claimants that have sued the bankrupt subsidiary over toxic "forever chemicals" in its firefighting foam products.

Kidde-Fenwal said in a Friday court filing in Delaware that it would use the settlement to create a Chapter 11 plan that would pay its creditors, including local governments, companies and individuals who have claimed that firefighting foam products it sold contaminated drinking water and soil with perfluoroalkyl and polyfluoroalkyl substances, known as PFAS or "forever chemicals," near airports and military bases around the U.S.

The settlement has the support of a committee representing Kidde-Fenwal's junior creditors and the lead plaintiffs in the PFAS lawsuits.

The company has agreed to pay \$540 million to Kidde-Fenwal and \$190 million to the PFAS plaintiffs.

Carrier said in a Friday filing with the U.S. Securities and Exchange Commission that it will fund the settlements with \$615 million in cash paid over five years, plus \$115 million that was raised from the sale of Kidde-Fenwal's assets to private equity firm Pacific Avenue Capital Partners, which was approved in April.

Carrier said it is entitled to up to \$2.4 billion in insurance payouts for the PFAS claims, enough to cover its costs for the settlement. Carrier also agreed to contribute additional insurance rights to Kidde-Fenwal, which may make more funding available for the water pollution settlements.

Kidde-Fenwal filed for bankruptcy in May 2023, after being named as a defendant in more than 4,400 PFAS lawsuits that have been centralized in federal court in South Carolina. The lawsuits were filed by local governments, companies and individuals who alleged that a chemical firefighting foam products that the company sold from 2007 to 2013 used at airports and military bases had caused extensive contamination of drinking water and soil.

Water providers in the U.S. have reached a \$10.3 billion settlement with 3M and a \$1.19 billion settlement with DuPont, Chemours and Corteva, resolving their claims that those companies contaminated drinking water with PFAS.

The case is Kidde-Fenwal Inc, U.S. Bankruptcy Court for the District of Delaware, No. 23-10638.

For Kidde-Fenwal: Brian Glueckstein and Justin DeCamp of Sullivan & Cromwell

For the creditors' committee: David Molton of Brown Rudnick

Read more:

Fire protection company Kidde-Fenwal files for bankruptcy citing PFAS lawsuits

3M's \$10.3 billion PFAS settlement gets preliminary approval

Litigation over 'forever chemicals' is growing: Is your company the next defendant?

Reporting by Dietrich Knauth

Carrier to Make \$540 Million Payment in Kidde-Fenwal Bankruptcy

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Class Action

- Deals poised to resolve PFAS claims over firefighting foam
- Carrier to make cash payments, contribute insurance rights

Carrier Global Corp. has agreed to pay \$540 million in cash and contribute insurance rights to resolve claims it faces in the bankruptcy of its subsidiary Kidde-Fenwal Inc., a fire protection equipment manufacturer.

Carrier's agreement, announced in an Oct. 18 filing with the US Bankruptcy Court for the District of Delaware, will help extricate the multinational from claims related to the production of firefighting foam with per- and polyfluoroalkyl substances, or PFAS. The company separately said in an Oct. 18 regulatory filing that it had agreed to pay \$615 million in cash over five years to settle claims arising in the bankruptcy and in multidistrict litigation over PFAS in firefighting foam.

The proposed MDL settlements "release a very substantial amount of current and future direct claims" Carrier had agreed to absorb as part of a spin-off from United Technologies Corp. in 2020, it said. The settling MDL claimants include a number of airports and public water systems.

The resolution will help advance Kidde-Fenwal's bid to wind down in bankruptcy after selling its assets earlier this year to an affiliate of Pacific Avenue Capital Partners for \$140 million.

Kidde-Fenwal filed for bankruptcy in May 2023 facing more than 4,400 lawsuits over its production of firefighting foam containing PFAS, or "forever chemicals."

Kidde-Fenwal is represented by Sullivan & Cromwell LLP and Morris Nichols Arsht & Tunnell LLP. Carrier is represented by Richards Layton & Finger PA.

The case is In re Kidde-Fenwal Inc. , Bankr. D. Del., No. 23-10638, Notice filed 10/18/24 .

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Paper Mill Company Sues Insurer Over Coverage for PFAS Case

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Class Action

- **COURT:** W.D. Wis.
- **TRACK DOCKET:** No. 3:24-cv-00726 (Bloomberg Law subscription)

An insurer breached its policy with units of paper manufacturer Ahlstrom by denying coverage for an underlying proposed class action alleging PFAS contamination from paper mill sludge on farmland in Wisconsin, the policyholders said in a lawsuit.

Colony Insurance Co. must defend and indemnify the paper mill plaintiffs under a premises environmental and remediation liability insurance policy for property damage, bodily injury, and cleanup costs resulting from the alleged PFAS pollution, according to the suit filed Oct. 18 in the US District Court for the Western District of Wisconsin.

The underlying proposed class action, filed in August 2023, alleges per-and polyfluoroalkyl substances from the paper mill sludge contaminated properties and water supplies near Rhinelander, Wis.

The Ahlstrom plaintiffs seek damages for breach of contract and bad faith, as well as declaratory relief that Colony has a duty to defend and indemnify them.

Colony didn't immediately respond to a request for comment.

Barnes & Thornburg LLP represents the Ahlstrom plaintiffs.

The case is Ahlstrom Rhinelander LLC v. Colony Ins. Co. , W.D. Wis., No. 3:24-cv-00726, complaint 10/18/24 .

This story was produced by Bloomberg Law Automation.

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Boies Schiller Ex-Partner Wants New Firm to Rival His Old One

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Jonathan Sherman left Boies Schiller & Flexner after 24 years to build a litigation practice at Sterlington that can compete with his prior firm.

Sherman said he was enticed by the opportunity to build a trial practice at a young firm still run by its founders and that has an “idiosyncratic” way of operating. Sterlington lawyers work remotely, and according to its website the firm doesn’t require partners to make capital contributions and provides flexibility in billing rates.

“They gave me something I never imagined I’d be able to do, which is build a commercial litigation practice that they’re willing to support and compete at the level of firms that have sprung up in the shadow of Boies Schiller & Flexner,” he said in an interview.

Sherman’s departure comes during a leadership change at Boies Schiller, where founder David Boies will pass the chair role to Matthew Schwartz in January. The transition caused Sherman to reassess plans for the “third act” of his career, he said.

“It’s no secret that Matt Schwartz will become the sole chair of the firm and that David will relinquish that position although still practice,” Sherman said. “It’s clearly moving to its next generation. For me, that was cause for reflection.”



Jonathan Sherman

Photographer: Maansi Srivastava

Sherman said his new firm isn’t yet a competitor to his previous firm but that he “has every intention” to put it on equal footing with Boies Schiller and any elite litigation department. He said he will focus on building out Sterlington’s white collar and international arbitration benches.

In a statement, a spokesperson for Boies Schiller said: “We thank Jonathan for his contributions to the firm over the years, and we wish him well in his new role.”

Sherman started at Sterlington at the beginning of this month as a partner and vice chairman of strategic litigation. Former Schulte Roth & Zabel M&A partner Christopher Harrison founded Sterlington in 2016 and he leads the firm as CEO.

In an email, Harrison said the firm already has “an exceptional team of world-class litigators who specialize in complex commercial and securities litigation,” among other areas of trial work. “Sterlington currently has 21 litigators and has ambitious growth plans for all of our practice areas,” he said.

Media Practice

Sherman was the co-leader of the media and first amendment practice from the time Boies Schiller formalized the creation of practices under the leadership of managing partners Schwartz and Sigrid McCawley in 2021, Sherman said. Until earlier this year, Sherman also served as a co-leader of the firm’s securities litigation team.

Sherman, after joining Boies Schiller in 2000, represented high-profile clients including National Enquirer publisher AMI and Apple Inc.

In a case over Apple’s alleged anti-competitive behavior in the digital music industry, Sherman was on the company’s defense team and successfully argued against the release of deposition footage of Steve Jobs taken six months before his death in 2011. In 2014, Sherman argued the video was not admitted into evidence as an exhibit and therefore couldn’t be shared with the press.

In 2018, Sherman confirmed to the American Lawyer he and a small team at Boies Schiller represented National Enquirer publisher AMI in its engagements with the Associated Press. The outlet was reporting on a \$30,000 payment allegedly made by AMI to the doorman of a Trump-owned building to prevent him from spreading rumors about the future-president’s sex life, the AP described in an April 12, 2018 story. Sherman told the American Lawyer he and colleagues communicated with AP “that they were going to write something false” about AMI.

Sherman said some of his client engagements are following him to Sterlington, where he expects fewer conflicts of interest to prevent his representation of clients.

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The Sophisticated Investor Test

Published: Tue Oct 22 14:22:42 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

Certificate of Smart Investor

I love my job but I'd take a sabbatical to write this test:

A group of lawmakers has proposed legislation that would allow any investor capable of passing an exam to buy private securities—an array of investments like shares in pre-IPO startups or loans to private companies that are considered riskier because they have looser disclosure rules than public securities and can be harder, and sometimes impossible, to sell in a pinch.

The idea is that the ability to make these high-risk, high-reward bets should be open to all sophisticated investors, not just those with the biggest bank accounts. It is a pitch that has lots of fans on Wall Street and many smaller advisory firms, where a movement is trying to get a bigger slice of everyday investors' retirement funds and savings in private-equity funds and other nontraditional investments.

"Investing your hard-earned money in startup businesses in your community shouldn't be limited to the wealthy," said Sen. Tim Scott (R., S.C.), the ranking member of the Senate Banking Committee and who proposed the bill.

Crudely speaking the rules in the US are:

1. Ordinary retail investors are only allowed to invest in "public" investments — stocks, mutual funds, exchange-traded funds, etc. — that are subject to strict disclosure requirements, so that the investors know what they're getting into.
2. "Accredited" investors — ones who are sophisticated and able to bear risk — are allowed to invest in whatever they want, without any mandatory disclosure; the accredited investors are assumed to be able to negotiate disclosure and governance terms for themselves, to make their own decisions about how much information they need, and to bear the risk of losing money.
3. The main way you get accredited is by making more than \$200,000 per year (\$300,000 for married couples), or having a net worth of more than \$1 million. ¹

Every part of this feels antiquated. Start with the public investments. In theory the disclosure requirements protect public investors: They can read a prospectus and financial statements before buying a public stock or ETF, so they can evaluate the investment intelligently. In practice it would be *extremely weird* for a retail investor ever to read a prospectus. When retail investors kept piling into irrationally priced meme stocks a few years ago, the US Securities and Exchange Commission scolded the meme-stock issuers to put language in prospectuses saying “this makes no sense,” and they did, and it didn’t matter. We have talked about how Bed Bath & Beyond Inc. raised hundreds of millions of dollars from retail investors, to hand over to its creditors in bankruptcy, while explicitly saying “we’re gonna go bankrupt and you’ll lose all your money.” This did not matter at all! They bought the stock anyway! And lost all their money.

This is naive; the point of public disclosure requirements is not *really* that retail investors are supposed to read the disclosures. The point is that public securities tend to trade in public liquid markets, and *somebody* reads the disclosures (hedge fund managers, etc.), and they compete to make prices rational, so public shareholders benefit from efficient markets based on public disclosure.² But that is not guaranteed by the public disclosure regime, and it’s not always true. There are plenty of thinly traded public penny stocks that retail investors can buy whose prices are not set by rigorous competition among multibillion-dollar hedge funds; there are also some heavily traded *meme stocks* like that. There are plenty of publicly listed exchange-traded funds with weird and risky payout structures that anyone can buy; some people surely do their research before buying triple-levered daily-return ETFs or single-stock zero-day options, but some people surely don’t.

Then there’s the theory that private investors have the sophistication and leverage to negotiate for the disclosure and governance that they want, so they don’t need the protections of public securities regimes. Is that true? Well, at the top end of private investors — pensions and endowments who invest in venture capital and private equity, etc. — it makes a certain amount of sense. But even there, *the SEC* clearly doesn’t believe it, because it has proposed rules (which were shot down by a judge) to mandate more disclosure and governance terms in those investments, on the theory that those sophisticated private investors really *can’t* protect themselves.

But not every private investor is a giant pension fund with a professional staff. Some private investors are dentists investing in their free time. Can they negotiate for the disclosures they need?

