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<https://www.wsj.com/finance/regulation/audit-reports-matter-after-all-appeals-court-says-4920235f>

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Audit Reports Matter After All, Appeals Court Says

Decision reverses earlier ruling that spurred debate about the reports

By [Jonathan Weil](#) [Follow](#)

Updated Oct. 31, 2024 4:31 pm ET



The case involves audit work performed by accounting firm BDO. PHOTO: TYRONE SIU/REUTERS

A federal appeals court has changed its mind and decided that accounting firms' audit reports really do matter to investors after all.

In a case brought by investors against the accounting firm BDO, the Second U.S. Circuit Court of Appeals on Thursday released an amended version of an opinion it originally decided in August 2023. Back then, the court ruled in favor of BDO in a shareholder lawsuit over its audit work for the insurance company AmTrust Financial Services.

In explaining its reasoning at the time, the court said the firm's audit report was so general that an investor wouldn't have relied on it. Consequently, the court

said the audit report wasn't material—meaning it didn't matter—and upheld the dismissal of fraud claims against BDO.

After the ruling, a trio of former Securities and Exchange Commission officials filed a brief with the court asking it to reconsider the decision. The court then asked the SEC to submit a brief expressing its views on the subject. The SEC did so and it, too, asked the court to reconsider, writing in a brief last February that “audit certifications convey crucial information to the investing public” and “audit certifications are not too general to be material.”

The appeals court on Thursday reissued its decision with amendments and ruled the investors' claims against BDO could proceed. “Although the challenged audit certification reflects standardized language, it is not so general that a reasonable investor would not depend on it as a guarantee,” the court's amended opinion said.

BDO in a statement said the firm continues to believe the original decision was correct and that “we are in the process of evaluating the path to seek reconsideration of the decision.”

Samuel Rudman, a lawyer for the plaintiffs in the case, called the amended ruling “a sentinel decision for investor protection” and said: “The message here is simple, but increasingly important—auditors need to do their jobs and will be held accountable to investors when they don't.”

The appeals court's original ruling last year prompted new debate within the accounting profession and among investors about whether audit reports serve a useful purpose. Audit reports operate on a pass-fail model, and their language is standardized.

Nonetheless, investors still pay attention to what auditors say. This week, shares of Super Micro Computer plunged after the server maker disclosed that Ernst & Young had resigned as its outside auditor and told the company in its resignation letter that it no longer could rely on management's representations.

The SEC in a 2018 order had accused three BDO accountants of signing off on their audit work for AmTrust's 2013 annual report without completing all the required audit procedures beforehand. They agreed to be suspended from

auditing public companies, without admitting or denying the agency's misconduct claims. The SEC didn't allege any violations by BDO.

AmTrust in 2017 restated five years of earnings downward, and its shares are no longer publicly traded. In 2020, the company and its former chief financial officer settled SEC fraud claims covering several years and were fined, without admitting or denying the allegations.

Write to Jonathan Weil at jonathan.weil@wsj.com

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Shareholder Charge of Shoddy BDO Audit of AmTrust Revived (1)

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BDO USA P.C. acted recklessly in its audit of insurer AmTrust Financial Services Inc. and must face a shareholder class action over the company's accounting errors, a panel of Second Circuit judges said Thursday.

The Manhattan-based appeals panel revised its 2023 decision that had dismissed the investor challenge against the auditor. In their amended ruling, judges for the US Court of Appeals for the Second Circuit deemed that BDO issued a "false certification" that its work for AmTrust met basic US audit standards. The judges also found that "misstatements" in the firm's audit opinion were significant, or material, to investors.

The appeals panel ordered the case sent back to the Manhattan federal district court and re-affirmed that it would reinstate certain claims against AmTrust, its officers, and directors plus underwriters including Citigroup Global Markets Inc and Morgan Stanley & Co. LLC.

"Appellants do not rely on mere accounting irregularities or BDO's failure to identify problems with AmTrust's accounting practices. Rather, they allege that BDO consciously covered up its own misrepresentation that its audit complied with PCAOB standards," the order said, referring to the Public Company Accounting Oversight Board, the US audit regulator.

Investors adequately argued that "BDO acted recklessly in conducting the audit," according to the judges' order. "The allegations support a strong inference of fraudulent intent," the order stated.

The panel pointed to allegations from investors that BDO didn't complete its work before signing off on AmTrust's financial statements, finding that the auditor didn't conduct a "meaningful" inquiry.

BDO is reviewing its options "to seek reconsideration of the decision to reinstate" a single claim, the firm said in a statement, arguing the panel correctly dismissed all claims against the auditor in its original order.

Lawyers representing AmTrust did not respond to requests for comment.

"Time after time, we've seen public companies collapse shortly after receiving clean audit opinions, and the investors end up crushed," Samuel Rudman, partner at Robbins Geller Rudman & Dowd LLP, lead counsel for investors, said in a statement. "The message here is simple, but increasingly important—auditors need to do their jobs and will be accountable to investors when they don't."

The Securities and Exchange Commission and other stakeholders had urged the appeals court to reconsider its previous decision upholding the lower court's ruling to dismiss the case. The appeals panel initially agreed to dismiss claims against BDO, finding that shareholders had failed to link the auditor's statements with the errors in AmTrust's public filings.

US audit reports rely on a standard pass-fail model to inform investors whether they can rely on a company's financial statements. The SEC argued the standardized report is not flawed and asked the court to reassess whether shareholders consider the audit opinion as material information that could sway their investing decisions.

Investors sued both AmTrust and its auditor for losses stemming from financial accounting errors reported in 2017.

The top-10 accounting firm said that it has launched a multiyear shake-up of its audit practice as it works to repair an inspections track record that lags its peers.

The case is *New England Carpenters Guaranteed Annuity and Pension Funds v. AmTrust Financial Services, Inc* , 2d Cir. App., 20 1643-cv, 10/31/24 .

(Adds BDO statement in paragraph seven.)

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...

Hey this is a rehearing opinion where CA2 agrees audit opinions are material after all, despite their generic language.

I blogged about the case here:

WSJ Business News @WSJbusiness · 23h

An appeals court on Thursday ruled that investors' claims against BDO could proceed on.[wsj.com/4e7K7AD](https://www.wsj.com/4e7K7AD)

11:59 AM · Oct 31, 2024 · 539 Views



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315



Cannabis Company Tilray Sued Over Vote to Increase Share Limit

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Class Action

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-1124

Tilray Brands Inc. is trying to trick investors for a second straight year into increasing its share limit, according to a lawsuit against the Canadian cannabis company.

The complaint, filed Thursday, says Tilray is trying to woo shareholders by again making misleading statements about how its corporate charter calls for their votes to be counted. The company raised the limit in 2023 after improperly requiring only a majority of votes cast—rather than a majority of shares outstanding—to approve the proposal, the suit says.

Judicial intervention is needed “to compel corrective disclosures and ultimately keep the board from compromising Tilray’s capital structure” after “a defective vote predicated upon materially false disclosures,” according to the proposed shareholder class action filed in Delaware’s Chancery Court.

Ontario-based Tilray didn’t immediately respond to a request for comment Friday. In addition to operating the largest US cannabis business by annual revenue, the company owns a portfolio of consumer brands including craft breweries, distilleries, and hemp-based foods.

The dispute stems from statutory changes Delaware lawmakers adopted in 2023 altering the default tabulation standard for stockholder votes. The amended law says companies can count a simple majority of votes cast “unless otherwise expressly required by the certificate of incorporation.”

