Column: Litigation funder's lawsuit exposes underside of mega class actions

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Alison Frankel

The U.S. flag, a judge gavel and a vintage scale are seen in this illustration taken August 6, 2024. REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights, opens new tab

Oct 24 (Reuters) - I write all the time about class actions and multidistrict litigation. Class action complaints, dismissal motions, expert testimony, class certification, fee awards– they're all issues I've covered.

But a new lawsuit, opens new tab in Delaware Chancery Court has me wondering if I've failed to heed what appears to be an expanding segment of the class action ecosystem. The plaintiff is an entity called CoreStream Capital, which was founded in January 2024 to purchase claims from class members in a 2019 $5.5 billion, opens new tab antitrust settlement with Visa and MasterCard.

The defendant is Managed Care Advisory Group, which describes, opens new tab itself as a “class action settlement recovery company.” CoreStream alleges that MCAG breached a deal to supply the litigation financier leads to class members interested in selling their claims rather than waiting for the long-gestating settlement to wrap up. (The claims deadline is in February 2025.)
CoreStream’s lawyers at Potter Anderson & Corroon claim in the complaint that MCAG agreed to introduce the claims purchaser to 200 of its “top clients” every 10 days and to vouch for CoreStream if MCAG clients asked about selling their claims. But according to CoreStream, MCAG didn’t follow through with the promised introductions, connecting the claims purchaser with only one member of the Visa/MasterCard class.

CoreStream also claims that when it made offers to other class members, the merchants said MCAG had estimated much higher payouts for them. CoreStream said in its complaint that if MCAG was, in fact, providing estimates to class members about their prospective recovery, it was violating its own rule against making such promises about settlement payouts that will ultimately be affected by the class participation rate and other factors.

CoreStream did not say whether it paid MCAG anything up front but said that their deal called for MCAG to receive a portion of CoreStream's revenues from the claim purchasing program.

Neither CoreStream nor its lawyers responded to my email queries. CoreStream did not answer the phone at its Florida headquarters.

MCAG, which is represented by Blank Rome, declined to comment on the lawsuit but sent me a two-page memo, opens new tab on the benefits for class members that use MCAG to file their claims. In essence, it said, class members can avoid the hassle of filing their own claim and the risk of receiving less than they are entitled to by using MCAG's contingency-fee services.

"By partnering with MCAG, class members can ensure their claims are handled by experts, allowing them to focus on their business or personal priorities while maximizing their recovery from class action settlements," the company said.

It's not news to me or anyone else who follows class actions and multidistrict litigation that there is a secondary market for claims. To cite just a few examples over the last 15 years, mass torts plaintiffs, pro football retirees, September 11 victims and defrauded Bernie Madoff clients have all been targeted by litigation funders offering immediate cash payments in exchange for claimants' anticipated payouts from global settlements.

I'm also aware of the existence of claims facilitators, thanks in part to my Reuters colleague Mike Scarcella, who earlier this year reported on a spate of fraudulent claims filed by Milberg Coleman Bryson Phillips Grossman in the Visa/MasterCard case. Milberg is not class counsel in the case, which is led by Robbins Geller Rudman & Dowd; Robins Kaplan; and Berger Montague. But it filed more than 115 fake claims on behalf of merchants it did not actually represent. (As Scarcella reported in July, Milberg blamed a "referral source" and averted sanctions by U.S. Magistrate Judge Joseph Marutollo of Brooklyn.)

I was nevertheless not aware of the scope of the claims-facilitator industry until – inspired by the CoreStream complaint – I took a closer look at the official, court-approved Visa/MasterCard settlement website, opens new tab operated by settlement administrator Epiq.

Epiq's website makes clear that class members can file their own claims and don't need an outside lawyer or facilitator to do so. But these facilitators have become so prevalent in the Visa/MasterCard case that Epiq has a whole page, opens new tab linking to court filings about third-party claim filers, including monthly reports by class counsel on facilitators that appear to violate a 2018 court order, opens new tab requiring these companies to follow a set of specific rules designed to protect members of the Visa/MasterCard class.

The monthly reports are dispiriting, to say the least. They reveal a litany of misleading websites and advertisements by businesses trying to seize a piece of a megafund settlement they had no role in obtaining. The most recent report, opens new tab, for instance,

described three websites designed to look like the official settlement site but were “riddled with errors, false statements [and] invented merchants giving false testimonials.”
The sites all traced back to a claims facilitator called Certificate Clearing Corp, which also happens to be cited in CoreStream’s complaint as a competitor in the claims-buying business.

CCC’s president and general counsel Brian Blockovich said in an email on Thursday that the problematic websites were not under its control and that it took action when it was informed of problems.

I absolutely don’t mean to suggest that every claims facilitator is breaking the rules. As MCAG said in its statement, class members may have good reasons to rely on businesses that specialize in maximizing recoveries from class action settlements. The September report from class counsel said their recent teleconference with these third-party claims filers was attended by 127 participants, the vast majority of which have not been accused of wrongdoing.

The report also said that at least 550,000 class members have filed claims through third-party facilitators. We don’t know the entire universe of claims in a case where the class is estimated to include more than 12 million retailers. But I was taken aback by the number of claims facilitators involved in the Visa/MasterCard case and the raw number of class members paying fees to these third parties.

That’s big business -- and now, thanks to CoreStream’s lawsuit, we also know claims facilitators may have an opportunity to make even more money by teaming up with litigation funders.

Read more:

Law firm Milberg skirts sanctions over fake claims in credit card fees case
Law firm defends work in $5.6 bln card fee case after disclosing fake claims
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Reporting By Alison Frankel

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Thomson Reuters

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

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QuantumScape Investors Sue Leaders, VW Over Battery Performance

By Martina Barash 2024-10-25T12:42:40000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. 3:24-cv-07422

QuantumScape Corp. officers and directors, along with controlling shareholder Volkswagen Group of America Investments LLC, are responsible for the battery maker's misrepresentations about its products' performance, two investors allege in a derivative suit.

The company leaders and the VGA entity are also to blame for not complying with a California law requiring at least one female board member, John Gonzalez and Matthew Cannella say. They filed their suit on behalf of QuantumScape Thursday in the US District Court for the Northern District of California.

The electric vehicle battery misrepresentations and board diversity problems subjected the company to several types of harm, including discrimination-related regulatory fines, the costs of defending proposed class actions, and compensating the individual defendants, the investors say.

Cannella and Gonzalez asked the board to take action on behalf of the company before filing suit themselves, according to the suit. The board refused their first demand, partially refused their "supplemental" demand, and failed to follow up on the rest of the supplemental demand, they say. Their inquiries mean they won't have to explain a failure to make a demand, which is typically required in the context of a derivative suit.

The shareholders bring claims for breach of fiduciary duties, unjust enrichment, abuse of control, gross mismanagement, waste of corporate assets, and contribution. They seek damages and internal governance reforms.

QuantumScape didn't immediately respond to a request for comment on behalf of itself and the individual defendants. VGA couldn't immediately be contacted directly for comment.

Rosen Law Firm PA represents Gonzalez and Cannella.

The case is Gonzalez v. Singh , N.D. Cal., No. 3:24-cv-07422, complaint 10/24/24 .

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Related Documents

Complaint

Docket

QuantumScape Corp.

Securities Law News

Oct. 24, 2024, 12:46 PM PDT

Adidas Investors Appeal Dismissal of Suit Over Ties to Rapper Ye

By Martina Barash

Bloomberg Law News 2024-10-25T11:12:32749407598-04:00

Adidas Investors Appeal Dismissal of Suit Over Ties to Rapper Ye

By Martina Barash 2024-10-24T15:46:26000-04:00

Adidas AG investors say they're appealing the dismissal of their securities fraud case over statements related to the footwear and apparel company's celebrity business partner Kanye West, the rap star also known as Ye.

The bid to revive the suit will go to the US Court of Appeals for the Ninth Circuit, the lead investor said in a filing Wednesday in the US District Court for the District of Oregon. That investor, a group of funds associated with the Hampton Roads Shipping Association—International Longshoremen's Association, seeks to represent a class of Adidas investors.

- The HRSA—ILA funds alleged that Adidas' relationship with Ye caused its stock to drop—because of the rapper's "antisemitic and racist" statements, Adidas officials' knowledge of workplace mistreatment issues for its staff, and the financial effects of its split with him
- None of the targeted company risk disclosures and statements that allegedly concealed Adidas' knowledge and concerns are actionable for securities fraud, Judge Karin J. Immergut said Aug. 16 in dismissing the suit
- Immergut distinguished the language in Adidas' risk disclosures about business partners from Facebook's privacy risk disclosures, which the Ninth Circuit decided were actionable in a suit the company, now Meta Platforms Inc., took to the the US Supreme Court

The Rosen Law Firm PA and Ransom Gilbertson Martin & Ratliff LLP represented HRSA-ILA and the proposed class in the district court. Markowitz Herbold PC and Debevoise & Plimpton LLP represented Adidas.

The case is HRSA-ILA Funds v. Adidas AG , D. Or., No. 3:23-cv-00629, notice of appeal 10/23/24 .

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Securities Law News

Oct. 24, 2024, 4:23 AM PDT; Updated: Oct. 24, 2024, 10:38 AM PDT

Tron Crypto Holders Advance Would-Be Securities Class Action (1)

By Martina Barash

- Digital asset holders sued over losses on TRX purchases
- Unregistered securities claims OK; prospectus claims fail

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Tron Crypto Holders Advance Would-Be Securities Class Action (1)

By Martina Barash 2024-10-24T07:23:01000-04:00

- Digital asset holders sued over losses on TRX purchases
- Unregistered securities claims OK; prospectus claims fail

Two purchasers of Tron Foundation's TRX digital asset successfully pleaded claims against the blockchain company and one of its co-founders, a federal court ruled in a proposed class action.

Corey Hardin and Chase Williams can proceed with federal and state claims for the offer and sale of unregistered securities, Judge Vernon S. Broderick said Wednesday for the US District Court for the Southern District of New York.

But claims based on alleged prospectus misstatements must be dismissed on grounds of timeliness and standing, Broderick said.

Hardin, a Nevada resident, and Williams, of Texas, allege they purchased TRX cryptocurrency tokens on the Binance platform—that is, on the secondary market, not during Tron's initial coin offering in 2017. By the time they filed their complaint, the tokens had lost most of their value compared to their 2018 high, they say.

The pair sued Tron and its co-founders, CEO Justin Sun and former chief technology officer Zhiqiang (Lucien) Chen. They obtained a certificate of default against Chen, who didn't appear in the case.

Tron and Sun offered a variety of arguments for dismissal—most of which Broderick rejected.

But the judge agreed that Hardin and Williams' prospectus-based claim was time-barred under the Securities Act's one-year statute of limitations. The token holders also lacked standing to pursue that claim because they purchased the assets on the secondary market, he said. Liability under the relevant section of the law "hinges on the existence of a prospectus and therefore applies only to transactions made during an initial public offering and not aftermarket transactions," he said.

But the claim for the offer and sale of unregistered securities is sound, Broderick said. Contrary to the company's arguments, the "allegations about TRON's actions to promote and solicit TRX tokens are sufficient to demonstrate that TRON engaged in 'steps necessary to the distribution' of TRX," and thus was a "statutory seller," he said.

And the allegations allow the inference that US securities laws apply even though Binance is based in Malta, he said.

Selendy Gay PLLC is lead counsel for the token holders. Fenwick & West LLP represents Tron and Sun.

The case is Hardin v. Tron Found. , 2024 BL 378584, S.D.N.Y., No. 20-CV-2804, 10/23/24 .

(Updated with additional analysis from court opinion beginning in fourth paragraph.)