Then there’s the fact that the accredited investor designation used to “be limited to the wealthy,” but over time, with inflation, the bar has gotten lower. As of 2022, about 24.3 million US households, or 18.5% of them, qualified as accredited. Meanwhile only 21% of US households own *public stocks* directly. (More own stock via mutual funds or retirement plans.) The pool of people who can buy private investments is about as big as the pool of people who do buy stocks.

And so if you are a retail financial adviser telling your clients what stocks and ETFs to buy, there’s a

pretty good chance that your client is accredited, so you can go ahead and tell her to buy shares of private credit funds or non-traded real estate investment trusts or other private stuff too.

You could also advise her to buy shares of SpaceX, if you want, but you probably can't *get* her any SpaceX shares. (You could advise her to put her money into Citadel's hedge fund, or Renaissance Technologies' for that matter, but you probably can't get her into those funds either.) There are private investments that are, as it were, mass marketed to accredited investors, and there are others that are not. There is some reason to think that the hottest startups are *not* looking to raise every last dollar from dentists, while the least hot startups might be.

Anyway everyone understands that this is an unsatisfying situation, so there are frequently proposals to fix it. Often these proposals seize on two problems:

1. Many of the biggest returns in investing come from private markets (pre-IPO startups, etc.), so it seems unfair that those are off-limits to ordinary investors.
2. Limiting private investments to "accredited investors" makes it sound like those investors are *smart*, so it seems unfair to make it actually an income-based qualification. Shouldn't you be able to take a test to get "accredited"?

I sometimes start from the opposite perspective:

1. Many of the biggest *losses* in investing come from private markets, and *it's not like anyone is offering you SpaceX stock*.
2. Private fund managers are not salivating over an audience of retail investors *because they think they are ultra-sophisticated*, and if you think of the "accredited investor" standard as signaling sophistication you will make mistakes.

I have proposed my own solution, which I call the "Certificate of Dumb Investment." The idea is that anyone can go to the SEC and ask for the certificate, which says:

I want to buy a dumb investment. I understand that the person selling it will almost certainly steal all my money, and that I would almost certainly be better off just buying index funds, but I want to do this dumb thing anyway. I agree that I will never, under any circumstances, complain to anyone when this investment inevitably goes wrong. I understand that violating this agreement is a felony.

And then the SEC will slap you in the face and say "really?" and if you say "yes really" then they give you the certificate and you can buy whatever private investment you want.

Obviously I am partially joking about this, but only partially. The essential point about the Certificate of Dumb Investment is that it is *not aspirational*. It's *not* that you go to the SEC and take a test and get

The Sophisticated Investor Test

100% on the test and they're like "congratulations you're so smart" and you are like "I know right" and they give you the Certificate of Being a Smart Investor Who Can Buy the Good Investments Now and a little button saying "SMART INVESTOR" and you walk out of the SEC office wearing that button and you are absolutely *mobbed* by people selling structured notes. People selling financial products *love* investors who think they are sophisticated.

Though I guess it depends what's on the test:

The new Scott-proposed bill would let the SEC or another regulator write an examination that would test "financial sophistication," by quizzing individuals on such topics as the types of securities, disclosure requirements under securities laws, corporate governance, financial statements and the liquidity and leverage risks involved in these transactions. ...

A Senate aide said it shouldn't be as easy as a driver's learning permit test, but it also can't be "impossible."

Ehh, sure. My impression, though, is that when people talk about "financial sophistication" and "financial literacy," they tend to underweight some topics. One is basic financial trivia, things like "to within a factor of two, what is the current yield on the 10-year?" I once tweeted that "the basic test of financial literacy has one question: If I offer you a 20% risk-free return, am I lying?" To answer that question, you need to know that a 20% annual return is *high*.

If I were writing the test I'd also have a section on fees. Like: "To within an order of magnitude, how much are you paying for your index fund? If your broker tells you to buy a structured note, how much do you think he gets paid for that?" Stuff like that.

But the main thing I'd put on the test is a section on adverse selection. It would have questions like:

1. You are a dentist. Your financial adviser offers you the chance to invest in XYZ AI, a private artificial intelligence startup that he says is very hot. Is Sequoia also an investor in XYZ?
2. You see an online ad for a course that will teach you to make millions trading foreign exchange markets. The course costs \$250 per month. How much money can the teacher make trading foreign exchange markets?

The essential difference between public markets and private markets is that, in public markets, everyone has the same menu of investing choices. In private markets, you can only invest in the things that people offer to you. The point of the test is to understand why they are offering you the investments.

Greenwashing

If you want to call your investment fund an ESG (environmental, social and governance) fund, the rule in the US is roughly:

1. “ESG” can mean whatever you want, but
2. You have to say what it means, and
3. You then have to do what you say.

So: Can an ESG fund put 100% of its money into fossil fuel producers? Sure why not; here’s one. ³

But if you say “as part of our ESG standards, we do not invest in companies that produce any fossil fuels at all,” then you can’t invest in companies that produce fossil fuels. And if you say that, and invest in a wind power company that quietly operates one oil well, then you will get in trouble. The US Securities and Exchange Commission, like many investors, does not like “greenwashing,” which means saying that you are ESG while not being ESG. But the SEC has no ability to make substantive determinations about whether something is or is not ESG. All it can do is look at *your* definition of ESG, and check to make sure you’re following it.

Weirdly a lot of people aren’t. Yesterday the SEC fined WisdomTree Asset Management Inc. \$4 million for not being as ESG as it claimed:

According to the SEC’s order, from March 2020 until November 2022, WisdomTree represented in prospectuses for three ESG-marketed exchange-traded funds, and to the board of trustees overseeing the funds, that the funds would not invest in companies involved in certain products or activities, including fossil fuels and tobacco. However, the SEC’s order finds that the ESG-marketed funds invested in companies that were involved in fossil fuels and tobacco, including in coal mining and transportation, natural gas extraction and distribution, and retail sales of tobacco products. According to the SEC’s order, WisdomTree used data from third-party vendors that did not screen out all companies involved in fossil fuel and tobacco-related activities. The SEC’s order further finds that WisdomTree did not have any policies and procedures over the screening process to exclude such companies.

The SEC’s order quotes the funds’ prospectuses saying that “[s]ecurities of companies involved in certain controversial products or activities,’ including ‘fossil fuels’ and ‘tobacco,’ ‘are excluded regardless of revenue measures.’” But WisdomTree did its screening by buying data from a vendor — “Vendor B” in the SEC order — which divided companies by industry sectors:

Vendor B’s data used by WisdomTree classified companies by their primary business sector. ... Vendor B’s delineation of industry sectors meant that multiple sectors had involvement in fossil fuels. Information concerning the Vendor B data (including the limitations of that data) was publicly available on Vendor B’s website.

WisdomTree only used Vendor B's "Energy Sector" data to exclude the securities of companies from the portfolios of the ESG Funds, even though other Vendor B industry-sector classifications included companies involved in fossil fuels. For example, the "Utilities Sector" included utility companies that distributed natural gas to residential and industrial customers that were not identified in Vendor B's "Energy Sector" data.

And so it got a few non-energy companies that nonetheless did fossil-fuel stuff:

The WisdomTree U.S. ESG Fund held the securities of: (i) multiple utility holding companies that owned natural gas distribution utilities from March 2020 until the fund was liquidated on February 5, 2024; (ii) a utility holding company that owns a large natural gas distribution utility and also has an operating division engaged in the extraction of shale gas from June 2022 until March 2023; (iii) a steelmaker that owned a 49% stake in a company that maintained properties with oil and gas reserves from June 2021 until the fund was liquidated on February 5, 2024; and (iv) a freight railroad that hauled coal, fracking sand, petroleum coke, and crude oil from June to September 2020 and again from December 2020 to December 2021.

It had data from another vendor, Vendor A, which *did* classify companies by whether they had any involvement in fossil fuel activities, but it ... didn't have all the data?

Vendor A did not offer to subscribers like WisdomTree a single data set that encompassed or otherwise was described as "fossil fuels." Instead, Vendor A offered several data sets that addressed different aspects of fossil fuels activities that were described as: "Arctic Oil and Gas Exploration," "Thermal Coal," "Oil Sands," "Shale Energy," and "Oil and Gas." WisdomTree did not subscribe to the latter two data sets and WisdomTree's agreement with Vendor A did not include them.

Yes right there are probably definitions of ESG that are like "shale energy is ESG but arctic oil exploration, thermal coal and oil sands are not."⁴ If you ran a fund with that definition, you can subscribe to only those data sets. But WisdomTree's definition didn't say that.

Similarly lots of retailers are "involved in" tobacco, in the sense that they operate big stores that sell some cigarettes among many other products. Vendor A's tobacco data set initially "would not capture a company's tobacco retail sales if those sales comprised less than 10% of such company's revenue," so WisdomTree's funds owned some stocks of companies that sold cigarettes. Again, perhaps a reasonable thing to do in an ESG fund in the abstract, but not what WisdomTree said it was doing.

This is not the first greenwashing case like this. We talked about a similar case against BNY Mellon in 2022, and last month there was what I called a "Biblewashing" case, where the SEC charged a

biblically responsible investment fund with not doing what it said it was doing. The SEC doesn't know what is mandated by the Bible, or by ESG principles. But it can read what *you* say is mandated by those principles, and check to see if you did what you said you would.

Dish

Ordinarily the way you acquire a company is that you go to the owner of the company, offer to buy it, and negotiate a price. If the owner is an individual, you call up that individual to negotiate. If the owner is a private equity firm, you probably call up the managing director in charge of the investment. If the owner is itself a company — if the company you want is a subsidiary of a bigger company — then you probably call up an executive at the parent company.

If the company is owned by dispersed shareholders — if, for instance, it is a public company with lots of investors — then you will negotiate the deal with its managers and board of directors. The board represents the shareholders, and is tasked with negotiating the price on their behalf. But then generally the shareholders get the final say: The board approves the sale, but then the shareholders get a vote, and if they are unhappy with the deal that the board got for them, they can vote no. This sometimes happens. If you're buying a public company, you might have to do two rounds of negotiations, one with the board and a second, less organized one with the shareholders.⁵

Last month DirecTV agreed to buy Dish Network. Dish's owner, nominally, is EchoStar Corp., a bigger company, so DirecTV sensibly negotiated the deal with EchoStar and agreed on a price. The price was approximately negative \$1.568 billion: EchoStar would get \$1 for Dish, and DirecTV would take over Dish's assets and liabilities *minus* \$1.568 billion of debt. The way it would get rid of that \$1.568 billion of debt was by asking the holders of Dish's \$9.75 billion of bonds to accept less than 100 cents on the dollar.

Now, on the one hand, that is how you have to do this: You have to go to EchoStar, the nominal owner of Dish, to get it to agree to a deal. On the other hand, if the deal that you agree on is "the bondholders will pay me to take Dish off EchoStar's hands," you have not *really* negotiated your deal with the owners. The actual owners of Dish, in that scenario — the residual claimants who are economically affected by the price you pay — are the bondholders. Perhaps in some sense EchoStar represented the bondholders in negotiations with DirecTV, though not really, but in any case the bondholders get their own say.

So far they've said no. The Financial Times reports:

According to documents seen by the Financial Times, Dish creditors have pushed DirecTV to narrow the discount from \$1.6bn to about \$300mn, but the bidder has refused to change its terms.

Letters exchanged between DirecTV and members of the bondholder group, including BlackRock, show that the two sides are at an impasse, threatening the exchange offer less than two weeks before it expires on October 29.

Holders of two-thirds of the bonds by value must agree to the exchange for the merger to close. Should the offer fail, DirecTV can terminate the deal contract by November 9.

“The [bondholder] group’s expectations, as reflected by the proposal, do not represent terms that DirecTV will accept and further DirecTV has no intention of restructuring terms that were negotiated at length between the parties,” Ryan Preston Dahl, a Ropes & Gray lawyer representing DirecTV, said in a letter sent on Sunday to Lazard and Milbank, which are advising Dish bondholders. “Time is of the essence,” he said.

Yeah I don’t know about “no intention of restructuring terms that were negotiated at length between the parties.” DirecTV definitely negotiated the terms of this deal at length with *somebody* (EchoStar), but I’m not sure it was the relevant party. It wants to buy Dish from its bondholders, so it has to make a deal — or not — with them.

A 180

I wrote last week that “most cannabis companies used to be gold mining companies.” That was a joke, sort of. The point is that there are a bunch of public companies in the US whose main asset is *being a public company*. Their business is tiny or unprofitable or failed — they owned a gold mine that had no gold in it, or a single deli — and they’re not generating any value for shareholders. But they are public companies, often listed on a stock exchange, so retail investors can buy and sell their stock.