But Tilray’s charter does in fact specify the old default standard requiring a majority of shares outstanding to pass corporate proposals, according to the court complaint. That means the company is once again trying to raise its share limit based on inaccurate disclosures, the lawsuit says.

It seeks an order rescinding the 2023 share increase—pending a new, properly structured vote to ratify it—and preemptively invalidating any share increase approved at the upcoming Nov. 21 company meeting until Tilray makes corrective disclosures. A declaration to that effect “is necessary to safeguard the stockholder franchise,” the suit says.

The investor leading the lawsuit, Nabil Salama, is represented by Ashby & Geddes PA, Fields Kupka & Shukurov LLP, and Kaskela Law LLC. Tilray hasn't yet made a court appearance.

The case is Salama v. Simon , Del. Ch., No. 2024-1124, complaint filed 10/31/24 .

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iRhythm Leaders Concealed Heart Monitor Deficiencies, Suit Says

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Class Action

A printout from an EKG heart monitor.

Daniel Acker/Bloomberg via Getty Images

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. 3:24-cv-07560

iRhythm Technologies Inc. directors and executives harmed the medical device company by concealing shortcomings in its heart monitor's performance, including transmission issues that led to two deaths, an investor alleges.

The board members and officers failed to disclose that the wearable Zio AT device for diagnosing and monitoring cardiac arrhythmias wasn't capable of real-time, continuous transmission to doctors; wasn't suitable for high-risk patients; required registration by the patient before beginning transmission; and capped data transmission after a certain number of arrhythmias, Jennifer Purcell-Jones says.

She filed her derivative suit on behalf of iRhythm on Thursday in the US District Court for the Northern District of California.

Many of the defendants sold stock while the share price was artificially inflated, collecting about \$12 million in profits from insider trading, she says.

The company was harmed in several ways, Purcell-Jones says: it was subjected to regulatory scrutiny and a would-be securities class action, and suffered damage to its corporate image and an increased cost of capital.

iRhythm has been sued by investors before. The Northern District of California dismissed a proposed securities class action over Medicare reimbursements in 2022, and an appeal by an investor in the suit who didn't become lead plaintiff was thrown out for lack of standing.

Purcell-Jones brings claims for proxy misstatements, breach of fiduciary duties, unjust enrichment, abuse of control, and waste of corporate assets. She seeks compensatory and punitive damages, as well as a constructive trust on the defendants' "profits and special benefits and unjust enrichment."

iRhythm didn't immediately respond to an emailed request for comment on behalf of itself and the individual defendants.

Wolf Haldenstein AdlerFreeman & Herz LLP represents Purcell-Jones.

The case is Purcell-Jones v. Blackford , N.D. Cal., No. 3:24-cv-07560, complaint 10/31/24 .

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Instructure's \$4.8 Billion KKR Sale Draws Suit Seeking Deal Info

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1122](#)

Bloomberg Law News 2024-11-01T09:56:04795190414-04:00

Instructure's \$4.8 Billion KKR Sale Draws Suit Seeking Deal Info

By Mike Leonard 2024-10-31T13:19:51000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-1122

Thoma Bravo LLC had self-dealing reasons for steering Instructure Holdings Inc. toward a \$4.8 billion bid from KKR & Co. rather than a more lucrative sale to Francisco Partners Management LP, according to a shareholder lawsuit.

A pension fund is suing Instructure over the transaction, seeking corporate files to investigate allegations that the deal prioritized Thoma Bravo's exit window ahead of the interest of public investors in maximizing the sale price. The private equity giant owned roughly 83% of the education technology business when it engineered the acquisition, according to Thursday's filing in Delaware's Chancery Court.

"Rather than maximizing value for minority stockholders by promoting competition between bidders, Thoma Bravo instead" opted to "cut KKR's only active rival out of the picture entirely," the suit says.

Instructure and Thoma Bravo, which isn't named as a defendant, didn't immediately respond to requests for comment Thursday. KKR also isn't named as a defendant. The deal is allegedly expected to close this year.

According to the lawsuit, Thoma Bravo was driven to orchestrate the deal as it neared the end of its five-year investment horizon after taking Instructure public in 2021. The company, founded in 2008, had its first public listing in 2015 before Thoma Bravo bought it out for \$2 billion in 2020.



Despite slightly selling down the 88% stake it held immediately after the 2021 initial public offering, Thoma Bravo still owned more than 83% and controlled seven seats on the company's eight-member board, the suit says. After several unspecified suitors expressed interest in a potential acquisition, most allegedly withdrew over price concerns, leaving only Francisco Partners and KKR.

'Barely Blinked'

Francisco Partners then indicated its proposal would likely come in low too, leading Instructure's directors to exclude it from the sale process going forward, according to the shareholder complaint. But when KKR followed suit and lowered its own offer, Thoma Bravo and the board allegedly rushed to finalize a deal on those terms.

"Earlier in July, the mere possibility that Francisco Partners might have to lower its bid was reason enough for the board to cut Francisco Partners out," the lawsuit says. "But now, Thoma Bravo and the board barely blinked at KKR's lowered offer: It took only two days for Thoma Bravo to receive, negotiate, and unilaterally approve KKR's lowered bid."

The court filing is light on details about the potential conflicts that allegedly motivated Thoma Bravo, beyond its "much closer relationship with KKR" than with the smaller Francisco Partners.

The suit seeks internal documents from Instructure under a law giving investors broad access to corporate records if they have credible but preliminary suspicions of wrongdoing. Records cases often reflect an attempt to drum up fiduciary breach claims for future litigation.

The pension fund, the Genesee County Employees' Retirement System, is represented by Grant & Eisenhofer PA. Instructure hasn't yet made a court appearance.

The case is Genesee Cty. Emp. Ret. Sys. v. Instructure Holdings Inc. , Del. Ch., No. 2024-1122, complaint filed 10/31/24 .

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Warner Bros. Discovery's Class Action Win Upheld on Appeal (1)

By Ben Miller 2024-11-01T11:16:01000-04:00

- Ruling affirms companies didn't mislead investors pre-merger
- Investors had alleged stock drops were linked to misstatements

Warner Bros. Discovery Inc. and its top executives prevailed again on appeal in a securities lawsuit, after a panel of Second Circuit judges ruled Friday that investors couldn't show the entertainment giant misled them in disclosures before its merger took place.

The offering documents for the tie-up between Warner Bros. and Discovery allegedly left out key details about subscriber numbers, third-party licensing, and content release strategy, but those claims aren't sufficient to show "actionable omissions" in disclosures, the unsigned opinion said.

Investors had alleged that both Discovery and WarnerMedia stated they had scrutinized each other's investment plans and nonpublic financial information, but that the subsequent shuttering of news streaming service CNN+ and revelation of lower HBO Max and Discovery subscriber numbers, among other revelations, prompted three stock drops after the merger took place.

Warner Bros. Discovery's stock price fell more than 16% to close at \$14.59 on Aug. 5, 2022. That was the company's biggest single-day decline since the merger, according to data compiled by Bloomberg Law.

The Second Circuit upheld the February ruling [dismissing](#) the case by Judge Valerie E. Caproni in US District Court for the Southern District of New York.

"Appellants assign great weight to the fact that, after the merger, WBD adopted a new methodology for counting subscribers," the appeal panel said in its order. "But such a change of methodology after the merger does not render the pre-merger subscription numbers false or misleading."