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Securities Law News

Oct. 24, 2024, 2:18 PM PDT

Amazon Defeats Investor Lawsuit Seeking Antitrust-Related Files

By Mike Leonard

- Suit stemmed from landmark FTC case against e-commerce giant
- Judge rejects ‘scattershot’ claims, ‘disjointed allegations’

Bloomberg Law News 2024-10-25T11:17:05219282133-04:00

Amazon Defeats Investor Lawsuit Seeking Antitrust-Related Files

By Mike Leonard 2024-10-24T17:18:12000-04:00

- Suit stemmed from landmark FTC case against e-commerce giant
- Judge rejects ‘scattershot’ claims, ‘disjointed allegations’

Amazon.com Inc. sidestepped preliminary litigation by a shareholder demanding corporate documents that may have shed light on the e-commerce giant’s antitrust woes.

A Delaware judge rejected the “astoundingly broad” lawsuit Thursday, criticizing an investment trust for the “boundlessness” of its request, its “scattershot allegations of wrongdoing,” and its “haphazard” efforts to back up its suspicions by cross-referencing other legal proceedings.

A statute giving investors broad access to company records “does not permit stockholders to act as inquisitors, searching a corporation’s documents for any hint of transgression,” Vice Chancellor Lori W. Will said in a 16-page ruling. “These disjointed allegations leave me unable to discern the potential wrongdoing the trust seeks to investigate.”

The suit in Delaware’s Chancery Court stemmed from the fallout of a landmark antitrust case brought against Amazon by the Federal Trade Commission and 17 states. The Delaware case invoked a law requiring corporations to open their books to shareholders with credible but preliminary suspicions of wrongdoing.

The lawsuit didn’t directly target founder Jeff Bezos—the world’s second-richest man, with a net worth of $209 billion—but records cases typically reflect an effort to drum up fiduciary breach claims for future shareholder litigation. It’s common for investors to piggyback on earlier scandals or ongoing court cases on the theory that a company’s leaders steered it into trouble while concealing their own misconduct.

The court complaint sought files related to the practices targeted by the government's case, which includes allegations that Amazon coerces merchants into using its logistics services, exploits "most favored nation" pacts to drive up prices virtually everywhere, and competes unfairly against third-party sellers on its platform.

The shareholder suit, filed in December 2023, briefly detailed other antitrust challenges facing the company, including scrutiny from US lawmakers and regulatory troubles in Europe. Amazon has also faced other enforcement cases and a slew of class actions making similar claims.

For months, the proceedings in Delaware seemed to concern mainly whether the allegations in the FTC complaint offered a strong enough basis for shareholder records litigation. But the lawsuit had "a more fundamental problem," Will wrote Thursday.

Seeking to investigate "any possible anti-competitive conduct by a global conglomerate at any time anywhere in the world" amounts to "the sort of abuse that this court cannot bless," the judge said.

Amazon is represented by Ross Aronstam & Moritz LLP and Wachtell, Lipton, Rosen & Katz. The investment trust is represented by Prickett, Jones & Elliott PA; Robbins LLP; and Hach Rose Schirripa & Cheverie.

The case is Roberta Ann K.W. Wong Leung Revoc. Trust v. Amazon.com Inc. , Del. Ch., No. 2023-1251, 10/24/24 .

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Barclays Wins Bid to Cut £330 Million From UK Dark Pool Suit (1)

By Jonathan Browning2024-10-25T09:49:37584-04:00

- London judge reduces claim amount by 60% by tossing suits
- Bank faced claims stemming from US allegations over trading

Barclays Plc won a bid to cut more than half of the value of a London lawsuit brought by investors over allegations about its dark pool trading system after a judge struck out a series of claims.

More than 100 investors including the New York City Teachers' Retirement System and Allianz Global Investors Fund jointly sued Barclays in 2020 over the allegations. They argued that the bank concealed "serious underlying misconduct in Barclays' investment banking division" between 2011 and 2016.

On Friday, a judge dismissed the claims brought by a group of investors — mostly consisting of "passive" tracker funds — that together accounted for about £330 million ($429 million), or over 60% of the total claim. Judge Thomas Leech said that by reducing the scope of the claims, he hoped to boost the chances of a settlement.

The dispute centers on New York state allegations from 2014 that Barclays lied to customers and masked the role of high-frequency trades to boost its dark pool, a private stock market where buy and sell orders are matched within the banks, making the trades anonymous. Barclays ran one of Wall Street's largest dark pools at the time and paid $70 million to settle the allegations in 2016.

The claims wiped as much as £2 billion from the bank's market value when they first surfaced.

Lawyers for the investor group said they were likely to appeal, given that the ruling had implications for the type of claims that British tracker funds could pursue.

"In our view it is not appropriate for Barclays to seek to shut out such investors," they said.

Barclays declined to comment.

(Updates with comment from lawyers from fifth paragraph.)

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Jonathan Browning

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Pharma, Litigation Funders Seek Derivatives Accounting Clarity

By Amanda Iacone 2024-10-25T12:25:38000-04:00

- Proposal limits transactions subject to derivatives accounting
- Stakeholders want a broader exception from complex rules

Firms that fund drug research and an international development lender urged the US accounting standard setter to draw a sharper distinction between complex derivatives and certain common financing arrangements.

US companies and accounting firms generally support a July proposal that would winnow the list of business transactions that must follow rules intended for interest rate swaps, options and other types of derivatives, according to letters submitted to the Financial Accounting Standards Board. The project would broaden exceptions to the complex accounting with targeted relief for litigation funding and financing for research and development.

Comments were due earlier this week on the board's proposal that would exclude from derivatives accounting certain contracts with variables called underlyings—including interest rates or commodity prices—that are based on operations or activities specific to one of the parties. It also would revise FASB rules for assessing the "predominant characteristics" of certain contracts or features of a contract.

Transactions such as warrants and options must be accounted for at fair value, or the current price they could draw in an orderly market, under current derivatives accounting detailed in ASC Topic 815.

Companies that qualify for a lower interest rate on loans if they meet emissions targets or gender targets, for example, also would benefit from the proposed accounting break.

Concern Over ESG, Litigation Finance Impact

Those contracts with environmental, social, or governance or ESG-based performance features, however, might not qualify for the relief under the proposal, the International Finance Corporation, a World Bank Group member institution, said in a letter to the standard-setter.

“Such features may not necessarily have a direct impact on the financial performance of a party to the contract” even though those features are essential to the goals of the development bank or its clients, the IFC said. “It is currently unclear as to whether this would be in scope of the derivative scope exception.”

Ligand Pharmaceuticals Inc. and Royalty Pharma plc, both backers of drug research, similarly asked the board to clarify how the rules would apply when one party to the contract, such as an investor that acquires royalty rights, isn’t “directly involved” in the activities that serve as the basis for the contract settlement.

MindtheGAAP, a Philadelphia-based provider of accounting training, similarly cautioned that the board’s planned relief also might not capture litigation financing tools as intended. Litigation financing companies provide capital for plaintiffs in exchange for a share of any financial settlement.

“From the perspective of the litigation funding company, it is unclear whether the underlying—i.e., a favorable verdict or settlement—is an activity specific to one of the parties to the contract,” the company said.

Burford Capital Ltd., which offers litigation finance services, asked the FASB to detail how the company and other funders would account for transactions that no longer apply derivatives accounting.

“We believe that fair value is the most appropriate measurement basis to be used in the financial reporting for this asset class as it provides our investors and stakeholders with the most useful and relevant information,” Burford said in its letter to the board.

Financial Executives International’s committee on corporate reporting asked the board to clarify that arrangements that would now qualify for the exception could skip the predominant characteristic assessment. That process determines if any aspects of the contract terms would trigger the more complex accounting or whether the exception would apply.

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DOJ Backs Suit Accusing Vegas Hotels of Algorithmic Price-Fixing

By Katie Arcieri 2024-10-25T11:39:53000-04:00

- DOJ says use of algorithms can have anticompetitive effects
- Plaintiffs filed appeal after district court dismissed case

The Justice Department filed an amicus brief supporting customers who accused Ceasars Entertainment Inc. and other Las Vegas hotel companies of using algorithms to fix prices.

"Pricing algorithms can process more information more rapidly than humans aided by prior communications technologies," the DOJ said in a brief filed Thursday in the US Court of Appeals for the Ninth Circuit. "For this reason, such algorithms can increase the means and opportunities for collusion among competitors."

The Vegas case is the first of its kind to reach a federal appeals court and is expected to impact similar suits going forward.

A group of consumer plaintiffs who stayed at various Vegas hotels filed an appeal to the Ninth Circuit after Judge Miranda Du of the US District Court for the District of Nevada dismissed the case in May, saying they failed to plausibly allege a tacit agreement between the hotels to inflate room prices using algorithms built by the Rainmaker Group, a Cendyn Group LLC subsidiary.

In her ruling, Du said she reached her decision because the hotel-casinos signed up for the pricing software services at different times and the hotels weren't bound by the software's recommendations. A nearly identical suit accusing Atlantic City hotel-casinos was dismissed late last month on similar grounds.

The DOJ rejected Du's notion that the freedom to reject the software's pricing recommendations meant no collusion took place.

"To the extent the district court's decision turned on a distinction between starting-point prices and final prices, it was wrong," the department said in its brief. "The per se rule also prohibits a horizontal agreement on default or starting-point prices, even if the competitors retain the freedom to depart from those prices."

The DOJ also said that concerted action—conduct that joins together separate decision-makers—can indeed violate Section 1 of the Sherman Act, which prohibits agreement that restrain trade.

Various methods of concerted action apply to the joint use of pricing algorithms, the DOJ said in its brief. There could be evidence of an express agreement—either among competitors, or between an algorithm provider and a user—such as a deal between Cendyn and each hotel to use Cendyn's products, the DOJ said.

"Alternatively, an algorithm provider's 'pitch' could constitute an invitation for collective action among competitors—for example, by indicating to users that the same pitch was made to their competitors and that using the algorithm could help them avoid competition—and subsequent joint use of the algorithm could demonstrate acceptance of that invitation," the DOJ said.

The plaintiffs are represented by firms including Hagens Berman Sobol Shapiro LLP. Firms including Skadden, Arps, Slate, Meagher & Flom LLP and Kirkland & Ellis LLP have represented the hotels. Latham & Watkins has represented Cendyn.

The case is Gibson v. Cendyn Group LLC , 9th Cir., No. 24-3576, amicus brief 10/24/24 .

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US Justice Dept backs consumers in Las Vegas hotel pricing case

reuters.com/legal/government/us-justice-dept-backs-consumers-las-vegas-hotel-pricing-case-2024-10-25

Mike Scarcella

Caesars Palace Las Vegas Hotel and Casino is seen on the Las Vegas Strip in Las Vegas, Nevada, U.S. February 26, 2018. REUTERS/Darrin Zammit Lupi/File photo Purchase Licensing Rights, opens new tab

Oct 25 (Reuters) - The U.S. Justice Department on Thursday backed consumers who are fighting to revive a closely watched lawsuit accusing major hotels in Las Vegas of using shared data and computer algorithms to charge artificially inflated room rates.

Justice Department lawyers said in a friend-of-the-court brief, opens new tab to the 9th U.S. Circuit Court of Appeals that the use of algorithms by competitors to guide pricing decisions created “new dangers” for consumers.

The DOJ said a federal judge in Nevada who dismissed the consumers’ proposed class action made legal errors that should not be upheld.

The plaintiffs had accused a group of hotel owners along the famed Las Vegas strip of overcharging guests by feeding sensitive internal information to a shared software platform that offered pricing recommendations.

The price-fixing lawsuit filed last year against software maker Cendyn and the hotels, including Wynn Resorts and Caesars, was the first to reach a U.S. appeals court, and the case will be closely watched for its potential to influence other cases.

Cendyn, Wynn and Caesars either declined to comment or did not immediately respond to a request for comment. The Justice Department did not immediately respond to a similar request.

Plaintiffs’ attorney Steve Berman, a lawyer for the consumers, welcomed what he called the government's “powerful” submission to the San Francisco-based appeals court. The Justice Department is not part of the case but sometimes weighs in on cases where it believes there is broad public interest.