Meanwhile there are other companies out there that have, maybe profitable businesses, but more often *promising* businesses, *interesting* businesses, fun business *ideas* that will require some money to pull off. But those companies are not public, so they have a hard time raising money from public investors, and for whatever reason they also do not raise money from venture capitalists.⁶ Nor do they have the money or name recognition to do an initial public offering. If they just *were* public, that would be great, but the process of *going* public is too daunting.

And so there is a trade. The company with a public listing but no business merges with the company with a business (or business idea) but no public listing; the combined company has both the listing (so it can raise money from public investors) and the business (so it has something to pitch them).

In general there is no real need for the two companies to have anything else in common, and there are broad trends in popular business ideas, so it is fairly normal for a gold mining company to become

a cannabis company: The gold miner has a listing but no gold, the cannabis company has cannabis but no listing, and nobody is all that squeamish about working together.

There's a lot of mild comedy in this stuff. Here is a public company called 180 Life Sciences Corp. It is listed on the Nasdaq and has a market capitalization of about \$6 million. From its quarterly report filed in August:

The Company is a clinical stage biotechnology company focused on the development of therapeutics for unmet medical needs in chronic pain, inflammation, fibrosis, and other inflammatory diseases. ...

Due to restrictions in the Company's resources, the Company has slowed down research and development activities significantly in the SCA platform and the anti-TNF platform. The Company has not made progress on the $\alpha 7nAChR$ platform and has suspended further research and development activity in this program.

The Company is currently evaluating all options to monetize its existing assets, in addition to exploring other strategic alternatives to maximize value for its stockholders.

So it's a drug company with no drugs but a public listing. Can you guess what's next? Here's a press release from last week:

We are excited to announce that 180 is planning to strategically enter into the online gaming industry, utilizing its newly acquired "back-end" gaming platform, which incorporates blockchain technology and full cryptocurrency operability (the "Gaming Technology Platform"). The Company plans to use this technology platform to establish a blockchain-based business aimed at the global iGaming market. Initially focusing on B2C (business-to-consumer) online casinos, the Company also plans to expand into a B2B (business-to-business) model, offering a seamless blockchain-enabled technology platform for gaming operators worldwide. In addition, management has identified certain global iGaming industry characteristics and trends that they believe make potential acquisition opportunities attractive. Management believes that the combination of the Gaming Technology Platform and the strength of a Nasdaq listing make the Company an attractive consolidation vehicle for the iGaming industry, and plan to work to identify potential acquisitions (although no targets exist at present).

A rollup of blockchain-based online casinos. Why not. Why is a semi-defunct biotechnology company with a \$6 million market capitalization the right platform to roll up that business? Well, "the strength of a Nasdaq listing" helps.

Multitasking

I'm sure that, out of the millions of knowledge workers who sit at computers all day, there is at least one person who has blocked off half an hour, cleared her schedule, shut down all distractions, put away her phone, and sat down to watch an internal training video to fulfill her regulatory continuing education requirements. "Ooh, an interactive online course on new trends in data security, I will want to watch that with total focus and take detailed notes," this hypothetical person hypothetically said to herself. The world is large and some people have weird proclivities. Anyway here's this:

EY has fired dozens of US staff for what the accounting and consulting firm called cheating on professional training courses, sparking an internal debate about business ethics and the limits of multitasking.

The dismissals took place last week after an investigation found that some employees had attended more than one online training class at a time during the "EY Ignite Learning Week" in May.

Several of the fired employees told the Financial Times they did not believe they were violating EY policy and were just trying to take advantage of interesting sessions that ranged from "How strong is your digital brand in the marketplace?" to "Conversing with AI, one prompt at a time".

The sessions counted towards the 40 continuing professional education credits that EY required employees to complete in a year. The firm determined that watching two at a time amounted to an ethical breach. ...

One consultant who was fired last Friday said there was no warning that watching multiple sessions simultaneously was not allowed. "Their emails marketing EY Ignite actually encouraged us to join as many sessions as our schedule allowed," the person told the FT. "We all work with three monitors. I was hoping to hear new ideas that I could bring to the table to separate myself from others."

I think you have to distinguish two things:

1. *Watching* two training videos at the same time shows initiative and multitasking skill, getting you twice as many new ideas that you can bring to the table to separate yourself from others.
2. *Billing* for two training videos at the same time — in the loose sense of counting both of them toward your 40 hours of continuing education requirements — seems like an ethical red flag? (One employee told the FT: "I know a partner who will do two [client] calls and switch their camera on and off depending on who he is talking to. If this is unethical, then that is unethical,

too.” Yes, sure, but that’s why EY is cracking down!)

But there is no practical way to separate the two — if you watched two videos at the same time, the system also gave you credit for both of them, until you got fired — and the question is just whether the employees were doing this mostly for the credit hours or mostly for the knowledge. They say, to the FT, that it was for the knowledge. EY assumes otherwise. What does that tell you about EY’s opinion of its own training content?

Things happen

US rolls out ‘open banking’ rules to make sharing financial data easier. Red-Hot Bond Market Powers Wave of Risky Borrowing. HSBC Kicks Off Biggest Restructuring in Decade Under New CEO. Yellen Rebukes Chinese Lending Practices in Call for Debt Relief. “The prototype of the person you are competing with, the people in nearly all of the successful positions, have a stay-at-home partner.” Marc Lasry Sues Ex-Employee for Allegedly Trying to Extort \$50 Million. Former Abercrombie CEO Mike Jeffries Is Arrested in Sex-Trafficking Case. Bed Bath & Beyond Stores to Return in \$25 Million Partnership With Kirkland’s. Activist Urges Cheesecake Factory to Consider Breakup. Hugh Hefner’s Son Offers to Buy Playboy Brand for \$100 Million. Is Elon Musk’s \$1 Million Giveaway Legal? Ava Cado. Chaos packaging. Party barns.

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1. Certain securities licenses — Series 7, 65 and 82 — also can make you accredited. I’m not sure how many people hold those licenses and don’t meet the income thresholds. (You have to *hold the license*, not just pass the test, which means essentially that you have to currently work at a securities firm.)
2. We talked about this yesterday; I wrote: “One nice property of finance is that efficient financial markets are socially useful. It is good for the world if stock prices are approximately correct. ... Many retail investors are essentially price takers, so it’s helpful for them if prices are right: If you are investing your retirement savings in index funds, you are just hoping to receive an average profit from the growth of the economy, and if the prices of stocks in the index actually reflect

their values then that will work.” This is also related to the “fraud on the market” theory of securities fraud.

3. I’m sure I’m exaggerating. It’s the iShares MSCI World Energy Sector ESG UCITS ETF, which is “designed for investors wanting exposure to the World Energy Sector optimised to reduce the carbon intensity and potential emissions, increase the ESG score, and minimise tracking error relative to the parent index.” Its top holdings are Shell Plc, TotalEnergies, ConocoPhillips, Enbridge Inc. and Exxon Mobil Corp. It’s a lot of energy producers, plus pipelines and oilfield services companies and refiners, but for all I know maybe there's some wind power too; it’s a long list.
4. In fact the iShares fund I linked to earlier excludes thermal coal and oil sands, though not arctic drilling.
5. This sort of happened in the Sculptor deal, for instance, and also JetBlue/Spirit.
6. When I write the accredited-investor test, one of the short-answer essay questions will be: “What is the reason these businesses do not raise money from venture capitalists?” Honestly if that was the only question on the test it’d be fine.

Matt Levine's Money Stuff: Who Owns OpenAI?

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Who Owns OpenAI?

By Matt Levine 2024-10-21T14:52:40919-04:00

Waterfall

Who owns OpenAI? Is it Microsoft? The Wall Street Journal has a good breakdown:

OpenAI and Microsoft are facing off in a high-stakes negotiation over an unprecedented question: How should a nearly \$14 billion investment in a nonprofit translate to equity in a for-profit company?

The startup behind ChatGPT is transitioning from a nonprofit organization to a for-profit corporation after it recently closed a funding round valuing it at \$157 billion. Determining how to distribute equity when it becomes a for-profit is one of the biggest challenges it faces.

As OpenAI's biggest investor by far, Microsoft could end up owning a large stake in what would be, by current measures, the second-most-valuable startup in the U.S. behind SpaceX.

Basically Microsoft has invested \$13.75 billion in OpenAI in exchange for a variable share of its profits. (Well, the profits of its for-profit subsidiary.) That share is, per the Journal:

1. 0% of the first \$194 million, which goes to earlier OpenAI investors.
- 2. 75% of the next \$17.3 billion, with the other 25% going to those early investors plus employees.
- 3. 49% of the next \$_____ billion, with 41% going to employees, 8% to other investors and 2% to the nonprofit organization that controls OpenAI.
- 4. 0% of profits above \$_____ billion: Microsoft's return is capped, and above the cap all the profits go, somewhat paradoxically, to the nonprofit.

Unfortunately I don't know what number goes in the blanks there. Each early investor in OpenAI — of which Microsoft is the biggest — has some cap on its returns; some investors are capped at 100 times their money, but presumably Microsoft's cap is not *\$1.4 trillion*. If the cap is that Microsoft can get up to 10 times its money — \$137.5 billion — then it gets roughly 49% of profits between \$17.5 billion and \$272 billion, and 0% of profits above that. Again, I don't know what the cap is, but \$137.5 billion feels like a plausible order of magnitude, so I'll just use that illustratively here.

How much is that stake worth? Well, it depends. If OpenAI makes \$1 trillion of profits next year, Microsoft's stake is worth more or less exactly whatever its cap is, \$137.5 billion in my hypothetical numbers. AI is moving fast, but that seems unlikely. OpenAI's profits so far are negative billions of dollars, so huge positive profits seem a ways off. If OpenAI makes zero dollars of profits ever, then Microsoft's stake is worth zero dollars. That also seems somewhat unlikely: OpenAI keeps raising money from investors at higher valuations, suggesting that they expect it to make money. It recently completed a fundraising round at a \$157 billion valuation.

As a crude approximation, that suggests that the present value of OpenAI's expected future profit available to its owners is about \$157 billion. You can just plug that number into the waterfall: If OpenAI made \$157 billion of profits, then Microsoft would get about \$81.3 billion of them. That's about 51.8% of the total profits: Microsoft owns a little bit of 0% of OpenAI, a chunk of 75% of OpenAI, and mostly 49% of OpenAI, so its blended position is about 51.8%.

But you can plug in different numbers and get different percentages. If you plug in fairly small numbers, Microsoft's percentage starts small and grows: If OpenAI's total lifetime profits are \$100 million, Microsoft gets \$0 (0%); if they're \$1 billion, Microsoft gets \$600 million (60%); if they're \$10 billion, Microsoft gets \$7.35 billion (73.5%). But above \$17.5 billion, the bigger the number you plug in, the lower Microsoft's percentage is: If OpenAI's total lifetime profits are \$20 billion, Microsoft will get about \$14.2 billion (71%). If its total profits are \$1 trillion, Microsoft will be capped out at \$137.5 billion, or 13.75% of the total. If total profits are \$1 quadrillion, Microsoft's \$137.5 billion will round to zero percent.

But now OpenAI wants to get rid of this whole waterfall and just give Microsoft common stock. So ... how much? One thing you could do is what I did in the previous two paragraphs: Estimate what OpenAI's likely future profits will be, see how much of those profits would go to Microsoft, calculate the percentage and give Microsoft that. If you think the future profit will be \$157 billion, Microsoft will get 51.8% of them, so Microsoft should get 51.8% of the stock. My math is very crude, though, and you could hire someone to be a bit more sophisticated:

In a sign of how significant the outcome will be for Microsoft and OpenAI, both have hired investment banks to advise them on the process. Microsoft is working with Morgan Stanley and OpenAI has tapped Goldman Sachs, according to people familiar with the matter.

They'll make these arguments using some combination of business information (OpenAI management projections, views about the market for its products, etc.) and stock-price information (the fact that OpenAI just raised a round at \$157 billion gives you a decent starting point for the market-implied expectations about future profits).