The proposed class action was led by Ohio public pension funds, and its case was tossed for failure to state a fraud claim under the Securities Act, which the appeal panel affirmed on Friday, citing a

prior Second Circuit ruling that a corporation isn't required to disclose certain facts in offering documents just because investors would prefer to know those facts.

Judges Dennis Jacobs, Sarah A. L. Merriam, and John P. Cronan, sitting by designation from the Southern District of New York, sat on the panel.

Warner Bros. Discovery and its attorney didn't immediately respond to a request for comment.

Boyden Gray PLLC represents the investor appellants and didn't immediately respond to a request for comment.

Weil, Gotshal & Manges LLP represents the company, CEO David Zaslav, and CFO Gunnar Wiedenfels. Paul, Weiss, Rifkind, Wharton & Garrison LLP represents major discovery stockholder Advance/Newhouse Partnership and its individual affiliates, and didn't immediately respond to a request for comment.

The case is [Ohio Pub. Emps. Ret. Sys. v. Discovery Inc.](#) , 2d Cir., No. 24-646, 11/1/24 .

(Updated with additional reporting throughout.)

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Musk \$56 Billion Pay Case Final Ruling Expected by End of Year

By Mike Leonard 2024-11-01T09:17:50000-04:00

- Judge weighing \$7 billion fee request, Musk's do-over bid
- Delaware court watchers had hoped for decision by Oct. 31

A final ruling in the landmark litigation challenging [Elon Musk's](#) \$56 billion pay package, which a judge voided in January, will come by the end of the year, according to a filing by the judge.

Delaware Chancellor [Kathaleen St. J. McCormick](#) acknowledged in [a letter](#) to both sides late Thursday that a decision on the case's remaining issues is taking longer than she'd hoped.

McCormick, chief judge of the state's elite business court, is weighing a request by the prevailing lawyers [for \\$7 billion](#) in legal fees and Musk's bid [to restore the compensation deal](#) after Tesla shareholders voted to re-approve it.

Read More: [Musk's \\$56 Billion Pay Gambit Risks Endless Corporate Do-Overs](#)

"Sometimes, decisions require more time to prepare," the judge said. "In the interest of transparency, I write to inform you that I am to issue that decision before the end of this year."

Her [blockbuster ruling](#) striking down the record compensation deal set the tone for a year that has [stress-tested Delaware's long-cherished status](#) as America's corporate capital. The decision inspired a barrage of attacks by Musk, who has one of the world's largest megaphones, and turbocharged efforts by states such as Texas and Nevada that are trying to lure companies away with business-friendly reputations.

The attorneys who brought the lawsuit on behalf of an individual investor followed up their win by asking to be paid with roughly 29 million Tesla Inc. shares valued at more than \$7 billion—a request that drew worldwide attention, outraging the legions of retail shareholders with a worshipful view of their CEO.

Meanwhile, Musk proposed at the company's June meeting to move it to Texas and "ratify" the invalidated pay package, measures that easily sailed through an investor vote. He then filed an unprecedented motion seeking, effectively, to overturn McCormick's decision at the shareholder ballot.

Read More: [Rule of Law Isn't a Recommendation, for Elon Musk or Anyone Else](#)

Court watchers had been anticipating a ruling soon thanks to a Delaware Chancery Court policy of issuing opinions "by the end of the month in which the 90-day period following final submission expires," a guideline that pointed to a decision by Oct. 31. But the deadline is a soft one, and it's not rare for Delaware's overworked judges to miss it, especially in complex disputes.

Musk and the board are represented by Ross Aronstam & Moritz LLP, Quinn Emanuel Urquhart & Sullivan LLP, and Cravath, Swaine & Moore LLP. Tesla is represented by Morris, Nichols, Arsht & Tunnell LLP, Richards, Layton & Finger PA, and Sullivan & Cromwell LLP. The investor who led the case is represented by Bernstein Litowitz Berger & Grossmann LLP, Andrews & Springer LLC, and Friedman Oster & Tejtell PLLC.

The case is [Tornetta v. Musk](#), Del. Ch., No. 2018-0408, letter to counsel 10/31/24 .

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Renovaro Directors Get Shareholders' Corporate Waste Suit Tossed

By Ben Miller

- Investors didn't properly show 'demand futility,' judge says
- Suit alleged breaches related to AI health tech firm buyout

Bloomberg Law News 2024-11-01T09:57:08321183924-04:00

Renovaro Directors Get Shareholders' Corporate Waste Suit Tossed

By Ben Miller 2024-10-31T14:26:00000-04:00

- Investors didn't properly show 'demand futility,' judge says
- Suit alleged breaches related to AI health tech firm buyout

Renovaro Biosciences Inc. board members prevailed against a shareholder derivative suit after a judge ruled that the investors had made a formal demand to the board for corrective action before bringing the case in a California federal court.

The suit failed to show that the board acted with gross negligence in refusing the shareholder demand, meaning the demand itself and a demand futility plea are mutually exclusive in this case, Judge Hernán D. Vera of the US District Court for the Central District of California said in an order docketed Wednesday.

Shareholders who brought the suit in January alleged the biotech directors violated securities law, breached their duties, and wasted corporate assets when acquiring GEDi Cube Intl. Ltd., an artificial intelligence health tech company.

An amended complaint filed in June alleges the Renovaro board deprived shareholders of key information about the acquisition before a special meeting. The investors had sought a restraining order to require the directors to fix deficient disclosures so they could make an informed shareholder vote.

That restraining order was denied and the acquisition closed in February, resulting in GEDi Cube shareholders owning approximately 49% of Renovaro and all preclosing shareholders being diluted by nearly half, according to the amended complaint.

In a letter to Renovaro's board a week before the litigation began, the investors attached an already-drafted version of the district court complaint, and demanded that the company take steps to address alleged misconduct and corporate wrongdoing.

The letter is a presuit demand, and shareholders failed to show that the board's pending investigation amounts to negligence, Vera said in the ruling.

Vera granted the motion to dismiss without a chance to amend the complaint, since plaintiffs already had one prior chance to do so.

Summa LLP represents the investor plaintiffs, and didn't immediately respond to a request for comment.

Vedder Price represents the defendants. The company and the directors' attorneys didn't immediately respond to a request for comment.

The case is *Weird Sci. LLC v. Sindlev*, C.D. Cal., No. 2:24-cv-00645, 10/30/24 .

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Litigators of the Week: An Early Knockout Win in the Decongestant MDL

 [law.com/litigationdaily/2024/11/01/litigators-of-the-week-an-early-knockout-win-in-the-decongestant-mdl](https://www.law.com/litigationdaily/2024/11/01/litigators-of-the-week-an-early-knockout-win-in-the-decongestant-mdl)

Ross Todd



After an FDA advisory committee found last year that scientific data did not support the use of phenylephrine as a decongestant, makers of over-the-counter cough and cold medicines were hit with more than 100 class actions.

Our Litigators of the Week are **Andrew Soukup** of **Covington & Burling** and **Jay Lefkowitz** of **Kirkland & Ellis**, who scored a key, early victory for the defendants in those cases. With Soukup and Lefkowitz arguing for all defendants, U.S. District Judge Brian Cogan in Brooklyn, who is overseeing the decongestant multidistrict litigation, granted their motion to dismiss a "skinny" complaint focusing on claims brought under New York state law claims and the U.S. Racketeer Influenced and Corrupt Organizations Act. Cogan found the state law claims concerning the effectiveness of the decongestants were preempted by federal law, an issue that Soukup focused on during oral argument. Cogan further found the plaintiffs were indirect purchasers who lacked standing to pursue RICO claims, an issue that Lefkowitz had argued.