The hotels and software provider Cendyn have denied any wrongdoing.

In dismissing the lawsuit, Chief U.S. District Judge Miranda Du said in May that the consumers had not shown that the hotels were using Cendyn's software platform at the same and in coordination. Du also said the system generated pricing recommendations that hotels were not bound to follow.

The Justice Department's filing argued that a decision upholding the trial court ruling “could stymie meritorious antitrust claims involving pricing algorithms.”

Plaintiffs do not need to show “simultaneous action” to allege a price-fixing scheme, the brief said, and agreements among rivals to use algorithms to establish a default or starting price are illegal “even if there is no further agreement on final prices.”

Several pending lawsuits in other federal courts challenge corporate use of revenue management software.

In one case, a federal judge in New Jersey on Sept. 30 dismissed a consumer price-fixing lawsuit that was lodged against hotels in that state.
The case is Richard Gibson et al v. Cendyn Group et al, 9th U.S. Circuit Court of Appeals, No. 24-3576.

Read more:

Atlantic City hotels defeat latest class action over casino room rates
Consumers seek second chance in Las Vegas hotel price-fixing lawsuit
CoStar, hotels slam consumers' ‘fanciful’ room pricing lawsuit
Renters suing RealPage get US backing in pricing lawsuits
Reporting by Mike Scarcella

Oil companies say Md. judge keeps climate suit alive for wrong reason

legalnewsline.com/stories/665486599-oil-companies-say-md-judge-keeps-climate-suit-alive-for-wrong-reason

October 25, 2024

Climate Change

Platt | https://www.theplattgroup.com/neutrals/judge-steven-i-platt-ret/

ANNAPOLIS, Md. (Legal Newsline) - Oil companies say a Maryland judge is keeping a climate lawsuit by Annapolis and Anne Arundel County alive for the wrong reason while ignoring a fellow judge's dismissal of a nearly identical case by the City of Baltimore.

Judge Steven Platt will hold a hearing today on motions to dismiss by Chevron, BP, Exxon Mobil and other companies sued for allegedly causing global warming. They say Platt confused a central question by ruling the lawsuit "belongs in state court," when he should have ruled on whether federal air pollution law preempts the state action entirely.

The question of jurisdiction – whether a federal or state court can deliver the remedy the plaintiffs are seeking – has already been resolved by multiple federal courts in favor of hearing climate lawsuits in state court, the oil companies say. Meanwhile, Baltimore Circuit Court Judge Videtta Brown ruled in July that even though Baltimore's climate suit belonged in her court, it should be dismissed on the merits because federal law governs claims over interstate air pollution.

"Simply because a federal court lacks subject matter jurisdiction to hear a meritless case doesn't mean that case suddenly has merit when it is remanded to state court," the oil companies argue in their motion to dismiss.

In her July dismissal order, Judge Brown found that "artful pleading" couldn't save Baltimore's climate lawsuit since it was really seeking money to address harms the city ascribed to global CO2 emissions. Such emissions are governed by the federal Clean Air Act, she ruled.

Baltimore and Annapolis, like many other government plaintiffs, are represented by Sher Edling, a private law firm operating under a contingency-fee contracts. After losing several important cases in federal court, they retooled their litigation strategy to file suits based on state public-nuisance and consumer deception claims.

Their main claim is that oil companies hid information from consumers about the global warming effects of greenhouse gases – despite the fact such information has been widely known and discussed by scientists and politicians at least since the early 1900s – causing people to burn more hydrocarbon fuels than they otherwise would have.

"The explanation by Baltimore that it only seeks to address and hold Defendants accountable for a deceptive misinformation campaign is simply a way to get in the back door what they cannot get in the front door," Judge Brown ruled.

Judge Platt ignored the Baltimore ruling, saying only that the case could continue in his court. The defendants will ask the judge to at least stay the Annapolis case until a Maryland appeals court decides whether to uphold the dismissal of the Baltimore climate suit. If that happens, Annapolis will have to concede defeat on its identical claims, the oil companies say.

ORGANIZATIONS IN THIS STORY

Anne Arundel County

Mining

BHP and Vale agree landmark $23bn settlement over Brazil dam disaster

Deal relating to damages following 2015 Mariana incident comes as groups face separate lawsuit in London's High Court

An aerial view of the dam owned by Vale and BHP after it burst in Mariana, Brazil, in 2015 © Ricardo Moraes/Reuters

Bryan Harris in São Paulo and **Camilla Hodgson** in London 2 HOURS AGO

Mining groups BHP and Vale on Friday signed a landmark R$132bn ($23bn) settlement with authorities in Brazil to provide further reparations and cover damages stemming from the 2015 Mariana dam disaster.

The agreement seeks to draw a line under years of wrangling over compensation for the incident in the south-eastern state of Minas Gerais, which killed 19 people and caused extensive environmental damage. The settlement will take the mining companies' indemnity bill to about $30bn.

"These resources will allow us to do justice in reparations to the families directly affected," Jorge Messias, Brazil's attorney-general, said after announcing the agreement.

The settlement comes just days after the High Court in London began hearing a separate multibillion-pound lawsuit brought against the two miners on behalf of about 620,000 alleged victims.

The plaintiffs, including 2,000 businesses, 46 municipalities and 65 faith-based organisations, previously put the value of their claims at $36bn, before interest and inflation.

Cacique Bayara, right, leader of the Pataxo Geru-Tucuna village in Minas Gerais, and Gelvana Rodrigues, whose son died in the disaster, stand outside London's High Court on Monday © Jaimi Joy/Reuters

The case is among the most complex of a new breed of high-value lawsuits hitting the English courts, fuelled in part by the rise of funds that specialise in financing litigation.

The Mariana disaster occurred in November 2015 when a structure holding mining waste ruptured, unleashing an avalanche of mud that swamped villages and contaminated hundreds of kilometres of waterways all the way to the Atlantic Ocean.

Four years after the disaster, another of these so-called tailings dams operated by Vale ruptured and collapsed in the nearby Brumadinho township of Minas Gerais, killing 270 people.

The tragedies prompted authorities in Brazil to pass legislation phasing out the use of upstream tailings dams, which are cheaper to construct but are considered more hazardous than downstream alternatives.

At the centre of the settlement on Friday was the payment by the mining groups of more than R$100bn in new compensation to the Brazilian government. The money, which will be paid over 20 years, will be directed towards socio-environmental reparations in the Mariana region.

A further R$32bn will be paid by the companies for "environmental and social reparation actions", such as resettlements and compensation programmes.

The total package includes compensation of about $6,000 for each person affected by the incident, which increases to almost $17,000 if the person affected was engaged in agriculture or fishing.

The new payouts come on top of the almost R$38bn that BHP and Vale have already spent through the Renova Foundation that was set up in response to the disaster.

Mike Henry, chief executive of BHP, said the companies were committed to "do what's right" towards the Brazilian people, while Gustavo Pimenta, the boss of Vale, described the "definitive" settlement as a "mutually beneficial resolution for all parties".

However, Tom Goodhead, chief executive of UK law firm Pogust Goodhead, which is representing the claimants in London, said the companies' settlement with the Brazilian government "only serves to highlight exactly why the proceedings in the English courts are so critical".

Victims had "not been consulted" and the London case would make it "more difficult for multinational corporations more broadly to neglect their responsibility to the communities in which they operate".

Thiago Alves, co-ordinator of the Movimento dos Atingidos por Barragens, an organisation for victims affected by dam disasters in Brazil, said the $6,000 payout per person was "insufficient".

"We will continue to press for the [increase] of this amount through other compensation channels as well as through the English lawsuit," he said

Additional reporting by Beatriz Langella

Egg lawsuits test the line between puffery and deception

reuters.com/legal/litigation/egg-lawsuits-test-line-between-puffery-deception-2024-10-25

Jenna Greene

Cage-Free chickens are shown inside a facility in Lakeside, California, U.S., April 19, 2022. REUTERS/Mike Blake/File Photo Purchase Licensing Rights, opens new tab

Oct 25 (Reuters) - When it comes to puffery in advertising, most consumers know it when they see it. Sure, a greasy spoon diner might claim to serve the “world’s best cup of coffee,” but it’s a safe bet few people are actually fooled. (Will Ferrell’s character, opens new tab in “Elf” notwithstanding.)
There are times though when the line between puffery and false advertising can get scrambled, as a series of class actions over egg marketing shows.

For such a simple food, eggs strike me as surprisingly complicated to buy. Jumbo or large? White or brown? Organic? Farm fresh? And perhaps most perplexing, what does it mean if the hens are “cage free” versus “free roaming” or “pasture raised”?

A pending would-be class action in Chicago federal court confronts some of these questions head-on.

The claims come amid a new spike in egg prices. Bird flu eliminated 17 million egg-laying hens in the U.S. from April through July this year, my Reuters colleagues reported, with retail egg prices reaching a 16-month high in August, averaging $3.20 per dozen.
Two Illinois consumers allege they paid a premium for “cage free” eggs by Eggland’s Best, one of the largest U.S. producers, allegedly swayed by promises on the packaging that every hen is “free to roam in a pleasant, natural environment.”

But according to the complaint, opens new tab by lawyers from Werman Salas in Chicago and Winebrake & Santillo in Pennsylvania, many of the hens are kept indoors at all times in “windowless structures made of concrete, metal, and dirt,” and that each bird has about one square foot or less to itself.

“These hens are not ‘free to roam’ anywhere, and their living conditions are neither ‘natural’ nor ‘pleasant,’” the complaint, which was filed in July, states. “In fact, every part of that claim is false or misleading.”

According to the lawsuit, Eggland’s cage-free eggs command up to a 25% premium price over the company’s similarly-sized conventional eggs from hens kept in cages – money that the plaintiffs say they would not have spent absent the allegedly deceptive marketing.

Plaintiffs' lawyer John Frawley declined to comment.

Eggland's Best, based in Malvern, Pennsylvania, did not respond to requests for comment, nor did its outside counsel from Cozen O'Connor or its PR agency.

In court papers filed earlier this month, the company laid out its defense. The eggs are accurately labeled as "cage free," Eggland argues – a term defined by various states as well as the United Egg Producers to include hens that do not have outdoor access but are free to roam in indoor houses.

Moreover, Eggland says, the hens have scratch areas, perches, nest boxes and dust bathing areas inside, which allow them to engage in natural behavior.

Eggland argues no reasonable consumer would be deceived by the small-print, "free to roam in a pleasant, natural environment" description on its internal packaging into thinking the hens can go outside. If they could, the eggs would be called "free range" or "pasture raised" and would cost more, the company said.

Besides, the phrasing -- especially the word "pleasant" -- is "mere puffery" and is not enough to support a lawsuit, Eggland asserts.

A somewhat similar question arose in a case, opens new tab in the Northern District of California involving a "healthy" kombucha drink that was loaded with sugar. In refusing to dismiss the case, the court in 2022 held that it could not view "healthy" as puffery when the word was used to market arguably unhealthy foods.
The question now: Is it false advertising to say a hen lives in a "pleasant, natural environment" if consumers would conclude that's not true?

Puffery failed as a preliminary defense in a recent case involving Nellie's Free Range Eggs producer Pete and Gerry's Organics, which claimed on cartons that its hens "can peck, perch, and play on plenty of green grass."

The plaintiffs alleged, opens new tab the supposedly free-range hens were "crammed" into overcrowded sheds, 20,000 at a time, with minimal access to outdoor space.
Nellie's counsel argued in court papers that "free range" was puffery, "a statement that is too vague to constitute an actionable misrepresentation." As for hens pecking, perching and playing in green fields? That was merely a "whimsical description of what chickens do in grass," the company said.

U.S. District Senior Judge Vincent Briccetti in Manhattan declined to dismiss the case in 2022, ruling, opens new tab that a reasonable consumer could interpret the product descriptions "as factual claims, on which he or she could rely."
The case settled last year, and a Pete and Gerry's spokesperson told me via email that the company "remains committed to upholding the highest standards of animal welfare."