Roughly speaking, this is a standard investor/company negotiation over valuation, with the company wanting a higher valuation and the investor wanting a lower one: Morgan Stanley's job is to argue that OpenAI's profits won't be all that large, so under the current waterfall Microsoft would get about 75% of them, so it should get about 75% of the stock, while Goldman's job is to argue that OpenAI's profits will be *absolutely astronomical*, so under the current waterfall Microsoft would get a small percentage of them, so it should be happy with 10% of the stock. "It would be wise to view any investment in OpenAI Global, LLC in the spirit of a donation," old nonprofit-y OpenAI told investors, "with the understanding that it may be difficult to know what role money will play in a post-[artificial general intelligence] world," and I assume that will be on the first page of Goldman's deck.

(Disclosure, I used to work at Goldman, and it gives me physical pain to report that I never told a client "ehh don't worry too much about this derivative valuation, it's difficult to know what role money will play in a post-AGI world." Just an absolutely perfect thing to write in a financial model. I hope when artificial intelligence tools do banking models, they all write that. "Don't worry about the valuation, silly humans." I digress.)

There are other constraints:

In addition to figuring out how big a piece of the restructured artificial intelligence company Microsoft will own, the two sides must figure out what governance rights it will have. ...

Further complicating matters is the likelihood that the larger Microsoft's stake is, the more scrutiny it could invite from antitrust regulators already taking numerous actions to try to tame the power of giant tech companies.

I assume that if Microsoft's bankers calculate that its stake should be 54%, they will round that down to 49%. We talked last year about how Microsoft didn't even want to be a "minority owner" of OpenAI, for antitrust reasons; OpenAI carelessly referred to it that way, but then changed the description to "minority economic interest." Now I suppose that is going away and Microsoft is stuck being an owner, but at least it can be a minority owner.

By the way, they don't *have* to do this. There is no necessary connection between (1) OpenAI converting into a for-profit company and (2) Microsoft converting its ownership into normal stock. OpenAI could be a for-profit company with a weird profits waterfall, where Microsoft gets A% of the profits up to \$B and C% of the profits up to \$D, etc., and the other shareholders get the residual claim once Microsoft is paid off. And even in the new for-profit structure, the OpenAI nonprofit organization will own a big residual claim. ("At least a 25% stake," reports The Information.) But of course leaving the structure in place would be messy: Future *stock* investors would have to value Microsoft's weird claim to figure out how valuable OpenAI's residual stock is, and that would make it hard for OpenAI to sell more stock. Better to value the weird claim now, by negotiation, once and for all, and convert it into straightforward stock.

Jefferies

The job of an investment banker is to become a trusted adviser to senior corporate executives, and then pitch those executives on doing deals (acquisitions, stock or bond offerings, etc.) that will generate fees for the investment bank. How does the banker decide what deals to pitch? Well, here is a non-exclusive list of things she might consider:

1. She wants to preserve her relationship with the client, so she will pitch deals that are *good for the client*. If she pitches some horrible derivative that will rip the client's face off, she might get the business, but the client will notice and she won't get any *more* business.
- 2. She wants to get paid, which means pitching deals that will make a lot of money for the bank. Doing an acquisition financed by leveraged loans is better than doing an open-market stock buyback, because it usually pays more.
- 3. She wants to get paid, which means pitching deals that generate revenue *for her* in the bank's accounting. Exactly what that means will vary by bank, but in general the relationship banker gets most of the credit for a merger advisory assignment and less of the credit for, say, pitching the company's chief executive officer on the bank's wealth management capabilities. If the merger pitch succeeds, she'll do the merger. If the wealth management pitch succeeds, someone else — a wealth manager — will do the work and get most of the credit.
- 4. She wants to do fun cool deals and not bad boring deals. If she pitches a high-profile merger, and she ends up doing it, she will feel cool and have fun. If she pitches cash management services, she will be bored during the pitch, and will then never think about it again unless the client calls her with complaints.

This whole model is a long way of saying "investment bankers basically want to pitch mergers and have to be dragged kicking and screaming to pitch anything else," which is sort of true.

Still banks *do* drag their bankers kicking and screaming to pitch, you know, wealth management, because the *bank* can make money in lots of ways, and wants to. The investment bankers have the good relationships with the senior corporate executives, and the bank wants to exploit those relationships to make steady reliable fees. It is wasteful to have the bankers call on the executives to pitch *only* fun mergers; from the bank's perspective, that under-monetizes the bankers' relationships with the executives. I once wrote:

And so every big investment bank will from time to time announce an initiative that is like "we're going to tell our investment bankers that they should really mention our wealth management business to their corporate-executive clients," and it really does tell the investment bankers that, and the investment bankers are like "yes we are team players and want to help our wealth management colleagues bring in more revenue," but they shudder a little as they say it, and do they actually go out and pitch the wealth management business? I don't know, I'm not in the meetings.

A reader replied: "I am in a bunch of these meetings, and I can affirm that they do go pitch the business, occasionally, gingerly, usually in a walk-and-talk at a conference where the wealth manager was standing outside the door of the meeting room." *It's embarrassing.*

Anyway this model suggests that, if you run a small investment bank and want to break into the big leagues, a thing you could do is poach investment bankers from big banks by calling them up and saying "come work for us, you'll never have to pitch wealth management again." This is called "boutique banking." Or on a larger scale, here's a Wall Street Journal article about Jefferies Financial Group:

The bank is spending hundreds of millions of dollars to lure top bankers from competitors. The goal: become the world's fifth-largest investment bank and maintain the spot year after year. ...

Since 2020, Jefferies has increased its number of managing directors—the most senior bankers—by about 70% to around 360. The majority came through hiring as a deal slowdown, stumbles at competitors and the collapse of Credit Suisse meant that more seasoned bankers were receptive to overtures. ...

Jefferies attracted recruits with eye-popping numbers, in a few cases offering superstar dealmakers salaries of more than \$10 million a year for the first three years, according to people familiar with the matter. It also promised bankers greater autonomy to pitch clients, free from the pressure at larger banks to constantly sell services from other parts of the firm. ...

[Jefferies President Brian Friedman's] pitch: Jefferies was the "last frontier" on Wall Street for those who wanted to work at a stand-alone investment bank, without the complications of bigger institutions.

The curse here is that if this works you get big enough that you start thinking "well what if we got into wealth management," and then eventually you start telling the investment bankers "hey it would be great for the firm if you could pitch a little wealth management too." The big firms are the small firms that succeeded, and they do have their reasons to ask their bankers to cross-sell products.

Games

One nice property of finance is that efficient financial markets are socially useful. It is good for the world if stock prices are approximately correct. For one thing, it helps capital flow to where it will be more useful: If good companies have higher stock prices than bad companies, they can raise more money to do more good stuff. For another thing, many retail investors are essentially price takers, so it's helpful for them if prices are right: If you are investing your retirement savings in index funds, you are just hoping to receive an average profit from the growth of the economy, and if the prices of stocks in the index actually reflect their values then that will work.

And then the way that markets become efficient is that traders at hedge funds and proprietary trading firms work ruthlessly to kill each other. And if you work at one of those firms, your day-to-day experience consists largely of trying to *outsmart* people in a difficult abstract zero-sum-seeming game. But then your larger social purpose is "I make markets more efficient," which feels good. You are helping society as sort of an emergent property of trying to put one past the other guy.

And generally when you start out in financial markets you enjoy putting one past the other guy, but by the time you retire you are more concerned with justifying the social purpose of your life's work. It is convenient that both things are possible.

Anyway here's a profile of Susquehanna:

Jeff Yass used to see options trading as a "game". Now he sees it as a "mission from God".

The billionaire co-founder of Susquehanna International Group has claimed he was a socialist during his student days at the State University of New York, but now he talks about capitalism with the zeal of a convert.

"Throughout history, the money lenders have always been viewed with suspicion," he told a student group dedicated to the promotion of free markets in 2021. "When you're against finance, you're fundamentally against all human progress." ...

Yass started trading [options] as an independent trader on the Philadelphia stock exchange in the early 1980s and quickly made so much money he encouraged a group of his college poker buddies to band together and start their own firm.

"I called them and said this game is unbelievable, come on down to Philadelphia," he said in a SIG-produced video.

It is funny to think of what the opposite of this is. Do people get into businesses thinking that they are fostering human progress, and end up thinking "this is a fun game that I can play for money"? Does that possibly describe some people in carbon markets?

Also, if you trade stocks at a hedge fund you are making stock prices more efficient, which has *relatively* straightforward social benefits. If you trade options at a market maker you are also contributing to stock-market efficiency, though some of what you are doing can feel like operating a casino that relieves retail gamblers of their money. What happens when you get into sports gambling?

One of the few expansion plans Susquehanna has discussed publicly is its attempt to become a powerhouse in sports gambling, particularly in-play betting — gambling on games after they have started. Golf and American football may seem like less obvious markets for a financial firm, but they combine several of the same features that initially drew Yass to options: hard-to-price, time-limited trades and potentially massive scale.

Are accurate in-play sports gambling odds also socially useful? I'm sure someone will tell me.

Recruiting spoofing

In any middleman-type business — brokering, dealing, etc. — it is helpful to know a lot about who is looking to buy and who is looking to sell. The more you know about the motivations, strengths and weaknesses of everyone in the market, the better you will be at matching buyers and sellers. On the other hand, the buyers and sellers might not want to tell you everything. They might want to keep some secrets to protect their own negotiating position.

There are things you can do. You can call people up, ask them questions, be chatty and friendly and hope that works. You can take them out to fancy dinners or sporting events, ask them questions there, and hope that works. There are trickier things. One thing that you can do, in many contexts, is to *pretend* to have a buyer or seller for something and see what reactions you get. You offer to sell 100 shares of XYZ and you see what happens; you call an investor and say “I might have a big buyer of your ABC bonds” and see what they say. You chum the water to get information.

Versions of this, in many markets, are called “spoofing,” and it is often frowned upon. Here’s this:

Traders at some of the world’s biggest banks have allegedly been misled by cold callers dangling the prospect of jobs at the likes of Goldman Sachs Group Inc. and Morgan Stanley in exchange for details about their salaries, the make-up of their teams and even their desk’s confidential profit and loss statements. But often the jobs don’t exist. Neither does the named caller. Even their supposed employer — firms like Omertion Group or AMO Search — aren’t real.

Instead, the calls have been made by staff at Odin Partners — a recruitment and market intelligence firm — according to documents seen by Bloomberg and 10 people familiar with the matter, who asked not to be named given the sensitivity of the subject. Odin, which operates out of London, Singapore and Hong Kong, has placed more than 900 executives at international financial institutions, according to its website, making it one of the most prominent recruitment firms in the finance sector over the last decade.

It gets much of its information from legitimate interactions with traders including face-to-face meetings, according to people with direct knowledge of the situation. But it’s alleged that Odin staff have also obtained sensitive market intelligence from traders at some of the largest banks in the world using false identities. That information has been shared with unwitting clients, according to multiple people familiar with the matter. ...

As recently as last year, Odin staff contacted bankers using a process known inside the recruitment firm as “rusing,” according to documents seen by Bloomberg. The word, dating back to the 1500s, is defined as an action intended to mislead or deceive. The company uses the information gleaned from calls to unsuspecting bankers and traders as part of what it calls its “market mapping” of the key players trading in some of the world’s biggest asset classes from rates to currencies.

Honestly it’s a bit embarrassing that the banks’ *traders* were tricked into giving away information about their positions by random cold callers. Their whole job is not to do that!

SEC hacker

Earlier this year, the US Securities and Exchange Commission's social media account on X was hacked. The SEC appeared to post a tweet saying that it had approved spot Bitcoin exchange-traded funds. This briefly caused the price of Bitcoin to go up about 3%, though it went back down when people realized that the tweet was fake. Then the SEC went and *actually* approved spot Bitcoin ETFs like a day later, as everyone expected it to do. This struck me as a strange hack: Tweeting unsurprising but fake news hours before it became real news does not seem like a great way to make money. I speculated that the hack might be about "general trolling and hijinks" rather than market manipulation.

Last week the Federal Bureau of Investigation arrested a guy, Eric Council Jr., who allegedly did some of the hacking, though there is not really any more explanation of why, and no suggestion that he or his alleged co-conspirators traded any Bitcoin. He did allegedly do this though:

He later conducted internet searches for "SECGOV hack," "telegram sim swap," "how can I know for sure if I am being investigated by the FBI," and "What are the signs that you are under investigation by law enforcement or the FBI even if you have not been contacted by them."

If I were the FBI I would pay Google a little bit of money to run ads against the search "What are the signs that you are under investigation by law enforcement or the FBI even if you have not been contacted by them." My ads would say "lol you are, Eric, turn yourself in." I bet it would work.