Litigation Daily: How would you describe what was at stake for your clients?

Andrew Soukup: We are proud to represent The Procter & Gamble Co., which sells DayQuil and NyQuil cough and cold medicine. One of the active ingredients in this medicine is phenylephrine, which for decades has been approved by the FDA as an over-the-counter treatment for nasal congestion. In September 2023, an FDA advisory committee voted that oral phenylephrine is ineffective—a vote that is not binding on the FDA, and on which the FDA has not acted—and that vote touched off a flood of nearly 100 class-action lawsuits seeking economic damages against the entire industry.

This case is not just about whether a particular medicine works or not. Rather, it is about whether plaintiffs can use class-action litigation to challenge a federal agency's long-standing judgment about when medicine is effective and what information must be provided to consumers about that medicine. If manufacturers could not rely on the FDA's judgments on these issues, the uniform federal regulatory regime governing over-the-counter drugs

created by Congress would be thrown into disarray. Congress passed a law giving the FDA the exclusive authority to make these determinations, and we are grateful that the Court enforced that provision here.

Jay Lefkowitz: Phenylephrine (or PE) is an ingredient that has been safely used in cold and cough medications for decades, and this litigation challenged the marketing and sale of PE-containing products that our client, Haleon, had been selling with FDA's blessing for many years. The stakes were high for Haleon and all of the defendants in this MDL, as they faced dozens of class action complaints trying to litigate the labeling and efficacy of these products and insisting on getting all the money that they paid for these products back. Of course, the court recognized that the FDA is the ultimate arbiter of which over-the-counter drug products can be sold and how they must be labeled and there is no basis under the FDA regulations for those judgments to be challenged by the plaintiffs.

Who was part of the broader defense team and how have the defendants been coordinating the efforts?

Soukup: In large, industry-wide MDLs like this one, defendants often closely collaborate on areas that are of joint interest to them, and this case was no exception. This case benefited from the tremendous thinking and teamwork of many excellent defense counsel, including Jay and **Robyn Bladow** and the rest of the Kirkland team, **Hannah Chanoine** and **Amy Laurendeau** (**O'Melveny & Myers**, who represented Johnson & Johnson Consumer Inc.), **Lauren Colton** and **James Bernard** (**Hogan Lovells**, who represented RB Health), **Chris Campbell**, **Christopher Young** and **Cara Edwards** (**DLA Piper**, who represented Bayer HealthCare), and **Sara Thompson**, **Mark Lesko** and **Nilda Isidro** (**Greenberg Traurig**, who represented CVS, Target, Walgreens and Walmart). This was among the most collegial and collaborative joint defense groups that I have had the privilege of being a part of.

Lefkowitz: I am proud to have been part of a tremendous team effort by a very strong joint defense group in this MDL, where every firm attended regular meetings and offered critical input on our defense every step of the way. We were all focused on presenting the strongest defense possible, and we worked collaboratively to achieve that goal. There were no egos and little to no disagreement on strategy. Robyn Bladow and I led our Kirkland team, working closely with Andrew Soukup and the Covington team, as well as the entire joint defense group, including all the folks Andrew mentioned, each of whom contributed to this outcome. This truly was a team effort.

Here you were taking aim at what the court called "the skinny complaint." For lawyers who might not be conversant in the MDL process, can you give a quick summary of what that means?

Lefkowitz: The MDL consolidated almost 100 lawsuits, and the complaints in those lawsuits asserted various claims under different states' laws. Once we were in the MDL court before Judge Cogan, the joint defense previewed that we would be raising preemption as a threshold basis to dispose of every complaint in the MDL. To proceed efficiently, the parties agreed that the plaintiffs could file a "skinny" (or streamlined) complaint on behalf of a limited set of plaintiffs asserting certain state law claims, and that the defendants could move to dismiss that streamlined complaint on preemption grounds, reserving all other defenses in the event the complaint survived the preemption challenge. Plaintiffs then added a RICO claim to their streamlined complaint, and defendants raised threshold standing and preclusion arguments supporting dismissal of the RICO claim as well. The parties agreed that the court's decision on those threshold preemption and RICO arguments directed at the streamlined complaint would then apply to all actions in the MDL. In other words, if defendants were to win the motion, the MDL in its entirety would be dismissed.

How did the team divide the work on briefing the motion to dismiss?

Soukup: Our Covington team—which included **Laura Flahive Wu, Cort Lannin, Dillon Grimm, Amy Health, Jeff Huberman** and **Ethan Treacy**—and the Kirkland team—which included, in addition to Jay, Robyn Bladow, **Jacob Rae, Cole Carter** and **Joey Resnick**—worked together on the initial drafts. We also benefited from the excellent input and suggestions from the entire joint defense group, including very sophisticated in-house counsel.

Lefkowitz: While Kirkland and Covington took the lead on the motion to dismiss briefing, every joint defense firm added great value to the arguments and was directly involved in the editing process. It was really a tremendous group effort that resulted in great work product and a great outcome for our clients.

In a large multi-defendant case such as this one, how do you decide who is going to handle oral arguments? And how did you prepare for them?

Soukup: Ultimately, our clients determine who they think will be the right fit to handle a particular hearing. This group featured an all-star assortment of lawyers, all of whom would have done an excellent job, and Jay and I were honored that we were tapped to represent all the defendants at the hearing.

To prepare for this argument, I followed my typical approach: I spent a lot of time reading the briefs and authorities cited by the parties, and then brainstorming issues that might come up or questions that the court might ask. From there, I worked with the Covington team to come up with short and effective responses to the trickiest issues that could have come up. We then tested and discussed those themes with the broader joint defense group, which had additional good and helpful suggestions. The final product was a true team effort.

Lefkowitz: Several members of the joint defense group handled various hearings in this litigation, and Kirkland and Covington took the lead on this one primarily because we had taken the lead on the briefing. As for who argued which issues, although I am usually the preemption guy, here the argument before Judge Cogan came on the heels of Andrew's recent preemption argument in C.D. Cal. in another case he and I are both involved in and just a few weeks after Cole Carter and I won a Sixth Circuit case on the same RICO standing issue in this case. So that offered a natural split of responsibility here. In terms of argument preparation, it was a full-court joint defense group effort. We worked closely on strategy, shared ideas and participated in moot courts as we prepared for oral argument.

The plaintiffs brought their lawsuits after an FDA advisory committee found last year that the decongestants weren't effective at treating congestion, but the FDA hasn't changed its official position. Was this key to your defense?

Soukup: No. Our clients have remained consistent: they sell FDA-approved medicine, for an FDA-approved purpose, with FDA-regulated labeling, as permitted by FDA regulations. Even if the FDA changes its position in the future, that change would only apply on a go-forward basis. Any future change would not alter the fact that federal law deemed our medicine effective at the time it was sold.

Your express preemption argument here targeted claims related to statements about the drug's effectiveness. Would your arguments hold up as well in a case bringing claims related to a drug's safety?