Yet another egg producer, the Happy Egg Co, is facing a newly certified class action, opens new tab in U.S. District Court for the Northern District of California for describing its eggs as “Free Range Pastured Raised on Over 8 Acres.”
According to the plaintiffs, to call eggs “pasture raised,” the hens must have at least 108 square feet apiece of open field to roam and be able to go outside year-round, citing standards set by the American Humane Association and Humane Farm Animal Care.

The plaintiffs allege that Happy doesn’t meet these standards and that as a result, they were deceived into overpaying for their eggs.

U.S. District Judge Araceli Martínez-Olguín certified two classes of purchasers from California and New York on Sept. 27. Happy has now asked the 9th U.S. Circuit Court of Appeals to reverse the decision.

The Rogers, Arkansas-based company and its counsel from Venable did not respond to requests for comment, but they argue in court papers that Happy’s marketing is truthful, and that there’s no one industry standard for “pasture raised.”

It’s an argument that to me points to a fundamental problem. In the absence of regulations, how can we as consumers know what all the egg designations mean? Personally, I’d like my eggs to come from well-treated hens. But I’d also like to understand what egg producers mean when they make such promises.

(The opinions expressed here are those of the author, a columnist for Reuters.)

Reporting by Jenna Greene

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Bloomberg Law News 2024-10-25T10:51:50070047055-04:00

Quinn Emanuel Loss Piles on Woes for Judgment Insurance Market

By Roy Strom 2024-10-25T05:30:02000-04:00

- Quinn Emanuel case could mean $75 million in losses for insurers
- Insurers are hiking prices, lowering coverage for this relatively young market

Big litigation losses have slammed the market for insuring court awards, leaving potential clients with narrower coverage options and premium costs that have as much as doubled.

The most recent example of industry carnage was a judge on Oct. 10 slashing Quinn Emanuel's fee for the law firm's work on a case to $92.4 million from $185 million. Quinn had an insurance policy guaranteeing about 90% of the original fee, leaving underwriters potentially on the hook for about $75 million.

As a result of such losses, policies are being quoted to cost around 17% or 20% of the insured award, up from around 10% a year ago, said Charles Agee, chief executive of litigation funding advisory firm Westfleet Advisors.

"It is just harder to get the risk insured," Agee said in an interview. Large losses "are causing insurers to reassess their risk appetite."

Quinn Emanuel did not respond to a request for comment.

The losses have taken some of the luster off a judgment preservation insurance market that surged in popularity at the start of the decade. The insurance policies are popular with plaintiffs who want to protect their trial court awards before the judgments can be reduced or reversed on appeal.

Judgment preservation insurance providers including HDI Global Specialty, Lockton and Certum Group have been playing a growing role in the broader $13.5 billion litigation funding industry. Brokers including Aon, CAC Specialty and Willis Towers Watson Plc have sold the products.

Much about this corner of the insurance business is a mystery. Plaintiffs that win big awards generally don't need to disclose if they purchased judgment preservation insurance. Likewise, insurers don't disclose their coverage in individual cases, except for rare instances.

The existence of insurance in the Quinn Emanuel case is known only because the policy was made public during litigation. There are several insurers backing Quinn's policy, though the names of the companies are blocked out in court documents.

In the underlying case, Quinn had won billions for health insurers who successfully argued the US wrongly denied making payments promised by Obamacare.

BMO Loss

Along with the Quinn case, insurers are anticipating a loss stemming from another recent decision. The US Court of Appeals for the Eighth Circuit last month reversed a $564 million verdict against BMO Bank related to its involvement in a Ponzi scheme run by Tom Petters. The industry expects to pay out at least $80 million in insured losses from the case, Insurance Insider reported.

In one of the larger losses this year, insurers covered between $500 million and $750 million of a $1.6 billion judgment against IBM Corp. in April. In the wake of that ruling, Liberty Mutual Insurance Co., which covered between $100 million and $150 million of that policy, backed out of at least two potential litigation insurance deals, Bloomberg Law reported.

The losses have raised the cost of the policies and left insurers wary of covering large, individual awards, according to one industry source who requested anonymity to discuss judgment preservation insurance.

"I wouldn't say it is dead, but it's going through a massive shift," the person said of the insurance. "There's higher prices and lower limits, not as much capacity, and underwriting guidelines have gotten much stricter."

The amount of losses in recent months would have been difficult to manage at any point, the person added, even if it was two years down the line.

While the string of losses is the first such shake-out for the nascent judgment preservation insurance market, the broader retrenching is nothing new for insurers, said Byron Sumner, chief executive officer of Ignite Specialty Risk, which provides litigation insurance.

“Insurers are responding, and attaining coverage is unlikely to ever be as easy as it was recently in the last 12 months,” Sumner said. “However, I also don’t believe it will always be as challenging as it has become, because insurers will regain their appetite for the class once the market demonstrates an attractive level of profitability.”

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AI: the new legal powerhouse — why lawyers should befriend the machine to stay ahead

reuters.com/legal/legalindustry/ai-new-legal-powerhouse-why-lawyers-should-befriend-machine-stay-ahead-2024-10-24

Jeremy Glaser, Sharzaad Borna

Figurines with computers and smartphones are seen in front of the words "Artificial Intelligence AI" in this illustration taken, February 19, 2024. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights, opens new tab

October 24, 2024 - **The dual nature of AI — excitement and fear**

AI is evolving at lightning speed, sparking both wonder and worry. As it transforms industries and our daily lives, we are caught between the thrill of innovation and the jitters of uncertainty. Will AI elevate the human experience or just leave us in the dust? How will it impact our careers, privacy and sense of security?

Just as we witnessed with the rise of the internet — and later, social media — AI is poised to redefine how we work and live, bringing a mix of optimism and apprehension. While we grapple with AI's implications, our clients expect us to lead the charge in leveraging it for their benefit.

Phase one: Client pressure and the legal industry's cautious approach

The first wave of change in the legal profession will likely come from clients — especially those who are tech-savvy and corporate-oriented. They will expect law firms to incorporate AI into their services because of the potential cost and time savings. However, the legal field has a reputation for being cautious, and for good reason. Lawyers have fiduciary duties, ethical obligations, and regulatory frameworks to navigate.

The reluctance to adopt AI too quickly reflects the need for careful consideration of its risks and benefits. Law firms must balance this client pressure with a commitment to maintaining their professional and ethical responsibilities.

Efficiency and billing: the end of hourly rates?

AI's ability to streamline repetitive tasks like document review, drafting, and legal research means that billing clients by the hour may soon become outdated. As law firms adopt AI, the traditional billing structure will likely shift to flat fees or performance-based pricing, particularly in areas like M&A.

Platforms like "Relativity" for e-discovery and "Harvey" for contract review are already automating these processes, delivering results in a fraction of the time previously required. These tools are revolutionizing the way law firms approach their services, forcing them to rethink how they bill for their time and expertise.

AI as the new junior associate: Competition over fewer human positions

One of the immediate consequences of AI integration will be a reduced need for support staff and junior associates. Historically, these roles have handled administrative, repetitive tasks that AI can now perform with greater efficiency.

Tools like "ChatGPT" can assist with research, drafting, and other tasks with some guidance and multiple rounds of edits, much like a fast-learning junior associate might. The good news is that junior associates can now focus on higher-level tasks, positioning them for faster career growth.

However, this shift also means more competition for fewer entry-level jobs. Law schools will play a key role in helping students become more marketable by offering courses on AI tools and technology. Graduates with AI literacy will have an edge over their peers, as firms increasingly value associates who can collaborate effectively with AI tools.

Law schools like Stanford and Duke have already introduced legal tech courses, preparing the next generation of lawyers for an AI-driven profession.

Smaller law firms: leveling the playing field?

AI presents an opportunity for smaller law firms to compete with larger firms, at least for more common tasks. By becoming tech-savvy early, smaller firms can use AI tools to increase efficiency and offer lower fees for standard services.

Platforms like "Ironclad" and "Lawgeex" allow smaller firms to streamline processes that were once resource-intensive, leveling the playing field in areas where Big Law might otherwise dominate. However, for more complex and high-level AI applications, particularly in predictive analytics, larger firms may still maintain an edge due to their ability to invest in more advanced tools.

Phase two: the strategic lawyer adding value beyond automation

As AI takes over routine tasks, the value lawyers bring will increasingly come from strategy, client relationships, and navigating the growing field of AI regulations. Lawyers will need to manage AI tools effectively while ensuring that ethical standards and client privacy are upheld.

Additionally, the human element in negotiations and client interactions will remain indispensable, as AI can assist but not fully replace the intuitive and creative aspects of legal practice. Tools like "Lex Machina's Legal Analytics" already offer data-driven insights, but the final decisions in courtrooms and negotiations will still require human finesse.

Predictive AI: the next frontier in legal practice

While generative AI has grabbed much of the attention, predictive AI — which uses historical data, statistical models, and machine learning algorithms to forecast legal outcomes and trends — is set to revolutionize the legal landscape further. These tools can already forecast litigation outcomes, jury behavior, and the effectiveness of specific arguments.

Predictive AI also holds promise for advising clients on investments and company valuations. For example, "Blue J Legal" offers AI-driven predictions in tax law, providing valuable insights that help lawyers strategize more effectively. In M&A, tools like "Pitchbook" use AI to predict the future growth of companies, giving clients a more informed perspective on potential investments.

Ethics and AI: building trust through regulation

For AI to be fully embraced, it must be trusted. In response, governments are constructing the frameworks necessary for AI's responsible and ethical ascent. The European Union's AI Act, which took effect in 2024, promotes safety and accountability in AI by targeting high-risk sectors such as healthcare, transportation, and law enforcement.

Similarly, California's Safe and Secure Innovation for Frontier Artificial Intelligence Models Act, introduced the same year, sought to prevent catastrophic harm caused by AI such as cyberattacks and the creation of weapons of mass destruction. However, the bill was vetoed, with concerns that its strong focus on large scale AI models risked overlooking the dangers posed by smaller, specialized AI systems. These early efforts highlight the elusive balance between bold innovation and moral imperatives to ensure AI's potential is harnessed responsibly.

The human touch in an AI world

AI is here to stay and avoiding it would only hinder career growth in the long run. Lawyers who engage with AI, learn to use it effectively, and understand how it will affect their practice will position themselves to thrive in the new AI-driven landscape.

The key to future success lies in combining human intuition, empathy, and judgment with AI's capabilities. While AI can streamline tasks and provide valuable insights, it cannot replace the nuanced decision-making and personal connection that define the legal profession. The lawyers who can harness both AI and their own strategic thinking will be the ones who thrive in this new era.

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Securities Law News

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Matt Levine's Money Stuff: Apple’s Card Was Confusing

By Matt Levine

Opinion

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Matt Levine’s Money Stuff: Apple’s Card Was Confusing

By Matt Levine 2024-10-24T14:00:16900-04:00

User experience design

Who do you think would be better at designing a simple and delightful user experience for a credit card: Apple Inc., or the average bank? If you had asked me this a week ago I would have confidently said “Apple.” Banks are stereotypically confusing and legalistic; Apple is stereotypically friendly and easy to use. Apple’s whole thing is “it just works”: Instead of making you fill out pages of confusing forms, I would naively have thought, Apple would just let you choose a couple of clear options and automatically do what it was supposed to do.

But yesterday the US Consumer Financial Protection Bureau fined Apple $25 million, and Goldman Sachs Group Inc. another $65 million, for basically designing bad user experiences for the Apple credit card that Goldman issued. And yet most banks manage to run credit card programs without getting in this sort of trouble?