Things happen

AI Software Startup Zip Is Valued at \$2.2 Billion in New Funding. McKinsey, BCG's Hard Road to Partner May Be Eased by Gulf Boom. PwC offers 'managing director' title to retain staff who will not be partner. "Trump kicked off his rally with a 12-minute speech that included crude suggestions about the late golfer Arnold Palmer's anatomy." Why Do We Keep Reading About Elon Musk? "For instance, why would traders at Pierpoint be working on a company's initial public offering of stock—something that would so obviously be run by the equity capital markets syndicate."

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- 1. That is, Microsoft gets back \$13 billion between \$0 and \$17.5 billion, and needs to get back \$137.5 billion to get 10x its money. So it has to get \$124.5 billion above \$17.5 billion, and that's 49% of \$254.1 billion. So from \$17.5 billion to \$271.6 billion, Microsoft gets 49% of the profits, and then hits its cap and stops. Again, I have no idea what Microsoft's cap is, and since it invested in several tranches it might have multiple caps. Also

that \$17.3 billion corridor recoups its \$13 billion prior investment; it put \$750 million into the new round, which is probably more like common equity.

- 2. Zero dollars of the first \$194 million, \$13 billion (75%) of the next \$17.3 billion, and \$68.4 billion (49%) of the remaining \$139.5 billion. I am moving between “present value of future profits” and “profits” here, which introduces some error, but let’s not worry too much about it.
- 3. Though, again, the waterfall function is not monotonic, and Goldman could take a different approach. “OpenAI has never had any profits, it might never have any profits, it is difficult to know what role money etc., most likely total profits will be below \$100 million so Microsoft should get zero.” This seems harder.
- 4. Does some of big tech feel like that?

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SEC to Increase Scrutiny of AI Tools Used by Brokers, Advisers

By Nicola M. White

- Agency sharpens focus on AI in 2025 examination watch list
- Regulator will scrutinize AI tied to trading, fraud prevention

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SEC to Increase Scrutiny of AI Tools Used by Brokers, Advisers

By Nicola M. White2024-10-21T16:01:06135-04:00

- Agency sharpens focus on AI in 2025 examination watch list
- Regulator will scrutinize AI tied to trading, fraud prevention

The US Securities and Exchange Commission's examiners will step up scrutiny of financial firms' use of artificial intelligence next year, the latest sign of regulators' growing concerns about the emerging technologies.

Investment advisers, brokers, clearing agencies and others can expect the SEC to focus on their statements about AI tools to ensure they comply with agency rules, according to a Division of Examinations report published Monday. The regulator will also look into how firms supervise the use of the technologies for tasks tied to trading, fraud prevention and anti-money-laundering policies.

Although the agency put AI risks on its examination watch list last year, it went into further detail in the latest report. The sharper focus follows warnings from a number of financial regulators, including the Federal Reserve and Consumer Financial Protection Bureau, that the new tools present serious risks as well as opportunities. They have sounded alarms about everything from discrimination to potential systemic risk.

The SEC has clamped down on so-called AI washing, or misrepresenting how companies use machine learning and other tools. Chair Gary Gensler has repeatedly warned against overblown claims about AI.



Gary Gensler, chairman of the US Securities and Exchange Commission

Photographer: Jeenah Moon/Bloomberg

In March, the regulator fined two money managers for making allegedly bogus claims about their use of artificial intelligence. Last week, the agency sued a robotics company and its founder for allegedly making fake statements about an AI-powered humanoid robot.

The SEC watch list reflects rapid developments in AI's underlying technologies, said Peter Dugas, executive director of Capco, a financial-services consulting firm.

Investors and corporate board members want firms to push out automation tools to speed up processes, but the firms need to ensure they're complying with agency rules and disclosing risks to customers, he said.

"It's a broad industry challenge everyone is facing," Dugas said. "The SEC is very much watching."

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Purdue Opioid Victims Group Backs Creditors In Litigation Bid

By Hilary Russ

Law360 (October 21, 2024, 6:12 PM EDT) -- A group of more than 60,000 victims is backing creditors of Purdue Pharma LP in their efforts to potentially sue members of the Sackler family who own the bankrupt opioid maker, and has also warned against protracted legal battles if current mediation efforts fail.

An ad hoc group of individual victims — people "currently suffering from opioid addiction or recovering from it" and families who lost relatives to opioids — filed a **statement** Friday in New York bankruptcy court in support of the official committee of unsecured creditors, after the committee agreed to modify language to protect certain rights of the victims.

In particular, the committee made it clear that its motion seeking to exclusively pursue estate claims — that is, claims against the Sacklers on behalf of bankrupt Purdue — does not otherwise affect the ability of individual victims to pursue their own direct claims. The ad hoc group noted it represents more than half of all individual creditors who filed personal injury claims in the case.

The filing from the victims also painted a picture of the tenuous juncture at which the case now sits: Hundreds of thousands of claims worth billions of dollars hang in the balance of mediation, after the U.S. Supreme Court threw out Purdue's previous bankruptcy plan in June.

The group of individuals said it had been concerned that the committee's bid to pursue claims against the Sacklers, a bid backed by Purdue itself, would "result in a proliferation of unnecessary, vitriolic litigation at this critical time." "Now is not the right time for an all-out-war," according to the group.

Even if the committee is granted standing to pursue claims for Purdue, the Chapter 11 case "desperately need(s) to avoid a near-term conflagration," the group of victims told the court. The group added that it is worried about "the very real risk of an escalating, hostile, multifront conflict in which other participants affected by the prospect of litigation — the Sacklers, the states, the DOJ, the United States Trustee, and the personal injury victims themselves — will fire their own 'just this once' litigation fusillade to drive their own parochial strategies."

The previous settlement between the multitude of different parties was invalidated by the Supreme Court because it contained nonconsensual liability waivers for third parties.

Members of the Sackler family who own Purdue did not file for bankruptcy along with the company, but they agreed to contribute up to \$6 billion to pay out claims in exchange for being released from liability for other litigation.

Purdue, many of its creditors and members of the Sackler family have renewed talks, under the guidance of two court-appointed mediators, to reach the fastest and most pragmatic solution that resolves the mountain of claims against Purdue for its alleged role in America's opioid epidemic.

Even so, last week, the Sacklers said that such opioid claims would fail, and **challenged the committee's moves** to start seeking to claw back billions of dollars transferred out of Purdue and into Sackler trusts.

If mediation implodes, there are three possible outcomes, the ad hoc group said in its Friday statement.

Purdue and the creditors committee could strike their own settlement with the Sacklers under Rule 9019 of the Bankruptcy Code governing compromises in insolvency, the group pointed out.

Another possible outcome would see creditors with the greatest economic stake in the case pursuing a "no-settlement" litigation plan that would allocate future lawsuit proceeds to stakeholders in an agreed distribution scheme, through which voting creditors would decide who should file and prosecute claims for the estate, according to the filing.

The victims group used that possible scenario to lash out at the U.S. Trustee's Office, which had taken its objection to the nonconsensual third-party releases to the Supreme Court and also appoints the members of the official creditors committee.

"It would be a horribly unfortunate irony if the party that has injected so much chaos into these cases — the Office of the United States Trustee — effectively dictates through its official unsecured creditors committee appointments who will control litigation with the Sacklers outside of bankruptcy," the ad hoc group said.

Finally, the last and "most unfortunate" possible course, if the parties cannot agree on a plan, would see the Chapter 11 case converted to a Chapter 7 liquidation.

The group, "which consists of people who desperately need the money locked up in the mediation, urges the parties to appreciate that standing to sue should not be perceived as a mandate to start a war. Instead, all parties should remain laser-focused on getting much needed and long overdue distributions out to the Sacklers' victims as quickly as possible," it said.

Lawyers representing the committee did not respond to a request for comment Monday.

The unsecured creditors committee is represented by Mitchell P. Hurley, Arik Preis, Katherine Porter, Sara L. Brauner, Theodore James Salwen and Erin E. Parlar of Akin Gump Strauss Hauer & Feld LLP and Justin R. Alberto of Cole Schotz PC.

The ad hoc group of individual victims is represented by J. Christopher Shore, Michele J. Meises and Thomas E. Lauria of White & Case LLP and Edward E. Neiger and Jennifer A. Christian of ASK LLP.

The bankruptcy case is In re: Purdue Pharma LP, case number 7:19-bk-23649, in the U.S. Bankruptcy Court for the Southern District of New York.

--Additional reporting by Alex Wittenberg. Editing by Covey Son.



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EV Charging Co. Defeats Investor Suit Over Merger Statements

By **Hailey Konnath**

Law360 (October 21, 2024, 11:00 PM EDT) -- A California federal judge on Monday threw out, for good, an investor suit accusing electric-vehicle charging company Volta Inc. of making false and misleading statements around the time of its merger, finding once again that the investors failed to show how the statements were actually false and misleading.

U.S. District Judge Jon S. Tigar granted Volta's motion to dismiss the suit with prejudice, finding that the investors had once again failed to adequately allege that the statements made by Volta and its top brass were made in violation of the law. Among others, the investors had pointed to statements they said involved premature revenue recognition, financial needs, executive departures and revenue.

The judge already tossed the complaint in its entirety earlier this year, although he gave the investors an opportunity to take another stab at their complaint. The investors filed a second amended complaint in February.

The investors bolstered their amended complaint with more information from a confidential witness, according to the order. But the investors "still do not allege sufficient indicia of reliability for the court to consider" that witness' account, Judge Tigar said Monday.

Notably, the judge also said that new allegations included in the operative complaint don't give him reason to depart from his previous ruling that Volta management made forward-looking statements that don't seem to have been flagged as "inflated or unrealistic" by other members of the company's leadership team.

Volta works with real estate businesses and retailers to provide charging stations for electric vehicles, according to the suit. The company was formed through a 2021 merger between Volta Industries Inc., a private entity, and Tortoise Acquisition Corp. II, a special-purpose acquisition company.

The investors say Volta and its top brass made dozens of misleading and false statements before and after the 2021 merger. Notably, it failed to disclose "flaws," "serious accounting violations" and "financial improprieties," which were allegedly part of Volta's "deep-seated culture of deception used to cover up its poor financial performance," they claimed.

But in January, Judge Tigar sided with the company, agreeing that the plaintiffs failed to prove the falsity of a majority of the statements included in the complaint, along with scienter and loss causation.

In Monday's order, Judge Tigar again outlined several issues with the account of one of the confidential witnesses cited in the amended complaint. For one, the investors don't allege that the witness performed an accounting function or was otherwise in a position to have reliable information about the company's accounting practices, the judge said.

The investors also didn't provide the percentage of sales in the witness' region that were affected by an alleged sales practice outlined in the suit, nor do they offer any evidence that alleged instructions to "pull sales forward" were actually followed, Judge Tigar said.

The judge said that, given what's alleged in the complaint, he wasn't able to find that certain alleged

"revenue recognition violations" were significant, and thus material and actionable.

Similarly, the judge shot down the investors' claims regarding alleged misrepresentations regarding financing needs, executive departures and the business in general, finding that the investors haven't established adequate theories for these claims to proceed.

"In its prior order, the court held that plaintiffs failed to plausibly allege that Volta's delayed payments to site hosts materially impacted the cash balances or liabilities that Volta reported to investors," Judge Tigar said. "Plaintiffs attempt to bolster their theory of falsity with confidential witness accounts noting that Volta's relationships with certain site hosts suffered because of Volta's inability to pay them or install stations on their properties."

Those new allegations "do not remedy this deficiency," Judge Tigar said.

He added, "The court concludes that any further leave to amend would be futile."

Counsel for the investors didn't immediately respond to a request for comment late Monday, and counsel for Volta declined to comment.

The investors are represented by Jennifer Pafiti, Jeremy A. Lieberman and Michael Grunfeld of Pomerantz LLP, Peretz Bronstein of Bronstein Gewirtz & Grossman LLC and David W. Mitchell, Ashley M. Kelly and Joseph J. Tull of Robbins Geller Rudman & Dowd LLP.

Volta and the individual defendants are represented by William D. Savitt and Nathaniel D. Cullerton of Wachtell Lipton Rosen & Katz and Stephen D. Hibbard of Proskauer Rose LLP.

The case is Karoline Kampe v. Volta Inc. et al., case number 4:22-cv-02055, in the U.S. District Court for the Northern District of California.

--Additional reporting by Katryna Perera. Editing by Jay Jackson Jr.