Soukup: The law at issue expressly preempts any state law "that is different from or in addition to, or that is otherwise not identical with, a requirement" under federal law. There is no dispute that Congress carved out from this express preemption provision the product liability law of any state. But none of the plaintiffs brought personal injury claims. Rather, this case involved alleged economic losses and claims seeking to recover those losses are expressly preempted.

Johnson & Johnson added a message on its website next to pictures of all its phenylephrine products stating that the advisory committee has reviewed the efficacy of PE as a decongestant and linked to the FDA's statement. But J&J, like all the defendants, continues to sell the products. Did that move create any issues for you in briefing or arguing preemption and the RICO issues?

Soukup: Although the plaintiffs at times focused on that message, it was a sideshow. The FDA's statement simply reaffirmed what our clients had been saying all along: the FDA had not changed its longstanding position that phenylephrine is an effective nasal decongestant,

and if the FDA decided to change its position, it would seek public comment before making a final decision. This just reaffirms that it is up to the FDA, not private litigants, to determine when medicine is effective.

What's important in this decision for your clients and others who might face similar labeling or RICO claims?

Lefkowitz: This decision reaffirms the central and exclusive role the FDA has in determining whether or not drug products are effective to treat particular conditions or symptoms. Especially in the over-the-counter (OTC) context, neither state law nor private plaintiffs can usurp that role. This is important for our clients, the other defendants and anyone who manufactures and sells OTC drug products. The court's decision assures companies that they can continue to rely on FDA determinations of efficacy when deciding what products to make and sell. It's also good for consumers because they can continue to buy products the FDA has determined are effective treatments for common ailments like cough and cold symptoms. The decision also rejects plaintiffs' attempt to circumvent preemption by adding a RICO claim, as the court confirmed that indirect purchasers do not have standing to bring RICO claims.

What's next for the litigation? The judge had initially ordered plaintiffs to file a master complaint following his dismissal order in this bellwether complaint, but there's not much left. What do you predict will happen?

Lefkowitz: The parties agreed and the court ordered that the decision on defendants' motion to dismiss the streamlined complaint would "apply to all cases in this multidistrict litigation." Because the defendants won dismissal of the streamlined complaint, that holding now applies to all the MDL cases and a complete dismissal order should be entered. It is certainly possible plaintiffs will appeal Judge Cogan's decision, and if they do, our joint defense team will be prepared to defend the ruling and our clients at the Second Circuit.

What will you remember most about getting this result?

Lefkowitz: We had a really amazing team here. My partner Robyn Bladow is one of Kirkland's most accomplished class action litigators and was a leader among the joint defense group in developing our defense from the beginning. Our team also included Jacob Rae, Cole Carter, Joey Resnick and **Cameron Bonk**, each an indispensable contributor to the defense's success. They all did a fantastic job developing our winning arguments and presenting them in the most compelling way possible. We also have an amazing client, Haleon, that provides consumers ready access to cough and cold remedies and other consumer products. And the in-house lawyers at Haleon, especially **Liz Balakhani** and **Sarah Jane Petersen**, were full-time partners of ours in all the key decision-making.

But the thing that stood out the most here was how collaborative the defendant group was. That was particularly true for the collaboration between the Kirkland and Covington teams on the briefing and argument of the motion to dismiss. But the work of the joint defense group here really proved that the sum really is greater than any of its constituent parts.

Soukup: Three things stand out to me. First, the trust placed in us by our longtime client P&G, which has a fantastic and sophisticated in-house legal team that is a joy to partner with, especially **Megan Frient**, **Ken Blackburn** and **Meghan Walters-Price**. Second, the hard work and late nights by the Covington team and the collaborative spirit of the entire joint defense group, both of which were essential to getting the result we achieved here. Third, the importance of the result reached by the court, which reaffirms—to use the court's words—that federal law "empowers the FDA, not drug manufacturers, to determine whether a drug is effective."

Abbott and Reckitt unit secure win in infant formula trial

 [reuters.com/legal/abbott-reckitt-cleared-liability-latest-preterm-formula-case-2024-10-31](https://www.reuters.com/legal/abbott-reckitt-cleared-liability-latest-preterm-formula-case-2024-10-31)

Brendan Pierson

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

REUTERS/Dado Ruvic/Illustration/File Photo Rights 

- Verdict is victory for the companies after large losses in similar lawsuits
- Reckitt shares jump 10% after the verdict
- Plaintiff's lawyers sought award of over \$6.2 billion
- Abbott says proves preterm formulas are safe

Nov 1 (Reuters) - Abbott (ABT.N) , opens new tab and Reckitt's (RKT.L) , opens new tab unit Mead Johnson are not responsible for a young boy's debilitating intestinal disease, a jury found on Thursday in a lawsuit that accused the companies of failing to warn of the risks of premature baby formulas.

The ruling is a victory for the companies following large losses in similar trials.

London-listed Reckitt's shares rose as much as 11.7% to 52.30 pounds by 0954 GMT, set for its best day since 2009. Abbott shares rose nearly 5% in pre-market U.S. trading.

"The probability of a high pay-out has reduced, driving the positive move in the share price this morning," Tineke Frikkee of Waverton Investment Management, a Reckitt shareholder said.

At the five-week trial in St. Louis, Missouri state court, lawyers for plaintiff Kaine Whitfield had urged jurors to award more than \$6.2 billion.

"The decision reinforces what we, the medical community and regulatory bodies have said: that preterm infant nutrition products are safe," Abbott said in a statement.

Mead Johnson said the verdict "demonstrates that the claims in this case were not supported by the science or experts in the medical community."

A lawyer for Whitfield did not immediately respond to a request for comment.

"This is the first positive outcome in this action for Mead Johnson and Abbott, and could lessen concerns on final settlement liabilities," analysts at Jefferies said in a note.

The brokerage sees Reckitt's stock recovering somewhere between Thursday's close and the pre-litigation headlines price of 53 pounds per share.

That implies a 13% rise from Reckitt's last closing price.

"After today's verdict and the overwhelming societal support of infant formula, we think its prudent to lower the liability exposure and raise the odds of an Abbott victory in the trials, or at least improve the company's negotiating power in a settlement," J.P.Morgan analyst Robbie Marcus wrote in a note late Thursday.

The lawsuit, brought on Kaine's behalf by his mother, Elizabeth Whitfield, alleged that the companies failed to warn that their specialised formulas used by newborn intensive care units in hospitals could cause necrotising enterocolitis, a disease that almost exclusively affects premature infants and has an estimated mortality rate of more than 20%.

Kaine, now seven years old, was born prematurely at less than 28 weeks, weighing just over 1,000 grams or 2.2 pounds, and developed the disease after being fed formula at St. Louis Children's Hospital. He had surgery for his illness and survived, but will have lifelong developmental and health problems as a result, according to the lawsuit.

The hospital was also a defendant in the lawsuit, and was found not liable by the jury.

Reuters watched the trial through Courtroom View Network.

SIMILAR LAWSUITS

The case is one of about 1,000 similar lawsuits around the country, which have raised alarm from doctors who say the litigation could threaten the formulas' availability or affect medical decisions.

Abbott CEO Robert Ford told investors in an Oct. 16 call that it would be "very difficult for any company to remain on the market with these products" in the face of "indefinite liability." Reckitt in July said it was "considering options" for Mead Johnson, and CEO Kris Licht did not rule out a sale.

Abbott and Mead Johnson have said that, while mother's and donated human milk protect against necrotising enterocolitis, formula does not cause it. The companies have said that the benefits of human milk are widely known and incorporated into hospital feeding practices.