There are two main problems. One is that Apple and Goldman did not do a good job of letting customers dispute fraudulent charges, because when they clicked “dispute” they had to fill out another form and sometimes they didn’t (“Respondent” here means Apple):

On Apple devices, Apple Card users can select Apple Card transactions and click “Report an Issue.” After completing an initial form by selecting issue types and then selecting “Done,” the Messages application on consumers’ devices opens and generates a prefilled message based on the issue selected. After consumers press send, Respondent designed the Report an Issue functionality to connect them to Goldman. …

On June 25, 2020, Respondent added a new “forms feature” to the Report an Issue functionality, which Respondent had proposed and designed. For consumers who selected certain issue types and then sent the initial message, the “forms feature” sends consumers a link to an additional form in Messages. From when Respondent introduced this functionality through at least July 31, 2021, the message above this link read: “Ok. We’ll need a little more information about this transaction.”

Through at least July 31, 2021, when consumers did not complete and submit the additional form, Respondent failed to send tens of thousands of Billing Error Notices to Goldman for resolution. In this circumstance, neither Respondent nor Goldman attempted to further contact the consumer about the Billing Error Notice or conducted any investigation of the Billing Error Notice.

And, as we discussed yesterday, the reports that did get forwarded to Goldman overwhelmed its customer service department: “For the disputes that Apple did send to Goldman Sachs,” says the CFPB, “the bank failed to consistently send acknowledgment notices within 30 days, conduct reasonable investigations, or send resolution letters explaining the determinations of its investigations within 90 days.”

The other problem is that customers could use their Apple Card to buy Apple products with interest-free installment payments, but they had to click a box to opt into interest-free installment payments, and if they didn’t click that box they would instead put the purchase on their credit card (and incur interest):

Respondent designed the advertisements for Apple Card Monthly Installments, or ACMI, and the checkout process for enrolling purchases of Apple devices on Respondent’s website in ACMI. …

Through at least July 2020, the checkout process on Respondent’s website presented consumers purchasing iPhones with an option to “Pay in full” or “Pay monthly.” The checkout process did not explain that “Pay monthly” referred to ACMI, or provide further details about ACMI, until after consumers selected this option.

Honestly … this stuff does not strike me as that bad? Like “you have to fill out two forms to get a credit-card refund, and not close your session before you’re done”? “You have to click a box to pay in interest-free installments”? As consumer financial services go this does not seem all that onerous. I sort of expect consumer financial services to involve multiple confusing forms. We talked a few weeks ago about how the US Treasury has its own website for individual investors who buy Treasury bonds, and to move those bonds to another account you have to use “the Treasury Department’s antiquated system, which can require verified signatures and paper forms sent through the mail” and can take up to 12 months to complete. Oooh, Apple makes you check a box!

It feels a little like the problem here is that Apple was too ambitious about making the experience easy: It wanted things like disputing charges and paying in installments to “just work,” it tried to cut down on complexity and paperwork, and it advertised to its customers that everything would be intuitive and easy. And then things were slightly less intuitive and easy than the customers had come to expect from Apple, which the customers — and the CFPB — experienced as misleading.

ABS of capital call lines

The circle of life is:

1. Banks make some new sort of loan. Maybe it’s widget factory financing loans.
- 2. Banks realize it would be more efficient to sell these loans to someone else: Instead of making a loan with their own money and keeping it on their balance sheet, they can make the loan, package it up, sell it to investors, and free up capital to go make other loans. Widget-factory-backed securities, the package is called. Perhaps it’s sliced into tranches: Some investors get the senior claim which is very safe; others get the most junior claim, which is riskier but has a higher yield.
- 3. This is efficient for the banks, but sometimes a bit impersonal for the borrowers. Whereas in Step 1 borrowers would go to the bank and say “I need a new loan against my widget factory” and the bank would say “great let’s talk about what sort of financing makes sense for your factory,” in Step 2, the bank instead says “okay sure so standard terms in the widget-factory-backed securities market are a five-year term with 70% loan-to-value ratio, and we’ll need three weeks to market the loan to investors,” and that is perhaps less convenient for the borrower.
- 4. Someone else — now we call it a “private credit fund” — comes along and says, “well, we have a lot of money, we could lend it to widget manufacturers. We can give them faster, more certain financing with more flexible structures and more personalized service, and probably charge them more for it. And we can hold the loans on our balance sheet, because we are stuffed with money from long-term investors looking for yield.”
- 5. Private credit gets into the widget-factory-financing business and starts to compete with, or displace, the banks.
- 6. The private credit firm thinks “you know, this is nice, but what would be even better is adding some leverage. Instead of lending $100 of our investors’ money to finance widget factories, let’s borrow $100 from a bank and lend $200 to the widget factories.”
- 7. So the private credit firm goes to a bank and asks to borrow money, secured by its portfolio of widget-factory loans.
- 8. The bank is like “sure whatever that’s a good credit.” Because it is: Lending $100 against a $200 portfolio of widget-factory loans is *safer* than lending $100 against a $150 widget factory. You get a senior claim on a senior claim. The bank happily makes the loan.
- 9. The bank remembers Step 2: The bank has capital and funding constraints, and is often happy to get loans off of its books.
- 10. So it packages the loans from Step 8 into stuff it can sell to investors. Widget-factory-loan-backed-loan-backed securities, WFLBS-squared, I don’t know.

There are no theoretical limitations to this. The investors in Step 10 can borrow money from banks to finance their purchases of WFLBS-squared, and the banks can securitize those loans, etc. There are many variations and I am being a bit loose, but not that loose. Here’s the Wall Street Journal:

Goldman Sachs this month sold $475 million of public asset-backed securitization, or ABS, bonds backed by loans the bank makes to fund managers that tide them over until cash from investors comes in. The first-of-its-kind deal is a lucrative byproduct of the New York bank’s push into loans to investment firms, such as these so-called capital-call lines.

Goldman’s new deal reflects two trends transforming financial markets. Increasingly large managers of private-debt and private-equity funds are moving up in the Wall Street pecking order, but they often need money fast. Banks, once again, are reinventing themselves to adapt. ...

Capital-call loans function like credit cards for private-fund managers. The funds borrow money to invest quickly in private debt, private equity, real estate and infrastructure. They then “call up” cash commitments from clients in the funds, mostly institutions such as pensions and insurers, and repay the loans when the clients deliver. …

The bank still owns most of its capital-call loans, but repackaging even a small amount into investment-grade bonds sets the stage for future sales to large debt investors, such as insurers and pension funds. The move gives the bank a new way to compete against, and sometimes cooperate with, the private-debt funds that increasingly dominate the market for asset-based finance.

Capital-call loans are not exactly the sort of private-credit leverage I described above: These are not permanent leverage on the private credit fund, but rather a short-term tool for cash management and/or boosting reported rates of return, and they are not limited to private credit funds but also include private equity, etc. Still, circle of life.

Also part of this natural cycle is people complaining about it:

Bankers say the capital-call ABS and similar innovations help them safely serve clients while bringing in rich fees. But such efforts have preceded market excess in the past, to put it mildly. Skeptics see parallels between CDOs (the collateralized debt obligations that helped fuel the financial crisis in 2008) and the growing use of SRTs (synthetic risk transfers), NAV loans (based on net asset values) and more.

Yes right I mean the two potential “market excess” problems in banking are:

Banks can make risky loans, hold them on their balance sheets, and blow up.

- Banks can make risky loans, sell them to investors, get sloppy about what they’re doing because they’re not eating their own cooking, and blow the investors up.

The second one is bad for the banks because they’re probably financing the investors too.

HPS

I am not really an alarmist about private credit. There is a huge boom right now in the categories of lending broadly referred to as “private credit,” and people worry that this boom will lead to sloppiness and risk and eventually defaults and losses. And, you know, that’s probably true; financial markets move in cycles and “as long as the music is playing, you’ve got to get up and dance.” My general assumption is that private credit is less *systemically* risky than many other forms of credit, because it is funded mostly by locked-up long-term investors so there is less risk of fire sales, contagion and bank failures. But not *no* risk, and we talked above about how private credit is interconnected with banks.

I will say though that as someone who writes about finance through the cycle, I expect to *enjoy* eventually writing about sloppiness and losses at private credit firms, because sloppiness is interesting. A huge boom in private credit is a difficult thing for a private credit manager to manage: There’s so much money coming in, so many competitors getting into the space, that it’s hard to stick to tough underwriting criteria and do only the good deals. You have to do so many deals to keep up, and they can’t all be good.

This seems like a genuinely hard problem, though to be fair there is a straightforward solution. Here is a Financial Times article about HPS Investment Partners, a big private credit firm that is choosing among “three paths”:

The first, the sale of a stake in HPS to [a Middle Eastern sovereign wealth fund] of $1bn or more; the second, an initial public offering.

But it is the third track that could be the most lucrative for HPS’s founders and the one [founder and CEO Scott] Kapnick is keen to clinch: an outright sale, possibly to the biggest asset manager of them all, BlackRock. …

HPS and its rivals are seen as an answer to the problem many asset managers are struggling with: how to secure a toehold in private credit. It is a nearly $2tn asset class that credit rating agency Moody’s estimates could swell to nearly $3tn by 2028.

“If you’re caught in a tidal wave, your boat will go faster,” one HPS adviser said. “If you were small and important before you are bigger and important today and all you had to do was show up to work.”

If everyone is desperate to get into private credit, that makes it a bit hard to *run* a private credit firm: You have more competition each day, and more pressure to do bad deals. But it makes it an incredibly good time to *sell* a private credit firm.

Robinhood

I wrote yesterday about the theory “that day trading meme-stock options is a gateway drug for sensible retirement investing.” There are a lot of ways to put your money into the stock market; some of them feel mostly like “fun gambling,” while others feel like “boring sensible investment of retirement savings in the long-term growth of the economy.” A lot of retail brokerage accounts will let you do both. If you are young, carefree and confident, and don’t have very much money, you might gravitate toward the gambling stuff. And then later, as you get more money and responsibility and grow up a bit, you will get more curious about buy-and-hold investing in low-cost index funds.

And you can do both of those things — and transition between them — in the same brokerage account. This is good! Arguably it is socially useful for brokerage apps be competitive with, say, sports gambling apps, to be as fun and easy-to-use and exciting and risky as sports gambling. Because investing *is* competing with sports gambling for young, risk-seeking people’s attention. But the brokerage app is better positioned to transition those people into boring responsible investing. There is no analogous transition in sports gambling. Here is a recent paper finding that sports betting “does not displace other gambling or consumption but significantly reduces savings, as risky bets crowd out positive expected value investments.” Zero-day options are, arguably, a bit better than that.

Again you cannot get too carried away with this theory. Is it socially beneficial to introduce riskier and zanier financial products to retail brokerages? Well, if the zanier products lure customers away from sports betting, and start them on a road to mature sensible investing, then yes. If the zanier products lure customers away from index funds, and start them on a road *away* from sensible investing, then no. I’m not sure there’s an a priori answer.

Also it is not *exactly* true that you can easily do zany gambling and sensible investing in the same brokerage account. There seems to be some specialization; some brokerages optimize for fun and others for responsibility. Sometimes the fun brokerages also grow up to be responsible ones, though. We talked about this yesterday in the context of X-Trade Brokers Dom Maklerski SA., a Polish brokerage that started out with leveraged contracts-for-differences gambling and moved into things like actual stocks and pension savings accounts.

And in the US there is Robinhood Markets Inc., which is perhaps most famous as a place for young people to day trade meme stocks and options on their phones. Here’s a Barron’s story about how Robinhood is growing up, too:

Robinhood has big opportunities ahead, especially if it can get clients who opened accounts to invest significant assets on the platform. Piper Sandler analyst Patrick Moley estimates that 10% of U.S. adults currently have a funded account at Robinhood, but the company has less than 0.3% of the $65 trillion worth of retail assets in the U.S. …

Robinhood’s main task now is to increase wallet share. At the same time, it has to attract a broader group of investors as well as ones who want more help on their financial journey. It’s working on a financial advice offering. “For any customer anywhere in the world, we can be the place where they keep their assets and execute all their financial transactions,” [Chief Executive Officer Vlad] Tenev tells Barron’s. …

The company intends to launch a wealth management offering next year. “If we want to be a one-stop shop, we have to have it,” says Chief Brokerage Officer Steve Quirk.