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2nd Circ. Won't Revive \$500M Plunge Suit Against Wells Fargo

By **Katryna Perera**

Law360 (October 21, 2024, 6:13 PM EDT) -- The Second Circuit on Monday refused to revive a proposed class action accusing Wells Fargo of causing a Chicago fund manager to lose at least \$500 million by wrongfully forcing the liquidation of its mutual fund and other investments, finding that the district court was correct in dismissing the suit entirely.

A three-judge panel in a summary **order** disagreed with all of fund investors Joseph and Todd Kafka's claims and said U.S. District Judge Laura Taylor Swain was correct in her full dismissal of the suit **in September 2023**.

Wells Fargo Securities LLC served as a clearing broker to several investment funds run by Chicago-based LJM Partners and an affiliate, including LJM Preservation and Growth Fund, a publicly traded mutual fund. Joseph and Todd Kafka alleged that the Wells Fargo unit had unnecessarily and recklessly ordered LJM to dump fund assets in response to a brief February 2018 stock market rout and spike in volatility popularly known as Volmageddon.

The Kafkas said this fire sale caused them and other fund investors to collectively suffer \$500 million to \$800 million in losses. Their nearly 20-count suit sought to hold Wells Fargo liable for those alleged losses, asserting claims for negligence, tortious interference, breach of contract and more. But Judge Swain declined to let any of those claims proceed last year.

In their appeal, the Kafkas first argued that Judge Swain erred in dismissing their gross negligence claim, but the appeals court panel said Monday that the investors did not adequately allege that Wells Fargo owed them or any putative class any duty.

According to Monday's order, the investors said the duty of care for Wells Fargo arose from the "foreseeability of injury" created by the bank ordering LJM to liquidate its portfolio. However, the panel said there is no duty to exercise care to avoid intangible economic loss to others, which the Kafkas allege.

"If Wells Fargo had a duty to avoid financial harm to all downstream investors in its conduct, the scope of potential liability would be enormous and would severely restrict Wells Fargo's ability to protect its own financial wellbeing," the order stated. "The law would not impose such an immense burden."

The Kafkas also argued on appeal that the district court erred in dismissing their claims for tortious interference with a contract by applying an incorrect legal standard that required them to allege that Wells Fargo "acted with specific animus, or otherwise singled out plaintiffs or their contracts."

The Kafkas argued that they can plead intent by alleging that Wells Fargo acted to further its personal goals, but the panel said this argument is unavailing.

"The Kafkas must establish that Wells Fargo 'desired that [LJM] breach its contract' with them, but they make no such allegation. They allege only that Wells Fargo 'acted on its own behalf, in furtherance of its own interests.' Accordingly, they have failed to plead tortious interference with contract," the order said.

The Kafkas further argued that the district court improperly dismissed their aiding and abetting a

breach of fiduciary duty claim. However, the panel said Monday that the investors have not adequately alleged that LJM breached a fiduciary duty and, therefore, the aiding and abetting claim against Wells Fargo fails.

"The [first amended complaint] offers only the conclusory allegation that by liquidating the portfolio in response to Wells Fargo's coercion, LJM breached the fiduciary duties it owed to putative class members," the order said. "The fact that LJM acceded to Wells Fargo's demand to liquidate the portfolio, without more, is not sufficient to raise an inference that LJM breached a fiduciary duty."

The panel also rejected the investors' claim that the district court improperly dismissed their claim for breach of contract as third-party beneficiaries and for breach of the implied covenant of good faith and fair dealing.

The Kafkas had sought to represent a class of potentially thousands of investors who held stakes in either the LJM Preservation and Growth Fund or certain other limited partnership funds under the LJM umbrella.

The volatility surge that hit markets in February 2018 caught LJM short and is said to have resulted in trading losses of more than \$1 billion for its funds, or roughly 80% of their value. LJM, which subsequently closed down the funds, had been using options to effectively bet against the possibility of big market swings.

The episode has led to multiple lawsuits, including one in which Wells Fargo **has sued** LJM to recover more than \$16 million in allegedly unpaid margin. Federal regulators have **also sued** LJM, its founder and another one of its senior leaders for allegedly downplaying investor risks, claims they have denied.

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

U.S. Circuit Judges Guido Calabresi and William J. Nardini and U.S. District Judge Paul A. Engelmayer sat on the panel for the Second Circuit.

The Kafkas are represented by Mark C. Rifkin of Wolf Haldenstein Adler Freeman & Hertz LLP and Kenneth Gilman of Gilman Law LLP.

Wells Fargo is represented by Christopher J. Houpt, Benjamin D. Bright and Lucia Nale of Mayer Brown LLP.

The case is Kafka v. Wells Fargo Securities LLC, case number 23-1281, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Jon Hill. Editing by Rich Mills.



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Bristol-Myers Win Offers Lessons For Debt Security Holders

By **Alexander Lees, Jonathon Jackson and Lena Bruce** (October 21, 2024, 1:25 PM EDT)

A New York federal judge's Sept. 30 **decision** in UMB Bank N.A. v. Bristol-Myers Squibb Co. is a stark reminder to holders of debt securities of the pitfalls of commencing litigation against an issuer without meticulously following the procedures required by the governing documents. It is also a reminder to issuers to explore procedural defenses they may have when facing holder enforcement actions.

U.S. District Judge Jesse Furman of the U.S. District Court for the Southern District of New York dismissed a \$6.4 billion lawsuit against issuer Bristol-Myers Squibb because the plaintiff, UMB Bank, had not been properly appointed as the trustee for the securities and therefore lacked standing to sue on behalf of the directing holders.

The agreement at issue pertained to contingent value rights but had provisions typical of a bond indenture, including vesting in a trustee authority to sue the issuer in the event of a default.

A majority of holders alleged the company violated the agreement, and they sought to replace the existing trustee with UMB Bank, which they believed would be better suited to pursue litigation. But the court held that the replacement was ineffective.

The source of the defect was the indirect holding system, which was devised to facilitate settling of securities transactions. Rather than creating a certificated security for each investor, issuers create a single global security that is held by — and registered in the name of — a depository institution or its nominee.

An end-investor owns a book-entry interest, or a place on the depository's ledger that indicates its ultimate beneficial entitlement to payment.

This system was designed to reduce paperwork in connection with trading, but it has grown to have meaningful effects on litigation rights.

This is because indentures and similar agreements vest authority to take various actions only in "holders" — the registered owners of the securities, which usually means the depository or its nominee — and not in beneficial owners with only book-entry interests.

To have the same rights as holders, beneficial owners must either convert their interests into certificated securities or, more commonly, obtain proxies authorizing them to exercise the registered owner's rights.

This issue arises in the context of indentures and similar instruments; most credit agreements, by contrast, do not implicate the indirect holding system.

In UMB Bank, the indenture-like agreement specified that the trustee could be replaced only by a



Alexander Lees



Jonathon Jackson



Lena Bruce

majority vote of holders, and the investors seeking to sue did not obtain depositary proxies before attempting to install the new trustee.

This meant that UMB Bank was not duly appointed, and Judge Furman dismissed the suit based on the plaintiff's lack of standing, even though the case had been ongoing for three years.

In some contexts, a standing issue like this can be cured after the fact. When beneficial owners sue for payment on a note, they can avoid dismissal by obtaining a proxy from the registered owner after litigation has begun.

The unexpected twist in UMB Bank was that an after-the-fact attempt to reconfirm the replacement trustee after the beneficial owners obtained depositary proxies was held to be insufficient to cure the standing problem.

Judge Furman concluded that the improperly appointed trustee had no economic interest, direct or indirect, in the outcome, and that this presented a jurisdictional problem that could not be overcome after litigation was commenced.

In addition, Judge Furman did not accept that the issuer ratified the replacement trustee through its conduct. Despite the issuer's litigating the case for years without raising the issue, Judge Furman found insufficient evidence that the company intentionally relinquished its contractual right to insist on a proper trustee appointment.

In the end, however, Judge Furman dismissed the case without prejudice to the refiling of a new lawsuit by a duly appointed trustee, at which time, he said, he would "likely pick up where this case left off in terms of motion practice, discovery, and the like."

The beneficial owners in UMB Bank therefore may be able to save their litigation after some additional cost and delay. But the case is an important warning to holders of indenture securities: Carefully check the governing documents to determine which rights are reserved for holder as distinct from beneficial owners.

Be especially wary of language found in some indentures saying that beneficial owners "shall have no rights" with respect to the global security, and that the depositary shall be considered the "sole owner" of the global security for all purposes.

In some circumstances, the indirect holding system may not have a practical effect, such as when beneficial owners ask a properly appointed trustee to act and the trustee agrees to follow their direction.

Such a process usually can be accomplished with certifications of beneficial ownership. But in other circumstances, the difference between registered owners and beneficial owners may matter, such as when commencing a lawsuit for payment, sending a notice of acceleration or default, or — as in UMB Bank — seeking to replace the trustee.

Beneficial owners are well advised to consider obtaining proxies in advance. So, too, should they factor into their litigation strategies the additional effort and time that process will take.

Bond issuers likewise should consider the effect of the indirect holding system when confronted with the possibility of holder enforcement.

For example, if an issuer receives a notice of default or acceleration — or, for that matter, if it is served with a lawsuit — it can demand proof that the investors behind the action have received a proxy from the depositary or otherwise have obtained the status of holders. This can act as an additional barrier to litigation.

There is an irony here: The indirect holding system, originally developed to eliminate paperwork, now seems to be generating a significant amount of it given the way indentures are written.

When confronted with the possibility of suing their issuer, debt security holders should work closely to review the significance of holder status under their indenture to avoid procedural foot faults, and they

should take care to work through their depository's system to obtain proxies where necessary.

As UMB Bank teaches, it is unsafe to ignore the issues created by the indirect holding system, even several years into a litigation.

Alexander B. Lees is a partner and leader of the litigation and arbitration practice group at Milbank LLP.

Jonathon Jackson is a partner and leader of the corporate finance and securities group at the firm.

Lena Bruce is an associate at the firm.

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In OpenAI Copyright Case, Court Told, 'Too Many Cooks'

By **Andrew Karpan**

Law360 (October 21, 2024, 7:19 PM EDT) -- Lawyers for some of the media companies and groups hitting up OpenAI and Microsoft with copyright cases say they have major reservations about marrying their cases, warning about rushed discovery and "forcing too many cooks into the same kitchen."

While it is true that the copyright cases are related and there will obviously be "overlapping discovery," it is not enough to surmount "the burden of forcing plaintiff into an unreasonably short discovery period," reads a **response brief** filed Friday by the Center for Investigative Reporting, a nonprofit news organization that filed its own copyright case against OpenAI and Microsoft in **June**. The New York Times and various other newspapers that have filed their own copyright lawsuits against OpenAI and Microsoft also filed their own thoughts on merging suits on Friday.

On Oct. 4, OpenAI and Microsoft filed a **motion** to consolidate the Center for Investigative Reporting case with the New York Times one, arguing that the center's case is "materially indistinguishable" from the Times suit, and said the San Francisco nonprofit, which publishes the magazine Mother Jones, "stands to benefit immediately from the progress already made in the consolidated cases."

White a discovery period of less than three months for a high-stakes copyright case involving artificial intelligence technology the defendants describe as novel might be "speedy," it is neither just nor inexpensive, the center said.

The New York Times had similar misgivings about having the organization join its suit. The newspaper's own copyright lawsuit against OpenAI and Microsoft **dates to** the waning days of 2023. The Times case has already been **consolidated with** a similar lawsuit from a collection of eight regional newspapers owned by private equity giant Alden Global Capital.

While those plaintiffs "do not have any objection in principle to consolidation with the Center for Investigative Reporting," they "will be prejudiced if defendants use consolidation as a hook to further delay this case," **reads a response** cosigned by the Times and the other newspapers, also filed in the U.S. District Court for the Southern District of New York.

"Defendants claim that consolidation ... would not delay the existing case schedule. But how could it not?" they asked.

Furthermore, the group had misgivings about any effort to consolidate the case with "both the California plaintiffs and the Authors Guild class action plaintiffs," a reference to lawsuits **filed last year** by writers Paul Tremblay and Mona Awad in California federal court, and a different New York lawsuit **filed that year** by the Authors Guild and a handful of bestselling novelists, both also alleging copyright infringement based on how OpenAI software is used.

"Consolidation should also end" with the Center for Investigative Reporting, say the various newspapers. "The difficulties arising from defendants' attempts to force the news plaintiffs to coordinate with not just each other, but also both the California plaintiffs and the Authors Guild class action plaintiffs on a deposition protocol have demonstrated that coordination across so many cases is untenable and inefficient," they said.