Two cases that went to trial earlier this year resulted in verdicts of \$60 million against Mead and \$495 million against Abbott. The latter verdict was before the same St. Louis judge as Whitfield's case.

Following the earlier verdicts, U.S. regulatory agencies and a working group of scientists convened by the National Institutes of Health said current evidence does not support the hypothesis that formula causes necrotising enterocolitis. Abbott and Mead were not allowed to present those statements to the jury in the latest trial.

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Reporting By Brendan Pierson in New York; Additional reporting by Yamini Kalia in Bengaluru and Richa Naidu in London; Editing by Alexia Garamfalvi, David Gregorio, Emelia Sithole-Matarise and Barbara Lewis

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

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Abbott, Mead Johnson Win Defense Verdict Over Premie Infant Formula

 [law.com/2024/10/31/abbott-mead-johnson-win-defense-verdict-over-preemie-infant-formula](https://www.law.com/2024/10/31/abbott-mead-johnson-win-defense-verdict-over-preemie-infant-formula)

Amanda Bronstad



What You Need to Know

- The trial was the first against both Mead Johnson and Abbott over cow's milk-based infant formula that lawsuits allege causes necrotizing enterocolitis, or NEC, in premature babies.
- Previous juries this year had hit Mead Johnson with a \$60 million verdict, and Abbott with a \$495 million award.
- On Oct. 24, 22nd Judicial District Judge Michael Noble sanctioned Abbott attorney Jim Hurst for 'bad faith on several occasions.'

The two leading manufacturers of infant formula for premature babies scored a big win on Thursday after a Missouri jury handed them a defense verdict.

After about three hours of jury deliberations, Abbott Laboratories Inc. and Mead Johnson, owned by Reckitt Benckiser Group, were found not liable for product defect, failure to warn and negligence claims in a trial alleging their cow's milk-based infant formula caused a premature baby to contract a potentially lethal gastrointestinal illness called necrotizing enterocolitis, or NEC. Abbott makes Similac, and Enfamil is made by Mead Johnson. The jury also found a third defendant, St. Louis Children's Hospital, not liable for negligence.

Timothy Cronin, of the Simon Law Firm in St. Louis, who represented the mother, plaintiff Elizabeth Whitfield, had asked jurors in his closing argument on Wednesday for \$6 billion in punitive damages, tacked onto \$276.9 million in compensatory damages.

He told them, "The industry is watching," according to a livestream of the trial by Courtroom View Network.

"Today, you get to shout from the mountaintop and declare what you think is right and wrong, and people are waiting for what you say," he told jurors on Wednesday. "They won't change anything unless you put a huge amount of pressure on them to do so. And the only thing that

speaks to companies like these is money."



Timothy Cronin, with the Simon Law Firm. Courtesy photo

Cronin, through a firm spokeswoman, declined to comment about the verdict.

Lawyers for Abbott and Mead Johnson noted that the U.S. Food and Drug Administration, while not approving preterm infant formula, regulates the products, which have been on the market for 40 years.

"This is an important case, too. It has implications outside this courtroom," Abbott attorney Rebecca Fitzpatrick, a Kirkland & Ellis partner in Chicago, told jurors, according to the Courtroom View Network broadcast. "That's true, but not for the reasons plaintiffs said. NICUs across the United States are watching."

In a statement after the verdict, Abbott said, "The decision reinforces what we, the medical community and regulatory bodies have said: that preterm infant nutrition products are safe, and there is no reliable scientific evidence that they cause or contribute to cause NEC. Abbott stands by the vital role its preterm infant formula and human milk fortifiers serve in the hospital in nourishing premature babies."

In a separate statement, Mead Johnson said the verdict "demonstrates that the claims in this case were not supported by the science or experts in the medical community, and this case, like all the others brought by the plaintiff's bar, should be dismissed."

"This outcome illustrates that moving forward, plaintiffs face significant challenges due to the heavy burden they must meet in proving elements of their claims in every single case," Mead Johnson continued. "Today's verdict is consistent with the scientific consensus that there is no established causal link between the use of specialized preterm hospital nutrition products and NEC, and that where human milk is unavailable or when supplementation is necessary, specialized preterm hospital nutrition products can provide essential, lifesaving nutrition."

'He Was Robbed of His Independence'

The lawsuit alleged that doctors at St. Louis Children's Hospital gave the infant formula to Kaine Whitfield who, 16 days after his birth, was diagnosed with NEC. Cronin claims his client, Kaine's mother, should have been informed about the risk, but the labels on the bottles and packaging have no warning.

Kaine, now 7, has learning and motor skills problems, explosive diarrhea and skeletal abnormalities, he told jurors, according to the Courtroom View Network livestream.

"Please take time to think about what was taken from Kaine, what he can never get back, a lifetime of experiences he will miss," he said. "He was robbed of his independence and ability to navigate this world of his own."

Lawyers for the defendants insisted that Kaine had other factors that contributed to his NEC, such as being extremely premature and developing anemia and infections while in the hospital. They also insisted that Kaine could have a potential genetic condition.

The trial, which began Oct. 2, is the third involving claims that cow's milk-based infant formula given to premature babies in hospitals causes NEC. On March 13, an Illinois jury hit Mead Johnson with a \$60 million verdict, and, on July 26, another Missouri jury in the same courtroom handed a \$495 award against Abbott.

Thousands more NEC lawsuits are pending in Illinois courts, and there are cases in California, Florida and Pennsylvania. Another 400 cases were coordinated in the U.S. District Court for the Northern District of Illinois before Judge Rebecca Pallmeyer.

22nd Judicial Circuit Judge Michael Noble presided over both Missouri trials in St. Louis.

On Oct. 24, he sanctioned Abbott attorney James Hurst, of Kirkland & Ellis in Chicago, for "bad faith on several occasions."



Phyllis Jones, partner with Covington & Burling. Photo: Diego M. Radzinski/ALM

"Mr. Hurst's professional conduct has been reasonably called into question," he wrote. "Mr. Hurst has repeatedly either attempted to violate or overtly crossed the lines of the court's orders related to evidence and arguments before the jury."

He banned Hurst, who had given Abbott's opening statement, from presenting evidence or closing argument for the remainder of the trial.

On Wednesday, Fitzpatrick and another Kirkland & Ellis partner, Sierra Elizabeth, in Los Angeles, gave Abbott's closing argument.

In closing for Mead Johnson, Phyllis Jones, of Washington, D.C.'s Covington & Burling, told jurors that doctors only gave Kaine a "single feed" of her client's product.

"In the real world, these claims are real serious," she said. "And the consequences are really serious."

St. Louis Children's Hospital was represented by Teresa Bartosiak, of St. Louis-based Bartosiak Makepeace.

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Oracle's \$115 million privacy settlement faces some opposition from class members

 [reuters.com/legal/litigation/oracles-115-million-privacy-settlement-faces-some-opposition-class-members-2024-11-01](https://www.reuters.com/legal/litigation/oracles-115-million-privacy-settlement-faces-some-opposition-class-members-2024-11-01)

Mike Scarcella



The Oracle logo is seen on its campus in Redwood City, California June 15, 2015.
REUTERS/Robert Galbraith Purchase Licensing

Nov 1 (Reuters) - Oracle and the plaintiffs' lawyers who negotiated a \$115 million privacy settlement with the tech giant will face opposition when a U.S. judge in California considers final approval of the proposed deal.