Quirk declined to go into details. But given Robinhood’s tech-heavy approach, it is probably safe to say it will be low-cost and won’t involve human financial advisors operating out of bricks-and-mortar locations. In July, Robinhood bought Pluto, an investment research company that uses artificial intelligence to develop customized investment strategies.

Adding a financial-advice option could complement Robinhood’s mission to serve active traders, says Quirk, a former TD Ameritrade executive. He notes that it’s common for investors to take a do-it-yourself approach for part of their portfolio, while leaving the bulk in an advisory solution. “Until we expand into wealth management, we aren’t getting that portion of their business,” Quirk says. “And frankly, it is often the biggest part of their overall wealth.”

If Robinhood has 10% of the accounts but 0.3% of the assets, that suggests either that (1) it has mostly the smallest investors or (2) it has mostly people’s fun money, and their responsible investment money is somewhere else. Displaying confetti when you do an options trade is a good way to attract people’s fun-money accounts; having a low-cost automated financial advisory offering is a good way to attract their retirement savings. It is helpful, for Robinhood and perhaps for its customers, to have both.

Brics bridge

Here’s a good Financial Times story about Tether:

President Vladimir Putin has touted a new international payments framework to world leaders gathered in Russia this week, eager to show how he is shrugging off western sanctions and challenging the US-dominated global financial order.

Putin accused western powers of “using the dollar as a weapon”, arguing in a speech at a Brics summit in Kazan that sanctions against Russia since its full-scale invasion of Ukraine “undermine the trust in this currency and diminish its powers”.

The main agenda item of the summit, attended by the leaders of China, India, Iran and others, was a Russian proposal to circumvent the US dollar by setting up a new payments messaging system known as “Brics Bridge”. …

Despite the bonhomie, however, there have been few practical steps towards the proposed payments system. …

The main problem with the proposal is that the US has made it clear to third countries that working with Russia's war machine will cost them access to the dollar, hampering the Kremlin's efforts to build a sanctions-proof payments network. ...

The chilling effect spurred banks in countries such as Turkey and China to sharply cut back on dealings with Russian counterparties well beyond the executive order's scope.

No I'm kidding it's not about Tether, it's about Brics Bridge, a Russian proposal to do international trade without going through the US dollar system. The problem with the US dollar system, for Russia, is that the US government has a lot of control over it, and uses that control to pursue its own purposes. Those purposes include sanctioning Russia for invading Ukraine, with the result that a lot of Russian politicians and companies can't really use the dollar system.

This is a problem because the US dollar system is widely used for international trade — including trade that does not otherwise involve the US, like Russia buying stuff from China. So Russia would like to use some alternative system for trade with other countries. The other countries that Russia wants to trade with mostly do not care about the US government's geopolitical purposes and would, in the abstract, be happy to trade with Russia.

But *those* countries also want access to the dollar system, because they would like to be able to trade with — not just the US, but all the *other* countries in the world, which again mostly use the dollar system. So Russia's counterparties do not want to be cut off from the dollar system like Russia has been.

So if Russia came to them and was like "hey we built a new trading system, you want in," they will say no, because joining the new Russian trading system seems like an obvious way to annoy the US.

Whereas if some new trading system just came into being, set up by neutral third parties, with the properties that (1) it is not in any obvious way *tied to Russia* but (2) it is open to everyone and resistant to meddling by the US government, then that might appeal more to Russia's trading partners.

We talked last week about how Tether is reportedly pitching its stablecoin to global commodity traders who, you know, sometimes want Russian or Venezuelan oil. I wrote:

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

The people against whom the dollar is weaponized — Putin, etc. — are the ones with the most incentive to build a new global payments framework, but they're the ones least able to do it. The people who might do it are unaffiliated third parties just looking to make money.

Things happen

Polymarket Cracks Down on US-Based Users as Whale Bets on Trump. The French Connection to Online Bets on Trump. More Companies Ditch Junk Carbon Offsets but New Buyers Loom. Funds Frozen in Synapse to Be Returned by Year End, Trustee Says. Klarna Shareholders Vote to Oust Director Amid Tension on Board. This Little-Known Private-Equity Firm Booked a 79-Fold Return. Google's Anthropic AI Investment Gets Formal UK Merger Probe. Keurig to Buy Ghost Energy Drinks for More Than $1 Billion. Intel-Backed Blockchain Startup R3 Weighs Options Including a Sale. US finalises $20bn loan to Ukraine. Saudi Prince's Beach Party Looks to Show Neom Dream Is Real. "Richard White, the billionaire co-founder of Australia's largest listed technology company WiseTech Global, has stepped down as chief executive after … a legal dispute with an ex-girlfriend over an unpaid furniture bill."

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- 1. Disclosure, I used to work at Goldman, before it got into credit cards. Back then, it got up to other controversial stuff.
- 2. Also technically the capital-call loan is secured by the fund's investors' capital commitments rather than the fund's assets.
- 3. The weird edge case of this is "banks can buy safe Treasuries and blow themselves up on interest rate moves."
- 4. To be sure: "A person familiar with the firm said the founders had not launched the IPO and sales processes to cash out, and had not taken money out when HPS sold minority stakes in itself before. Instead, the intention was to 'further strengthen [HPS's] position' in the industry."

Bloomberg Law News 2024-10-25T12:42:54559725043-04:00

SEC Market Monitoring Tool Allowed to Operate During Litigation

By Ufonobong Umanah 2024-10-25T09:04:48000-04:00

- Critics say Consolidated Audit Trail allows agency spying
- Judge says injunction now would've disrupted status quo

The SEC's new market surveillance tool can operate while it faces a legal challenge, a federal court said.

The enhanced recordkeeping under the Consolidated Audit Trail has some elements that can warrant a preliminary injunction, but maintaining the integrity of a tracking system requires holding off until proper relief could be fashioned, Judge Alan D. Albright said.

The CAT requires broker-dealers, exchanges, and clearing firms to report real-time US equity and options trading data. Critics, including cryptocurrency groups and 19 states represented by Republican attorneys general, argued the tool would allow the SEC to spy on American trading activity, according to court documents from the US District Court for the Western District of Texas.

"Granting a preliminary injunction would create a 'chaotic and disruptive effect,' which cuts directly against the purpose of preliminary injunctions in preserving the status quo," Albright said, noting both the public and those affected by the CAT had prepared for the tool's implementation for years.

Cherry Johnson Siegmund James PLLC and New Civil Liberties Alliance represent the plaintiffs.

The case is Davidson v. Gensler , W.D. Tex., No. 6:24-cv-00197, 10/24/24 .

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Tesla (TSLA) Stock Rally Steamrolls Shorts, Erasing Year's Gains in One Day

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- Bears took $3.5 billion hit on biggest 1-day gain in a decade
- Shares soared on electric-vehicle giant's big earnings beat

By Esha Dey

(Bloomberg) --

Tesla Inc.'s blowout earnings caught everyone off guard.

But it was the bears who paid the price this week. The electric-vehicle maker's results delivered a gut-punch to short-sellers — investors who make money by betting that a security will fall over a certain period of time — when they saw all their profits for the entire year wiped out in just one trading day.

Expectations going into Wednesday's after-hours report from the EV giant were low, the stock was down some 14% for the year and Wall Street and Main Street alike thought demand for EVs would continue to struggle. Instead, Tesla delivered an upbeat report and Chief Executive Officer Elon Musk told investors the company would see as much as 30% growth in vehicle sales next year.

By the end of Thursday Tesla had added $150 billion to its market value on a 22% stock surge — the biggest one-day jump since 2013. Short sellers, on the other hand, took an estimated mark-to-market loss of $3.5 billion, according to data from S3 Partners. Even worse, their year-to-day profit of $1.7 billion was erased, shorts are now down $1.8 billion for 2024.

"Tesla's guidance was extraordinary," said Steve Sosnick, chief strategist at Interactive Brokers. "At least for yesterday, the market was willing to trust Elon Musk's assertions about sales growth."

Shorts weren't the only ones caught off guard by the report. Analysts on average were expecting Tesla to report a 10% drop in quarterly profit. Instead, the company came in with a 9% jump from the previous-year period. And a key metric for Tesla — automotive gross margin excluding regulatory credits — also blew past expectations.

A peek into options positioning reveals investors weren't prepared for a large move higher. Options trading implied that traders were expecting the stock to move around 6% in either direction after the results. That’s a low number to begin with, given Tesla shares had moved at least 9% after the previous seven quarterly earnings reports.

Now, with at least some faith restored that the worst part of the slowdown in EV demand might be over, and that the company is making steady progress on developing a fully self-driving car, investors are piling back into the stock. Demand for call options increased as traders chased the rally. Three-month calls moved to a premium over bearish puts Thursday for the first time since late August.

Wall Street is turning more optimistic as well. Several analysts raised their price targets on Tesla after the results and the rapid jump in the stock price. And bears are becoming rarer. Just about 2.9% of Tesla’s free float is now held short, S3 data show, hovering near what the firm called “historic lows.”

While the rally in Tesla was unusually strong, markets watchers, including S3 Partners’ Matthew Unterman and Citigroup’s US equity trading strategist Stuart Kaiser, see little sign that the gains were due to a so-called short squeeze — where traders are forced to cover their bearish bets quickly, ending up reinforcing an asset’s upward momentum.

“Thursday’s move seems more driven by surprisingly strong results against a backdrop of an under-owned stock rather than aggressive short covering,” Kaiser said, noting that short interest in the stock is low.

“There was pent up demand for the stock to do well,” said Dave Mazza, chief executive officer at Roundhill Financial. “There are devoted followers, both retail and institutional, who were waiting for anything less than the worst news to pile back in.”

Disappointment after the company’s unveiling of self-driving vehicles earlier in October, and the selloff that followed, also kept sentiment on the stock subdued.

“Considering the robotaxi debacle, its recent propensity to sell off after earnings, and the perception that the stock might have been poised for a breakdown if that occurred, I believe that many traders were caught offsides and that many investors found themselves under owning the shares,” Interactive Brokers’ Sosnick said.

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Robbins Geller Tapped To Lead Lincoln National Investor Suit

By **Sydney Price**

Law360 (October 24, 2024, 6:00 PM EDT) -- Robbins Geller Rudman & Dowd LLP will lead an investor suit against insurance holding company Lincoln National in Pennsylvania federal court alleging that it misled investors about its failing variable life insurance product.

According to Wednesday's order, Robbins Geller and its client Local 295 IBT Employer Group Pension Trust Fund's request to lead the case was unopposed after three other lead plaintiff motions were withdrawn. Saxton & Stump LLC will serve as local counsel.

The pension trust fund allegedly suffered approximately $122,000 in losses and meets the adequacy and typicality requirements for lead plaintiff, according to the order.

"As to adequacy, the pension trust fund has a significant direct interest in the outcome of this action, so we believe it will vigorously represent the class," the order said. "It is undisputed that the pension trust fund is a sophisticated institutional investor with a track record of success previously serving as a lead plaintiff."

Plaintiff Donald C. Meade said in his complaint in April that Lincoln National was experiencing a decline in its variable universal life insurance. Profitability of the segment is typically driven by mortality margins, investment margins, expenses and surrender fees, according to the complaint. Lincoln National and several of its executives failed to disclose that the goodwill associated with the life insurance business was overstated and the company's policy lapse assumptions were outdated, the suit said.

The suit's class period begins Nov. 4, 2020, the day Lincoln National reported that it had undergone a review of its reserve assumptions. The company said it uses an "ongoing valuation process" during which it "assesses the reasonableness" of its valuation techniques or models and makes adjustments as necessary.