Justice "should not be stymied because defendants engaged in such wide-ranging infringement that

many rights holders have sued them, and will likely continue to do so," the newspapers' response says. "Judicial economy is not served by forcing too many cooks into the same kitchen."

Counsel for the parties involved in the lawsuit did not respond to requests for comment Monday.

OpenAI is represented by Joseph C. Gratz and Eric K. Nikolaides of Morrison Foerster LLP, and by Robert A. Van Nest, Paven Malhotra, Michelle S. Ybarra, Nicholas S. Goldberg, Thomas E. Gorman, Katie Lynn Joyce, Christopher S. Sun and R. James Slaughter of Kecker Van Nest & Peters LLP.

Microsoft Corp. is represented by Annette L. Hurst, Christopher J. Cariello, Sheryl Koval Garko and Laura Brooks Najemy of Orrick Herrington & Sutcliffe LLP.

The Center for Investigative Reporting is represented by Jonathan Loevy, Michael Kanovitz, Lauren Carbajal, Stephen Stich Match, Matthew Topic, Thomas Kayes and Steven Art of Loevy & Loevy.

The Times is represented by Elisha Barron, Ian Crosby, Davida Brook, Ellie Dupler and Tamar Lusztig of Susman Godfrey LLP, and by Steven Lieberman, Jennifer B. Maisel and Kristen J. Logan of Rothwell Figg Ernst & Manbeck PC.

The other newspapers are represented by Steven Lieberman, Jennifer B. Maisel, Robert Parker, Jenny L. Colgate, Mark Rawls, Kristen J. Logan, Jeffrey A. Lindenbaum and Bryan B. Thompson of Rothwell Figg Ernst & Manbeck PC.

The cases are Center for Investigative Reporting Inc. v. OpenAI Inc. et al., case number 1:24-cv-04872, and New York Times Co. v. Microsoft Corp. et al., case number 1:23-cv-11195, both in the U.S. District Court for the Southern District of New York.

--Additional reporting by Lauren Berg, Ivan Moreno and Dorothy Atkins. Editing by Karin Roberts.



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John Deere's Tractor Brake Recall Is Also Defective, Suit Says

By **Gina Kim**

Law360 (October 21, 2024, 9:32 PM EDT) -- John Deere sold utility tractors with a brake defect that can cause them to crash, and the company's recent recall doesn't guarantee a permanent fix but rather appears to simply "replace defective systems with even more defective systems," according to a proposed class action in South Carolina federal court.

Customer Leroy Workman of Laurens, South Carolina, filed his **proposed class action** Friday asserting claims for breach of warranty, strict liability and unjust enrichment against Deere & Co., the maker behind the John Deere brand of agricultural and forestry machinery, as well as excavators, tractors and mowers.

The case centers on John Deere's compact utility tractors sold from November 2017 to July 2024. The tractors contain a purported defect in their braking system, according to the suit, due to John Deere's improper engineering, manufacturing or design of the products. The company, however, has made, advertised and distributed the tractors under the guise of them being safe and stoppable, Workman alleged.

The brake system defect stems from a front bellcrank in the brake linkage, which could fail, cause the tractor to lose braking and crash, the suit said. John Deere recently issued a recall for nearly 148,000 tractors, and included a free fix and repair. But that's not enough, Workman said, as the recall doesn't offer any foreseeable promise the defect would be permanently fixed.

"Instead, defendant sold tractors that were truly unstoppable, and thus deadly, given their braking issues," he said. "And, rather than refunding or reimbursing plaintiff and class members the difference in value related to the diminished resale value, defendant has offered to simply fix the class tractors with a fix that appears to do no more than replace defective systems with even more defective systems."

Unless John Deere issues a more robust recall to truly fix the root issue of the purported brake defect, it can be anticipated that the tractors' braking systems could fail again in the future, Workman said, characterizing the recall as "no more than a repeatedly ineffective waste of time."

Furthermore, John Deere purports to offer at-home fixes for consumers who can't ship their tractors to a dealer, but doesn't offer assurances as to the timeframe of when an on-site repair would take place, the suit alleged.

The complaint asserts causes of action for breach of implied warranty of merchantability and the Magnuson-Moss Warranty Act, strict liability design defect and manufacturing defect, and unjust enrichment.

Workman seeks to represent a nationwide class of customers who bought or leased the tractors at issue, along with a South Carolina subclass. He argued that proceeding as a class action was proper, since common factual and legal issues predominate over individualized inquiries.

Issues common for all class members include whether the tractors suffer from an alleged brake system defect, whether the defect is considered material, whether it's capable of being fixed, and whether it would constitute an unreasonable safety risk, according to the suit.

Other common issues include whether John Deere had the duty to tell customers about the defect, whether it knew of the brake system defect before it sold the products, and whether the defect diminished the value of the tractors, Workman said.

Friday's complaint against Deere comes amid an investigation launched by the Federal Trade Commission concerning claims that the company illegally **restricts the repair of its farm equipment**. Data aggregator Hargrove & Associates disclosed the agency's probe in a petition published by the FTC on Thursday asking to limit an information demand from enforcers seeking sales and market share data for the agricultural equipment industry.

The civil investigation demand, included with the petition, says the point is to determine if John Deere is engaging in "unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices" related to the repair of agricultural equipment.

A spokesperson for John Deere told Law360 on Friday the company is cooperating with the FTC.

John Deere is also facing private litigation from farmers in Illinois federal court alleging it limits competition for farm equipment repairs by **blocking** individuals and unaffiliated repair shops from acquiring the software and equipment needed to make repairs.

Representatives for Workman and Deere did not immediately respond to requests for comment Monday.

Workman is represented by Paul J. Doolittle of Poulin Willey Anastopoulos LLC.

Counsel information for Deere & Co. was not immediately available.

The case is Workman v. Deere & Co., case number 6:24-cv-05950, in the U.S. District Court for the District of South Carolina.

--Additional reporting by Matthew Perlman and Anna Bongardino. Editing by Adam LoBelia.



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Litigation Funding Firms Aim To Escape Hurricane Ad Suit

By **Rose Krebs**

Law360 (October 21, 2024, 1:07 PM EDT) -- Two litigation funders are urging a Texas federal court to adopt a magistrate judge's recommendation to toss claims against them in a proposed class action alleging a law firm deceptively advertised to hurricane victims.

In a filing Thursday, the litigation funders Equal Access Justice Fund LP and EAJF ESQ Fund LP told the U.S. District Court for the Southern District of Texas that Katherine Monson provided no evidence, arguments or pleadings that would allow her claims against them "to withstand scrutiny."

"Plaintiff relies on language in the Texas Penal Code that makes it an offense to knowingly finance an unlawful barratry scheme to make the quantum leap to suggest that this means lenders are strictly liable any time a borrower commits barratry," the filing asserted.

On Sept. 19, Judge Yvonne Y. Ho issued **her recommendation** that the funders should be cut from the suit because Monson failed to state a claim. Though the named plaintiff does have standing to sue, the judge found she had not connected the dots to "assert plausible barratry claims" against the funders.

Monson's claims against the Equal Access defendants cannot be brought under the Texas Rules of Professional Conduct, Judge Ho found, because litigation funders are not subject to those rules. As for claims the funders violated Texas Penal Code sections, the judge said there is not sufficient evidence to show the funders were aware of an alleged barratry scheme.

In **Thursday's filing**, Equal Access Justice Fund and EAJF argued that Judge Ho "properly considered the funds' motion to dismiss and concluded that plaintiff's allegations of wrongdoing were simply factual allegations that could be made in connection with most commercial loan transactions."

"The court correctly determined that plaintiff's allegations were insufficient, as a matter of law, to support a claim of knowingly financing a barratry scheme," they said.

In a filing earlier this month, Monson, on behalf of a proposed class of storm victims, said the Texas magistrate judge was wrong to recommend dropping the litigation funding companies from the suit, **arguing** the funders must have been aware of the scheme when they provided loans to the firm at issue.

Monson brought the proposed class action in March 2023 on behalf of what she estimated to be thousands of fellow hurricane victims residing in Louisiana. It named attorneys James McClenny and John Zachary Moseley; their firm, McClenny Moseley & Associates, also known as MMA Law Firm; and another entity, Tort Network LLC, which does business under the name Velawcity.

A little more than a year later, Monson **added the funders**, together referred to as the Equal Access defendants, in an amended complaint. Equal Access Justice Fund lent \$15 million to MMA or affiliated entities and persons, while EAJF lent \$10 million, according to Monson's amended complaint filed in April.

The various individuals and entities conspired to "obtain an economic benefit" through "prohibited barratry" in the form of questionable legal advertising pressuring her to file claims for storm damage she suffered in Hurricane Ida in 2021, Monson alleged.

Though the lawyers and firm sought to escape the suit, arguing Monson lacked standing because she suffered no real injury due to the lawyers' advertising, Judge Ho recommended denying dismissal after finding Monson had a valid claim for violation of privacy, and therefore could proceed.

U.S. District Judge Alfred H. Bennett **adopted** Judge Ho's recommendation in March. Monson has now asked Judge Bennett to reject Judge Ho's latest recommendation, which would allow the Equal Access defendants to exit the case.

"The United States magistrate memorandum and recommendation is abundantly clear that the claims brought by Katherine Monson are without merit," Brian W. Zimmerman of Spencer Fane LLP told Law360 in an emailed statement Monday sent on behalf of the funds. "As the United States magistrate judge held, Ms. Monson makes a 'quantum leap' to attempt to make claims against the funds, and she fell woefully short."

"We are confident that the United States district court will adopt the magistrate judge's recommendations, which are very thoughtful and well-reasoned," the statement said.

Counsel for Monson did not immediately respond Monday to a request for comment

Katherine Monson is represented by Jonathan P. Lemann and Robert E. Couhig Jr. of Couhig Partners LLC, Ron A. Austin and Scott Huete of Ron Austin Law, and Lance Christopher Kassab and David Eric Kassab of The Kassab Law Firm.

Equal Access Justice Fund LP and EAJF ESQ Fund LP are represented by Brian W. Zimmerman, Frederick T. Johnson and Brian Poldrack of Spencer Fane LLP.

The case is Monson v. McClenny Moseley & Associates PLLC et al., case number 4:23-cv-00928, in the U.S. District Court for the Southern District of Texas.

--Additional reporting by Spencer Brewer, Lynn La Rowe and Emily Sawicki. Editing by Robert Rudinger.

Update: This story has been updated with comments from Equal Access Justice Fund LP and EAJF ESQ Fund LP.



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Mazda Buyers Ask 9th Circ. To Revive Water Pump Defect Suit

By **Bonnie Eslinger**

Law360 (October 21, 2024, 9:52 PM EDT) -- Counsel for a group of Mazda vehicle owners urged the Ninth Circuit on Monday to reinstate their putative class action alleging that Mazda sedans and SUVs contain a design defect that results in leaky water pumps, saying a district court judge wrongly found fault with their engineering expert's report and tossed the case.

The drivers have contended that the lower court erred in excluding their expert, who found that internal water pumps in the Mazda vehicles at issue have a common defect. Then, having stripped the case of this expert evidence, the judge reversed class certification and granted summary judgment to Mazda.

During oral arguments before a three-judge panel of the Ninth Circuit, the car owners' lawyer, Melissa Yeates of Kessler Topaz Meltzer & Check LLP, said the lower court "overstepped its role" and "usurped the role of the jury when it acted as a fact-finder" by excluding their technical expert, Christopher White.

Daubert motions to exclude evidence are meant to prevent the jury from hearing "unreliable, nonsense opinions and junk science," Yeates told the judges.

In reviewing such motions, the district court is not tasked with determining whether the expert is right or wrong, only the soundness of the methodology, according to the attorney.

"Here, the district court violated these basic principles by engaging in free form fact finding to weigh the evidence and determine whether it agreed with Dr White's conclusions," Yeates said, adding that the expert is a Yale-educated academic.

White's analysis showed that the mechanical seal in the vehicles was made of hydrogenated acrylonitrile butadiene rubber, or HNBR, which degrades when it is exposed to coolant that reaches high temperatures, Yeates said.

U.S. Circuit Judge Gabriel P. Sanchez noted during the hearing that the lower court judge said while White pointed out that HNBR degradation would happen, he didn't do a comparative analysis showing that the seals degrade faster than in other vehicles.