More than 25 objections have been filed to the proposed deal, according to a filing on Thursday in federal court in San Francisco from the plaintiffs lawyers who are defending the accord and asking a judge to approve it. The settlement was announced in July.

Most of the challengers, part of an estimated class size of 220 million members, contend the settlement amount is inadequate, and others argue the court should reject the plaintiffs' lawyers bid for \$28.8 million in legal fees.

Oracle and the plaintiffs' lawyers did not immediately respond to requests for comment.

A hearing is scheduled for Nov. 14 before U.S. District Judge Richard Seeborg.

The class action accused Oracle of building "digital dossiers" on millions of people without their consent, violating federal and state privacy laws and California's constitution.

Oracle denied any wrongdoing as part of the proposed accord. It has since exited the advertising technology industry amid what it said was falling revenue.

In their filing [\[link\]](#), opens new tab, the plaintiffs' lawyers called the objections a "minute fraction of the class" and said they should not stand in the way of the settlement's approval. The lawyers asserted that challenges to the deal do not adequately account for the risks of further litigation.

More than 3.2 million people so far have submitted claims, the plaintiffs' filing said. Eligible class members can expect to receive about \$25, the attorneys told the court.

The class attorneys said the compensation was the highest in any privacy case where there is no direct relationship between the members and the defendant.

In one objection, a lawyer in New Orleans called the plaintiffs' demand for \$28.8 million in legal fees “a money grab.”

“This is the type of settlement that gives lawyers — and plaintiff-side attorneys in particular — a bad name,” attorney Chris Williams, an employment litigator, told the court.

The class lawyers defended their fee request, which amounts to 25% of the settlement fund. They said the 9th U.S. Circuit Court of Appeals has set that percentage as a benchmark for California and other federal courts in the West.

The case is Michael Katz-Lacabe et al v. Oracle, U.S. District Court, Northern District of California, No. 3-22-cv-04792-RS.

For plaintiffs: Michael Sobol and David Rudolph of Lieff Cabraser Heimann & Bernstein

For defendant: Tiffany Cheung and Purvi Patel of Morrison & Foerster

Read more:

Oracle reaches \$115 mln consumer privacy settlement

Reporting by Mike Scarcella

Apple \$35M deal OK'd | Courthouse News Service

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Brief

Apple \$35M deal OK'd

SAN FRANCISCO — A California judge gave the final stamp of approval to a \$35 million settlement that will bring an end to a 2019 class action against Apple from iPhone 7 and 7 Plus buyers who said the phones had audio issues that affected phone calls and other voice features. Affected customers may receive a cash payment of up to \$349 as part of the settlement, while attorneys for the class will take home \$8.75 million in fees.

Read the ruling [here](#).

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Major Drug Companies Agree to Pay \$49.1 Million to 50 States, Territories

 [law.com/therecorder/2024/10/31/major-drug-companies-agree-to-pay-49-1-million-to-50-states-territories](https://www.law.com/therecorder/2024/10/31/major-drug-companies-agree-to-pay-49-1-million-to-50-states-territories)

Emily Cousins

Connecticut Attorney General William Tong announced two cooperation agreements and settlements with Heritage Pharmaceuticals and Apotex Corp., totaling \$49.1 million, due to each companies' alleged scheme to inflate drug prices and limit competition.

The plaintiffs in the case are from 50 states and U.S. territories, including California, Connecticut, Delaware, District of Columbia, Georgia, New Jersey, New York and Pennsylvania. The lead attorney for the majority of the plaintiffs is Connecticut Assistant Attorney General Joseph Nielson.

Apotex agreed to a \$39.1 million settlement and Heritage agreed to \$10 million. As part of the settlement agreement, the companies must cooperate with the pending multistate litigation in Connecticut District Court against 30 corporate defendants and 25 executives. According to the Connecticut Office of the Attorney General, Heritage and Apotex will work with the states by providing witnesses, verifying documents and offering its knowledge of the industry to make the case stronger.

In addition, the companies agreed to internal reforms to uphold competition in the industry and follow antitrust laws.

"Heritage and Apotex both participated in widespread conspiracies to jack up prices and block competition for generic prescription drugs," Tong said. "Their brazen collusion cost American families and our public health care programs millions of dollars. Both companies are now cooperating with our ongoing litigation, and we are very confident in our case heading toward our first trial in Connecticut."

The two pharmaceutical companies did not immediately respond to requests for comment.

The settlements originate from three antitrust complaints filed against big pharma companies and executives. Each case is focused on different sets of generic drugs. The third complaint is set to be tried first, and concerns 80 topical generic drugs that generated billions of dollars. According to the Connecticut Attorney General's Office, this case is against 26 corporate defendants and 10 individuals, and six pharmaceutical executives have agreed to settlements "and have been cooperating to support the states' claims in all three cases."

The states are currently preparing for trial, which is on track to occur in Hartford, Connecticut.

These three lawsuits were brought after investigations revealed large amounts of evidence through witnesses, a database of more than 20 million documents and millions of detailed phone records that pointed to an alleged conspiracy to deter competition and unilaterally raise prices.

The full coalition of states involved in the settlement agreements include Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, U.S. Virgin Islands, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and Puerto Rico.

CVS Entities Fail to Dump Proposed Drug-Price Fraud Class Action

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CVS Health Corp. and related entities must answer claims that they blocked Medicare Part D beneficiaries' access to generic drugs as part of a conspiracy with brand-name drugmakers to squeeze out the competition, a federal court said.

The beneficiaries' proposed class action alleging civil violations of the federal Racketeer Influenced and Corrupt Organizations Act, common-law fraud, and violations of state consumer protection laws will go forward, the US District Court for the Eastern District of Pennsylvania said Thursday. Judge John Milton Younge dismissed only claims alleging unjust enrichment and violations of an Idaho consumer protection law.

Pharmacy benefits managers, pharmacies, and drug manufacturers have been the focus of several cases alleging that they've colluded to drive up consumers' out-of-pocket costs. The lawsuits are being especially closely watched now that the US government has made efforts to lower prices for drugs.

Medicare is a federal health-care plan mostly used by people 65 and older. Part D covers drugs, but beneficiaries still must pay part of the cost. Two beneficiaries sued CVS and the related entities, saying they conspired with brand-name drugmakers to ensure their products were dispensed instead of cheaper generic versions, leading to significantly higher consumer co-pays.

The plaintiffs adequately alleged a substantive violation of RICO and a RICO conspiracy, Younge said. The judge rejected the CVS entities' argument that the plaintiffs hadn't demonstrated that the companies engaged in racketeering activities. Allegations that the CVS entities concealed and omitted important information in mail and wire communications were sufficient, he said.

Younge also said the plaintiffs met a "relaxed" pleading standard for fraud that applies when the defendants are "sophisticated" enough to conceal details of a fraud so that they can't be easily discovered by others.

The plaintiffs weren't required to allege that the CVS entities had a duty to disclose their alleged scheme to fill prescriptions using brand-name drugs instead of generic alternatives, the court also said. Their affirmative concealment of the information would be sufficient establish fraud, it said.

The court also found that the plaintiffs stated claims for common-law fraud under Maryland and Florida law and for violations of state consumer protection provisions in multiple states.

Younge rejected the CVS entities' procedural grounds for dismissal, saying the plaintiffs' claims didn't fall within the US Department of Health and Human Services' exclusive jurisdiction under the Medicare Act such that they had to be filed with the agency first.