The complaint said that on Nov. 2, 2022, Lincoln National reported a net loss of $2.6 billion for the third quarter of 2022, compared to a net income of $318 million the previous year. Lincoln National allegedly said the results included "net unfavorable notable items" of $2 billion related to its annual debt-to-capital and reserve assumptions. The company also disclosed it incurred a $634 million goodwill impairment to its life insurance business.

On that news, Lincoln National's shares declined $17.27 each, or about 33%, to close at $34.83 per share on Nov. 3, 2022, according to the complaint.

The suit accuses Lincoln National of acting with scienter, or actual knowledge of wrongdoing or reckless disregard, and violating the Exchange Act.

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

Local 295 IBT Employer Group Pension Trust Fund is represented by Danielle S. Myers and Michael Albert of Robbins Geller Rudman & Dowd LLP and Lawrence F. Stengel of Saxton & Stump LLC.

Lincoln National and the individual defendants are represented by Timothy D. Katsiff of Faegre Drinker Biddle & Reath LLP and Alex G. Roman, Andrew J. Lichtman, Howard S. Suskin and Lillian M.

McGuire of Jenner & Block LLP.

The case is Meade v. Lincoln National Corp. et al., case number 2:24-cv-01704, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Stephen Berg.

LAW360 Insurance Authority

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Mixed Opioid Suit Rulings Complicate Disputes For Coverage

By **Abraham Gross**

Law360 (October 24, 2024, 2:50 PM EDT) -- Litigation against manufacturers and distributors of opioid products for their role in nationwide opioid deaths has pitted policyholders against insurers, and mixed rulings in the last year offer unclear signs of how general liability or specialty line policies will afford coverage.

Several experts told Law360 they were closely watching the ongoing appeal of the Arkansas Walmart case as a potential trendsetter. Both Walmart and the insurers have briefed the appeals court and requested oral arguments in the case. (AP Photo/Cedar Attanasio)

Courts across the country have arrived at different conclusions over the similar question of whether opioid litigation constitutes an occurrence of a covered physical injury or property damage under commercial general liability policies, clouding recovery possibilities under those policies even as policyholders explore other, more limited options.

The case law offers insurers and policyholders some guide to how to navigate coverage disputes and the various aspects of opioid claims that can prove determinative, but with such different outcomes, experts cautioned against drawing a clear inference about how ongoing and new cases will shake out.

"You really have a wildly divergent set of judicial rulings that are more or less looking at the same allegations, more or less the same policy language, and coming to wildly different results," said Matthew

Chiricosta of Calfee Halter & Griswold LLP, who represents policyholders.

Last December brought a high-profile win for policyholders seeking CGL coverage when an Arkansas state court ruled that Walmart was **owed a defense** for government suits because they were initiated "because of" bodily injury, which constituted an occurrence under the policy.

By contrast, an August decision from a Delaware court **denied CVS' request** for general liability coverage for over 200 opioid-related suits that, in the court's view, involved claims of economic harm rather than covered claims of bodily injury or property damage.

The claims share a striking similarity: an opioid distributor seeking coverage for government-led suits under similarly worded CGL policies issued, in part, by AIG. The difference, according to Thomas Breen of Mound Cotton Wollan & Greengrass LLP, who represents carriers, may lie in Walmart's settlement of one suit, which paid governments for opioid treatments.

"There's an undercurrent of thought there that the courts were persuaded by the fact that, yes, these cases do arise 'for' or 'because of bodily injury' because you can see from the settlement that the settlement funds are being used to treat these people," he told Law360.

The Seventh Circuit's 2016 decision in H.D. Smith v. Cincinnati Insurance concluded that coverage **applied to a government suit** against an opioid wholesaler, reasoning that medical expenses incurred by states are covered bodily injuries no different from that of a mother's medical expenses for a drug-using child.

Still, the differing decisions give some instruction as to how different jurisdictions may rule.

The Delaware decision, for example, built off a **January 2022 ruling** from the state's Supreme Court in Ace American Insurance Co. v. Rite Aid , which similarly found that suits brought by three Ohio counties could not constitute claims "because of" bodily injury. Consequently, thousands of lawsuits were dropped or dismissed from CVS' coverage disputes with its insurers.

"Basically in Delaware, it's clear that there is no coverage for the settlements and or defense fees that were incurred by the distributors in connection with the opioid crisis," Breen said.

Similarly, insurer wins at the **Ohio Supreme Court** in 2022 and the **Sixth Circuit above it** in 2023 likely make the possibility of CGL coverage for opioid suits in Ohio an uphill climb.

Other jurisdictions have yet to rule definitively on the core issue. A Ninth Circuit decision in January that **freed insurers** from covering drug distributor McKesson Corp.'s alleged involvement in the opioid crisis **limited its own reach** by leaning on a California state appeals court's unpublished ruling for support.

That decision raised the prospect of courts ruling against coverage on another basis: that certain opioid claims alleged manufacturers or distributors engaged in deliberate conduct that failed to meet the definition of a covered occurrence.

"The carriers are saying we rely on the very, very basic language of our policy that, on the most elementary level, covers property damage and bodily injury resulting from an accidental occurrence," Breen said.

He added that disputes over whether opioid claims constituted an occurrence presented more varied rulings, as companies could argue that they did not foresee all the injuries to individual patients even if they intended to sell or distribute opioids.

Meanwhile, the Eleventh Circuit agreed with a Hartford unit and an Alabama federal judge that opioid drugmaker KVK-Tech Inc. **failed to provide timely notice** of its suits, ending its bid for coverage early.

With diverging court rulings clouding the road to coverage under CGL policies, policyholders are exploring other paths to recovery using professional liability policies that afford directors and officers coverage or errors and omissions coverage.

For policyholder attorney Kristin Davis of Thompson HD, the quest for broader coverage reflects, in part, the diversifying nature of the opioid-related claims and the persons and entities they target.

"This whole kitchen-sink nature of claims that are being thrown at the manufacturing/distributing clients comes with additional policies that are meant to respond to allegations of misconduct in that regard," she said. "As the underlying suits are evolving, the risk is evolving and the type of policy that responds to certain risks changes."

Besides offering an additional avenue of coverage, D&O or E&O policies have the benefit of extending coverage for certain individuals in addition to the company and can often include investigation costs, she noted.

An October 2023 decision by a North Carolina court offered a hopeful sign to policyholders. There, the court allowed a drug wholesaler to tap into its **full $10 million D&O policy** to cover opioid-related public nuisance claims, rejecting the insurer's arguments that a contract exclusion and professional services exclusion applied.

D&O policies, however, offer a limited coverage lifeline.

Calfee Halter's Chiricosta noted that defense costs erode policy limits. For companies facing hundreds or thousands of expensive, complex opioid-related suits, taking that path to coverage could amount to a long walk off a short pier.

"For the big targets in these cases, I'm sure that they're spending those amounts in eye-poppingly quick fashion," he said. "Once you waste away your policy on your defense costs, you're done; you've got no more defense coverage and no dollars left to pay any settlements or judgments."

Still, broader CGL coverage is not a foregone conclusion, despite several high-profile insurer victories.

Several experts told Law360 they were closely watching the ongoing appeal of the Arkansas Walmart case as a potential trendsetter. Both Walmart and the insurers have briefed the appeals court and requested oral arguments in the case.

"I think that could set the stage for the next wave of battles here," Chiricosta said.

As for other policies, Davis of Thompson HD said that insurers were stretching exclusions to apply in ways that weren't originally intended, putting the onus on the insurance industry to create more specific exclusions. It also created opportunities for policyholders.

"It's kind of a round-peg, square-hole situation, and it's in that situation in particular that policyholders are able to find the coverage that they need," she said. "I don't think that we have seen the end of this litigation."

--Additional reporting by Shane Dilworth, Eli Flesch, Daniel Tay, Ganesh Setty, Emily Field, Jennifer Mandato and Travis Bland. Editing by Bruce Goldman.

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Mich. AG Claims Express Scripts, Optum Fueled Opioid Crisis

By **Carolyn Muyskens**

Law360 (October 24, 2024, 10:40 PM EDT) -- The state of Michigan has taken aim at Express Scripts and OptumRx for their role in the opioid crisis in a complaint filed in state court Thursday, the latest state to claim the companies for years boosted sales of opioids by giving them favorable placement on drug lists in exchange for rebates.

Michigan Attorney General Dana Nessel said the companies, two of the nation's largest pharmacy benefit managers, or PBMs, by market share, helped to push addictive pain medications — and failed to change course when the opioid abuse crisis emerged — profiting from their powerful role as "gatekeepers" in the pharmaceutical industry.

"Express Scripts' and Optum's role in stoking the opioid epidemic has been, until recently, largely concealed from public scrutiny. It has now become clear that the PBM defendants have had, for at least the last two decades, a central role in facilitating the oversupply of opioids through conduct that has the intended purpose of ignoring necessary safeguards to increase the prescribing, dispensing and sales of prescription opioids," Nessel said in the 203-page **complaint**.

Pharmacy benefit managers, which act as intermediaries between insurance providers, drug companies and pharmacies, have become **the latest target** in litigation over the opioid epidemic as pharmaceutical companies and pharmacies reach settlements, with bellwether cases against Optum and Express Scripts set to move forward in the opioid crisis multidistrict litigation in Ohio federal court.

Attorneys general in Arkansas, Alaska, Kentucky and Mississippi have also recently filed separate lawsuits against pharmacy benefit managers asserting similar claims that pharmacy benefit managers contributed to a public nuisance by fueling the opioid addiction crisis in those states.

Optum in June **agreed to pay** $20 million to settle U.S. Department of Justice allegations that one of its mail-order pharmacies improperly filled prescriptions in which opioids were prescribed along with certain other drugs, a practice that could indicate the prescriptions were not intended for legitimate medical use, in violation of the Controlled Substances Act.

Michigan's complaint, filed in Wayne County Circuit Court, said PBMs wield outsize influence in what drugs are dispensed because they set formularies, or lists of covered drugs, for insurance companies.

Optum and Express Scripts "encouraged" the easy flow of opioids by placing opioids on preferred drug list tiers and failing to implement restrictions on opioid prescription, despite being aware of the potential for abuse, the state claims.

The pharmacy benefit managers negotiated these favorable placements on national formularies in exchange for rebates and fees from opioid manufacturers, the suit says. In some cases manufacturer rebates were conditioned on PBMs not placing safeguards on opioid dispensing, according to the complaint.

Additionally, Express Scripts and Optum participated in opioid manufacturers' deceptive marketing campaigns aimed at expanding the market for the drugs, the complaint says.

The pharmacy benefit managers "have had a front row seat to the spread of the opioid epidemic, including in Michigan," the state claimed, through the "vast amount of data" PBMs collect, including information about the flow of opioids from pharmacies to individual patients and data from drug manufacturers, prescribing doctors and payers.

As a result of their access to this data, pharmacy benefit managers have been aware for decades about oversupply and abuse of prescription opioids, Michigan's suit says, yet they failed to implement controls that were in their power, such as placing stricter limits on dosage and additional authorization checks that would have made dispensing the drugs more difficult.

"The PBM defendants not only had knowledge of the dangers of opioids, they had the ability and the opportunity to rein in opioid access, but chose not to," Michigan alleged.

Instead, Optum and Express Scripts worked with opioid manufacturers for years to continue to promote opioid sales through preferred placements on formularies, profiting from the opioid market's growth, the state claims.

The attorney general's complaint also targets Optum's and Express Scripts' online pharmacy businesses, which fill prescriptions directly, for allegedly dispensing opioids without proper oversight to prevent diversion of drugs into the illegal market.

"Defendants dispensed and sold far greater quantities of prescription opioids than they knew could be necessary for legitimate medical uses. As a direct result of their conduct, Michigan has experienced a both a flood of prescription opioids available for illicit use or sale and a population of patients physically and psychologically dependent on them," the complaint said.