Yeates argued that comparative data was not required at the Daubert motion stage, adding that White "performed a very thorough, detailed analysis."

The district court judge incorrectly weighed the evidence to determine whether she agreed with White's conclusions or if there could have been alternative causes of the degradation, the lawyer said before the circuit court.

"For the district court to determine whether she agreed with White's conclusions was going too far," Yeates said. "That really should go to the jury."

Mazda's attorney, Michael Mallow of Shook Hardy & Bacon LLP, said the lower court judge rightly determined that there was no connection between White's hypothesis and whether vehicles actually failed on the road due to the defect described in the suit.

U.S. Circuit Judge Kim McLane Wardlaw said it seemed to her that the district court judge investigated a merits question.

"Dr. White testifies that this is caused by that. And I would see the defense as naturally saying, 'No, it isn't. There are many other causes,'" Judge Wardlaw said. "That would be a jury question whether what was actually the cause."

Mallow said what mattered was if the expert opinion was reliable enough to go to a jury.

In addition to wrongfully excluding White's testimony, the lower court ignored evidence supporting the drivers' claims "while drawing inferences in favor of Mazda," they said in an opening brief to the appellate court. And in the same ruling, the judge decertified the classes based on its summary judgment ruling.

"Accordingly, plaintiffs respectfully request this court reverse the district court's order in its entirety," the brief said.

In their operative complaint filed in February 2021, the car owners alleged that Mazda didn't inform customers about a defect in the chain-driven water pumps in its Cyclone engine, which is incorporated into the Mazda 6 and Mazda CX-9. Mazda incorporated the Cyclone engine beginning in 2007 and continued through the 2015 model year, according to the suit.

The cooling system in Mazda's Cyclone engine, including the water pump, is supposed to be a closed system so that the coolant won't leak into engine parts, or mix with engine oil and circulate throughout the engine, but coolant can escape and leak into other parts if the water pump fails, causing engine failure, the drivers said.

In February 2023, U.S. District Judge Josephine L. Staton **tossed the class action** alleging the automaker sold vehicles with faulty water pumps, finding that flaws in a key expert report from the class sunk the case.

The judge additionally found that because the claims of the classes are primarily reliant on White's analysis, Mazda is entitled to summary judgment on the suit's remaining claims. As a result of granting summary judgment, the judge **decertified all classes** in the action and denied as moot all motions pending before the court.

U.S. Circuit Judges Kim McLane Wardlaw and Gabriel P. Sanchez sat on the panel for the Ninth Circuit. U.S. District Judge Barbara M. Lynn sat on the panel by designation.

The drivers were represented by Melissa L. Yeates of Kessler Topaz Meltzer & Check LLP.

Mazda was represented by Michael L. Mallow of Shook Hardy & Bacon LLP.

The case is Sonneveldt et al. v. Mazda Motor of America Inc. et al., case number 23-55325, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Mike Curley and Craig Clough. Editing by Covey Son.



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Nissan Fights Uphill To Undo Cert. In Sunroof Defect Fight

By **Dorothy Atkins**

Law360 (October 21, 2024, 9:20 PM EDT) -- Ninth Circuit judges on Monday doubted Nissan's bid to undo an order certification of a class of drivers who allege the Japanese carmaker sold vehicles with panoramic sunroofs that are prone to shattering, telling Nissan's counsel the appeal appears to challenge the claims' merits, and not whether they could be resolved classwide.

The three-judge panel was hearing oral arguments in San Francisco on Nissan North America Inc.'s appeal of U.S. District Judge William H. Orrick's **July 2022 order** certifying classes of drivers in California, New York, Colorado and Florida who accuse Nissan of selling hundreds of thousands of vehicles with the defective sunroofs.

Nissan's counsel, Amir M. Nassihi of Shook Hardy & Bacon LLP, argued that Judge Orrick erred by certifying a "10-year class" of hundreds of thousands of owners and lessees of cars with the large panoramic sunroofs across four states, even though "499 of 500 drivers never ever had a failure."

Nassihi told the judges that the drivers' experts' evidence failed to identify a common defect to unite "highly individualized complaints" or to provide the court with a viable damages model that could be applied classwide.

Nassihi also argued that the named plaintiffs have legal standing issues that are "too individualized" to predominate, particularly for Colorado and New York class representatives who sold their vehicles and therefore passed any overpayments along to the car buyers. He also claimed that Judge Orrick erred by expanding state law to find that common issues predominate.

However, U.S. Circuit Judges Gabriel P. Sanchez and Kim M. Wardlaw repeatedly told Nissan's counsel that his arguments appear to attack the merits of the claims but not whether the allegations could be resolved classwide or based on common proof.

Judge Sanchez noted that class certification doesn't require proof of a defect, just that it's susceptible to class-wide treatment.

"Why isn't it susceptible to common proof, one way or another whether you're right or not?" Judge Sanchez asked Nassihi.

The judge also appeared skeptical of Nassihi's argument that the class contends that the vehicles' sunroof should last forever. He told Nissan's counsel that the allegations appear to be that "due to different reasons, [the sunroofs] just burst," but even if there is no defect, the court could resolve the claims on a class-wide basis.

"If you're right and there is no common defect, that would resolve the case in one fell swoop for the entire class," Judge Sanchez said. "So for the purposes of our review ... doesn't that suggest that [class certification] was [properly granted]?"

Judge Wardlaw echoed her colleague's concerns.

"I'm having the same problem as Judge Sanchez," she said, and she noted that the suit alleges the sunroofs allegedly spontaneously and explosively shatter, and Nissan should have disclosed the alleged defect, which presumably could be resolved on a class-wide basis.

Nassihi replied that Nissan's arguments are not "pure merits issues," and that the **Ninth Circuit's 2020 holding** in **Grodzitsky v. American Honda**  indicates that the drivers' expert evidence needs to show a common defect for a class to be certified. Otherwise, the sunroofs could have been broken for a variety of reasons, including that trees fell on them or rocks hit them, he said.

"Plaintiffs need to produce evidence of a common defect," he argued.

He added that Judge Orrick defined "materiality" in a way that virtually guarantees liability, and that the evidence shows Nissan sunroofs had less than 0.2% risk of a break for any reason, including wrecks, in the first 15 years of service.

But Matthew W.H. Wessler of Gupta Wessler LLP, representing the drivers, pushed back, arguing that Nassihi had misrepresented the theory of the case and that the drivers' experts testified "specifically and in detail" about the nature of the alleged defect.

The experts testified that the sunroofs were made of tempered glass, which is processed in a way that makes them prone to randomly shattering and raining shards of glass down on passengers, Wessler argued.

"You heard Nissan attempting to reframe the nature of defect or argue that it doesn't exist," he told the panel.

He added that the Grodzitsky case is distinct from the current litigation because the plaintiffs' experts in that case didn't provide any expert testimony or specific explanation regarding the alleged defect at issue.

Wessler said that ultimately Judge Orrick didn't abuse his discretion or make a legal error in deciding to certify the class, and the breakage rate doesn't matter in the class certification process, because the damages theory is that consumers paid more than they otherwise would have had they known about the purported design problem.

"We're not talking about the actual number of cars in which a shattering occurred," he said. "We're talking about the design problem that makes these prone to spontaneous shattering."

During a short rebuttal, Nassihi again criticized the drivers' damages theories, and argued that there was no evidence of materiality presented in the case. He also again underscored the rate of occurrence and argued that the drivers were trying to improperly downplay it.

"All they're able to focus on the panoramic sunroofs are prone to shattering, compared to what?" he asked. "There's no baseline here."

The trip to the Ninth Circuit is the latest chapter in a lawsuit filed in February 2017, alleging that the panoramic sunroofs Nissan installed in several models going back as far as 2008 are vulnerable to shattering suddenly. Nissan's decision to use thin, tempered glass that is weakened in the manufacturing process is at the root of the defect, the suit says.

The vehicles at issue are the Nissan Maxima model years 2009-14 and 2016-20; Nissan Rogue model years 2014-20; Nissan Pathfinder model years 2013-20; Nissan Murano model years 2009-20; Infiniti JX model year 2013; and the Infiniti QX60 model years 2014-20.

The operative complaint filed in March 2022 is led by named plaintiffs Sherida Johnson, Subrina Seenarain, Chad Loury, Linda Spry, Lisa Sullivan and April Ahrens, includes 12 counts and seeks actual and punitive damages, restitution and attorney fees.

U.S. Circuit Judges Gabriel P. Sanchez and Kim M. Wardlaw and U.S. District Judge Barbara M. Lynn sat on the panel for the Ninth Circuit.

The drivers are represented by Matthew W.H. Wessler of Gupta Wessler LLP.

Nissan is represented by Amir M. Nassihi of Shook Hardy & Bacon LLP.

The case is Sherida Johnson et al. v. Nissan North America Inc., case number 22-16644, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Lauren Berg. Editing by Brian Baresch.

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Target Wants Sanctions For 'Bogus' BIPA Suit

By **Lauraann Wood**

Law360 (October 21, 2024, 9:50 PM EDT) -- An Illinois federal judge should sanction a group of Target customers and their lawyers for pursuing a facial recognition privacy case even though the plaintiffs had seen evidence their legal theory was "bogus," the retail giant says.

Target argued Friday that Louisiana firm Kahn Swick & Foti LLC and four clients pursuing the last of three "meritless" biometric privacy suits should reimburse the company for excess costs, fees and expenses it has incurred defending their suit since June 26. That was the day they said they would press on with their claims despite having received letters from Target that the company says outlined in detail that it does not use facial recognition technology as alleged, the company said.

"This case is a clear example of an attorney pursuing a path that a reasonably careful attorney would have known to be unsound," Target argued in its motion. "We know this because two other sets of plaintiffs' attorneys elected not to pursue this path after reasonable inquiry."

The lawsuit was filed in May by three Illinois residents — Denise Arnold, Blaire Brown and Sandre Wilson — who claim Target violated provisions of the state's Biometric Information Privacy Act. Target's motion to dismiss comes after the plaintiffs filed an amended complaint in late August that includes new allegations from a fourth Illinois customer, Lindsay Schumm. They claim the company secretly employed facial recognition technology to collect shoppers' biometric data without their consent.

Similar claims had been lodged in Cook County Circuit Court about two months before, and a similar suit was filed about two months after the Arnold group of plaintiffs had lodged their claims, according to Target's motion. The retailer says that it sent those other plaintiffs the same information it sent the Arnold plaintiffs explaining that their claims lacked any plausible factual or legal basis, and that they "elected to abandon their cases" after asking some clarifying questions and receiving additional information.

The Arnold plaintiffs and their lawyers, however, pressed on, Target told the court. The attorneys "disregarded repeated warnings of the consequences of continuing to pursue a meritless theory" and filed an amended complaint that "attempts through conjecture to state a claim," the retailer said.

"Thus, Target has been left with no choice but to pursue sanctions," it said.

Target also argued that the Arnold plaintiffs' complaint "should have never been filed" because their claims are based on "information and belief," and civil procedure rules make clear that such allegations do not relieve litigants of their obligation to reasonably investigate the facts underlying their claims.

The plaintiffs' lawyers should never have pursued their claims because the letter they dismissed explained that none of the posts and articles they cited in their suit says what the plaintiffs alleged they said, Target argued. They either said nothing about Target's use of facial recognition technology, were not reputable or reliable sources or "did not say anything about facial recognition technology at all," the company told the court.

And an amended complaint should have never been filed after the plaintiffs faced an initial dismissal motion, which further explained how their cited sources failed to support their theory, Target argued.

The amended pleading does nothing to correct the plaintiffs' previously faulty assertions and instead

adds new ones, "most egregiously, an allegation that a Target employee who was in the midst of a month-long leave at the time and whose job responsibilities do not include retail location asset protection visited Plaintiff Schumm's LinkedIn page, and that this visit plausibly demonstrates Target's use of facial recognition technology for security purposes."

"Kahn Swick & Foti and their clients are pursuing claims that lack a plausible legal or factual basis, and in so doing, are unreasonably and vexatiously multiplying these proceedings," Target argued.

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

The plaintiffs are represented by Melissa Harris and J. Ryan Lopatka of Kahn Swick & Foti LLC.

Target is represented by Justin Kay and Ambria Mahomes of Faegre Drinker Biddle & Reath LLP.

The case is Arnold et al. v. Target Corp., case number 1:24-cv-04452, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Corey Rothausen. Editing by Peter Rozovsky.

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