The attorney general's lawsuit asserts claims of public nuisance, liability under Michigan's Drug Dealer Liability Act and negligence.

"Pharmacies, manufacturers and pharmacy benefit managers have reaped huge profits during the opioid epidemic, lining their pockets at the expense of Michiganders struggling with substance use disorder. I am committed to holding companies accountable for their role in this crisis and ensuring that the well-being of Michigan residents always takes precedence over corporate profits," Nessel said in a statement Thursday.

Express Scripts and Optum did not respond to requests for comment Thursday.

The state is represented by Matthew L. Walker and Scott A. Mertens of the Michigan Department of Attorney General, Russell W. Budd, Christine C. Mansour, Daniel Alberstone, Mark P. Pifko and Catherine Dorsey of Baron & Budd PC, Peter J. Mougey and Jeffrey R. Gaddy of Levin Papantonio Proctor Buchanan O'Brien Barr & Mougey PA, and Anthony J. Majestro of Powell & Majestro PLLC.

Counsel information for Express Scripts and Optum was not immediately available.

The case is Attorney General v. Express Scripts Inc et al., case number 24-015674-NZ, in the State of Michigan Circuit Court for the Third Judicial Circuit.

--Additional reporting by Dan McKay and Hailey Konnath. Editing by Linda Voorhis.

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Meta, TikTok Can't Ditch Schools' Social Media Addiction Suit

By **Lauren Berg**

Law360 (October 24, 2024, 11:52 PM EDT) -- Meta Platforms and other social media giants must face most of the claims brought by school districts and local government entities alleging the companies designed their platforms to addict children, a California federal judge ruled Thursday.

In a mixed 45-page **order**, U.S. District Judge Yvonne Gonzalez Rogers largely denied the motion to dismiss lobbed by Meta's Facebook and Instagram, Google's YouTube, ByteDance's TikTok and Snap Inc., mostly disagreeing with the companies that the alleged injuries of the plaintiffs — referred to in the opinion as simply "school districts" — are too remote or attenuated to seek redress.

"Defendants' conduct is plausibly alleged to have contributed to negative mental health outcomes for students, causing foreseeable resource expenditures by the school districts to combat that alleged public health crisis," the judge said, adding that the companies "have not sustained their burden that the economic loss doctrine bars any of the school district plaintiffs' claims of negligence."

The ruling comes in **multidistrict litigation** comprising hundreds of actions brought by personal injury plaintiffs, school districts and local government entities, and state attorneys general over the allegedly addictive designs of social media. The litigants generally allege that Facebook, Instagram, YouTube, TikTok and Snapchat designed their platforms to foster compulsive use by minors, resulting in a variety of harms to children, local governments and the public health.

The school districts and other plaintiffs defended their claims during **oral argument** this summer, with Judge Gonzalez Rogers appearing skeptical of some of the social media companies' arguments.

In her order Thursday, the judge allowed most of the school districts' claims to forge ahead.

Some of the school districts' negligence and public nuisance claims related to certain platform features are limited by Section 230 of the Communications Act, which shields internet service providers from liability for third-party content, as well as the First Amendment, according to the order, which incorporates the judge's near-identical findings related to personal injury plaintiffs' claims.

Allegations related to features that are barred by Section 230 include not providing a beginning and end to a user's "feed;" use of algorithms to promote addictive engagement; the timing of notifications of third-party content in a way that promotes addiction; and failing to institute blocks to use during certain times of the day, such as during school hours, Judge Gonzalez Rogers determined.

But allegations related to features not barred by Section 230 or the First Amendment include failure to implement age verification processes; failure to implement effective parental controls and notifications; failure to enable default protective limits to the length and frequency of use; and creating barriers that make it harder for users to deactivate their accounts, according to the order.

The judge also declined to hold at this stage of the case that Section 230 "bars liability predicated on a failure to warn of known risks of addiction attendant to any platform features or as to platform construction in general," the order states.

Judge Gonzalez Rogers also rejected the defendants' argument that the school districts' claims are barred by the "derivative injury rule," which holds that claims derivative of third-party harms are not cognizable, according to the order. Put another way, if the rule applied, the school districts could not recover for indirect damages based on students' or residents' injuries.

At this stage of the case, such questions are fact-intensive and cannot be disposed of on a motion to dismiss, the judge said.

The school districts have alleged injuries of increased financial resources to address the disruptive forces of social media in school, hiring mental health personnel and developing mental health resources, and implementing resources to limit access to social media platforms, among other alleged injuries.

"In this court's view, the school districts' alleged injuries are 'distinct' from harms allegedly suffered by students in their respective school districts (including any personal injury plaintiff residing in a suing district)," the order states.

"Defendants notably do not argue that minor students bear the cost of increased expenditures for healthcare resources at their schools," it added. "That the school districts suffer a corollary impact does not render their injuries 'derivative.'"

Judge Gonzalez Rogers further found that the school districts have sufficiently alleged that the companies "proximately caused resource expenditures related to defendants' conduct fostering compulsive use in minors," such as providing mental health resources.

"This core theory of injury focuses on the impact of compulsive use itself, irrespective of third-party content, defendants' protected publishing activity and defendants' protected first-party speech," the judge said.

The judge did find that the school districts have not adequately alleged the defendants "proximately caused third-party harms flowing from physical property damages, crimes, or threats transmitted on defendants' social media platforms," according to the order. But she said those allegations are not barred to the extent that the companies "promoted, developed or participated in a foreseeably dangerous challenge, beyond the algorithmic publication, curation, or amplification of that third-party challenge."

Judge Gonzalez Rogers also found that the school districts have adequately alleged the defendants' breach of a duty of care.

The first bellwether trials in the MDL are **set for October 2025**.

Lexi Hazam of Lieff Cabraser Heimann & Bernstein LLP and Previn Warren of Motley Rice LLC, lead plaintiffs' counsel in the litigation, applauded the ruling, saying in a statement Thursday that it's a "significant victory for schools, teachers and administrators who are on the front lines of the nation's youth mental health crisis."

"Because of the addictive design of Instagram, Snapchat, TikTok and YouTube, students are struggling," the attorneys said. "That means schools are struggling — their budgets are stretched and their educational missions are diverted — as they shoulder the added responsibility of supporting kids in crisis."

"As we proceed in this case, we will continue to reveal how these defendants designed their platforms in ways they knew would interfere with the health of young people," they added.

Michael Weinkowitz of Levin Sedran & Berman LLP, plaintiffs local government entity co-chair and member of the plaintiff leadership committee, told Law360 on Thursday, "The school districts are pleased with this outcome and are prepared to move forward confidently toward trial."

Counsel for the defendants did not immediately respond to requests for comment late Thursday.

The plaintiffs are represented by Lexi J. Hazam of Lieff Cabraser Heimann & Bernstein LLP, Previn Warren of Motley Rice LLC, Michael Weinkowitz of Levin Sedran & Berman LLP and Melissa L. Yeates of Kessler Topaz Meltzer & Check LLP.

The Meta defendants are represented by Ashley M. Simonsen, Phyllis A. Jones and Paul W. Schmidt of Covington & Burling LLP.

ByteDance and TikTok are represented by Andrea Roberts Pierson and Amy R. Fiterman of Faegre Drinker Biddle & Reath LLP and Geoffrey Drake and David Mattern of King & Spalding LLP.

Snap is represented by Jonathan H. Blavin, Rose L. Ehler, Victoria A. Degtyareva, Laura M. Lopez, Ariel T. Teshuva and Lauren A. Bell of Munger Tolles & Olson LLP.

Google and YouTube are represented by John H. Beisner, Nina R. Rose, Jessica Davidson, Jason David Russell, Laura Bernescu and Catherine Mullaley of Skadden Arps Slate Meagher & Flom LLP, Brian M. Willen, Lauren Gallo White, Samantha A. Machock, Christopher Chiou and Matthew K. Donohue of Wilson Sonsini Goodrich & Rosati PC, Joseph G. Petrosinelli, Ashley W. Hardin, J. Andrew Keyes, Annie Showalter and Chaloea Williams of Williams & Connolly LLP and Yardena R. Zwang-Weissman, Brian Ercole and Stephanie Schuster of Morgan Lewis & Bockius LLP.

The case is In Re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, case number 4:22-md-03047, in the U.S. District Court for the Northern District of California.

--Additional reporting by Hailey Konnath and Dorothy Atkins. Editing by Jay Jackson Jr.

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Truth Social SPAC Founder Wants $1M Award For Payout Suit

By **Katryna Perera**

Law360 (October 24, 2024, 10:40 PM EDT) -- The investment sponsor of the special purpose acquisition company, or SPAC, that took former President Donald Trump's Truth Social media company public has asked for a $1 million fee award for driving the Delaware Chancery Court litigation over the Trump camp's attempts to slash a SPAC deal stock conversion ratio that would have cost some preferred investors millions.

ARC Global Investments II LLC **told the court** Wednesday that its efforts helped save the $6 billion deal with Digital World Acquisition Corp., now known as successor Trump Media Technologies Corp., and secured a larger share for preferred stock investors after spending nearly $2.3 million on the case.

Vice Chancellor Lori W. Will **ruled in September** following a one-day trial that Digital World breached its contract with ARC by diluting its equity from the deal with an improper conversion rate for the SPAC investment sponsor's shares.

The vice chancellor ruled that Digital World's certificate of incorporation set a conversion rate of 1.49-to-1 when determining how many of ARC's Class B shares should convert to Class A shares of Trump Media upon the closing of Digital World's acquisition of Trump Media in March.

However, the ratio Vice Chancellor Will decided upon was less than the 1.82-1 ratio sought by ARC, but greater than the 1.35-1 ratio that Digital World said was appropriate. The ratio was not an even 1-to-1 given that Digital World issued additional Class A shares following its 2021 initial public offering, which triggered certain antidilution protections for prior investors.

Earlier this month, Trump Media said it released 785,825 of its common shares from escrow to ARC. The release of the shares was worth more than $12.7 million based on closing prices at the time.

Now, ARC argues that it should get a $1 million fee award since it "took all the risk and paid the entire bill," for the benefit of shareholders.

The investment sponsor says that without its lawsuit, the business combination would not and could not have closed properly, and the litigation preserved Class B shareholders' ability to vote on the merger.

"Had [Digital World] closed without the vote of a majority of the Class B stock voting in favor, [Trump Media] would now be a publicly traded entity that was the product of a deficient business combination and subject to recission," the motion states. "More likely, without ARC's vote, the business combination could not have closed and [Digital World] could have disappeared."

ARC also said it believes the conversion ratio would have been set at 0-to-1 if not for its efforts to "police" Digital World.

Additionally, ARC says its $1 million request is appropriate and reasonable based on the "complex and expedited nature" of the action.

The dispute over the plan to take Trump's Truth Social platform public landed in the Chancery Court in February when investors on both sides of the deal filed complaints alleging they would be shortchanged by tens of millions of dollars in the transaction. The go-public deal closed in March, and at the time was valued north of $10 billion, but that value has dropped by billions since then as the stock in the venture has fallen.

Separately, Trump Media announced earlier this month that its chief operating officer, Andrew Northwall, had **resigned**. Trump Media did not disclose a reason for Northwall's resignation, saying it "plans to transition his duties immediately."

In a statement posted on Truth Social, Northwall said it was his decision to resign and that working for Trump Media was among the "most rewarding experiences" of his career.

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

ARC is represented by Matthew D. Perri, Daniel E. Kaprow, Elizabeth J. Freud, Alfred P. Dillione, and Rae Ra of Richards Layton & Finger PA.

Digital World and its members are represented by Bradley J. Bondi, D. Scott Carlton and Nicholas Griepsma of Paul Hastings LLP and Kevin M. Coen and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP.

The case is ARC Global Investments II LLC v. Digital World Acquisition Corp. et al., case number 2024-0186, in the Court of Chancery of the State of Delaware.

--Additional reporting by Tom Zanki. Editing by Andrew Cohen.