Carella Byrne Cecchi Brody & Agnello and Kessler Topaz Meltzer & Check LLP represent the named plaintiffs. McDermott Will & Emery LLP and Hangley Aronchick Segal Pudlin & Schiller represent the CVS entities.

The case is Jones v. CVS Health Corp. , E.D. Pa., No. 24-cv-1703, 10/31/24 .

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Redfin, Compass Gain Approval for Settlement in Commissions Case

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Class Action

A Redfin sign advertises a home for sale in Atlanta on Nov. 13, 2022.

Photographer: Elijah Nouvelage/Bloomberg

- Companies accused of requiring sellers to pay buyer broker fee
- Redfin, Compass, Douglas Elliman among brokers to settle

Online real estate brokerage Redfin Corp. and Compass Inc. are among nine companies that gained approval for a \$110 million deal resolving claims they inflated real estate commissions in violation of antitrust law.

Judge Stephen R. Bough of the US District Court for the Western District of Missouri approved the settlement at a hearing Thursday, said Steve Berman, attorney for the plaintiffs and managing partner at Hagens Berman Sobol Shapiro LLP. The deal is in addition to others submitted for approval in a related suit, bringing total monetary value of settlements across both cases to more than \$1 billion.

“We are pleased that the case is moving forward with the historic settlement that will change the way commissions are charged in the real estate industry,” Berman said in a statement to Bloomberg Law.

Plaintiffs sued the brokerages and the National Association of Realtors with claims they conspired to inflate buyer-broker commissions for homes listed by NAR-affiliated multiple listing services. A Missouri jury last year awarded nearly \$1.8 billion in damages after finding NAR colluded to maintain high brokerage commissions.

Redfin said in a statement, “As the only U.S. brokerage that has saved consumers more than \$1.6 billion in fees, Redfin never belonged in this case, and we’re glad to resolve it and move forward.”

The other settling defendants include Real Brokerage Inc., Realty ONE, At World Properties, Douglas Elliman, Engel & Völkers, HomeSmart, and United Real Estate.

The deal moves forward despite objections from parties who questioned whether the settling defendants proved the deal was fair, reasonable, and adequate.

Redfin and the other defendant companies are represented by firms including Paul, Weiss, Rifkind, Wharton & Garrison LLP, Crowell & Moring LLP and Kasowitz Benson & Torres LLP.

The case is Gibson v. Nat'l Ass'n of Realtors, W.D. Mo., No. 4:23-cv-00788, 10/31/24 .

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3M, Atotech Must Face Missouri Drinking Water Contamination Suit

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Class Action

- Companies fail to defeat class action over metal factory
- Chemical makers knew of contamination danger, failed to warn

3M Co. and Atotech can't shake a class action suit over forever chemicals that leaked into the drinking water of a Missouri town.

3M and Atotech could have reasonably foreseen the damages from the hazardous chemicals they sold to the SRG Global Coatings electroplating facility in Portageville, Mo., the US District Court for the Eastern District of Missouri ruled Wednesday, denying their motion to dismiss.

"Although thin, plaintiffs have pleaded what defendants 3M and Atotech deny—that those defendants manufactured and sold the chemicals SRG used that ultimately leached into the plaintiffs' water source," Judge Stephen N. Limbaugh Jr. wrote.

The suit was filed by Portageville residents last year, alleging SRG knew hazardous metals, including the carcinogen hexavalent chromium, were leaking from its drainage system and into the groundwater aquifer the town uses for drinking water.

Limbaugh ruled the chemical companies sold their hazardous products to SRG with the "conceivable foreseeable" danger that they could contaminate the environment. A memo from 3M described how forever chemicals were volatile compounds that are highly mobile through air, soil, and water.

The residents have standing to bring medical monitoring claims because they have actually been exposed to harmful chemicals and see health monitoring as a viable remedy, the opinion said.

The residents are represented by Wagstaff and Cartmell LLP, Davis Bethune & Jones LLC and Stranch Jennings & Garvey PLLC. SRG Global is represented by Lathrop GPM LLP. 3M is represented by Gibson Dunn & Crutcher LLP. AtoTech is represented by Tucker Ellis LLP.

The case is *Peeler v. SRG Global Coatings LLC*, E.D. Mo., No. 1:23-cv-00023, Dismissal denied 10/30/24.

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Compass Minerals Leaders Sued Over Fire Retardants, Salt Mining

By Martina Barash

- **COURT:** D. Kan.
- **TRACK DOCKETS:** [No. 2:24-cv-02496](#) and [No. 2:24-cv-02495](#)

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Compass Minerals Leaders Sued Over Fire Retardants, Salt Mining

By Martina Barash 2024-10-31T14:45:53000-04:00

- **COURT:** D. Kan.
- **TRACK DOCKETS:** [No. 2:24-cv-02496](#) and [No. 2:24-cv-02495](#)

Compass Minerals International Inc. products to combat fire and ice are at the center of a pair of investor lawsuits against the multi-industry mineral provider's directors and executives, alleging they breached their fiduciary duties and committed other corporate malfeasance.

The leaders misrepresented the safety and government contract prospects for its magnesium chloride-based fire retardants, the main product of a company it had recently acquired, Fabrizio Morelli says in one derivative suit. And an overlapping set of current and former officials concealed the failure of new salt mining equipment to save costs as anticipated, Morelli says in the other suit. Morelli filed both cases Wednesday in the US District Court for the District of Kansas.

The salt mining suit targets alleged misconduct from October 2017 to October 2022, while the fire retardant suit focuses on the period from November 2023 to March 2024.

The harm to the company includes the need to defend securities class actions, undertake internal investigations, and implement new controls, Morelli says. Compass also lost money from the waste of corporate assets and from overcompensating the individual defendants, he says.

Compass settled Securities and Exchange Commission claims over the salt mining issue for \$12 million in 2022 without admitting to the SEC's allegations. And the company was sued in May in a trade-secret dispute tied to its acquisition of fire retardant maker Fortress North America LLC, which was seeking a US Forest Service wildfire-suppression contract.

Morelli brings claims for breach of fiduciary duties, unjust enrichment, abuse of control, gross mismanagement, waste of corporate assets, and contribution. The suit over the fire retardants also includes a claim for proxy misstatements.

He seeks damages, restitution, and internal governance reforms.

Compass didn't immediately respond to an emailed request for comment on behalf of itself and the individual defendants.

Walters Renwick Richards Skeens & Vaughan PC and the Brown Law Firm PC represent Morelli in both suits.

The cases are Morelli v. Crutchfield , D. Kan., No. 2:24-cv-02496, complaint 10/30/24 and Morelli v. Malecha , D. Kan., No. 2:24-cv-02495, complaint 10/30/24 .

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PepsiCo beats New York state's lawsuit over plastics pollution

 [reuters.com/legal/pepsico-beats-new-york-states-predatory-lawsuit-over-plastics-pollution-2024-11-01](https://www.reuters.com/legal/pepsico-beats-new-york-states-predatory-lawsuit-over-plastics-pollution-2024-11-01)

Jonathan Stempel

Item 1 of 2 Bottles of Pepsi are pictured at a grocery store in Pasadena, California, U.S., July 11, 2017. REUTERS/Mario Anzuoni/File Photo/File Photo

[1/2]Bottles of Pepsi are pictured at a grocery store in Pasadena, California, U.S., July 11, 2017. REUTERS/Mario Anzuoni/File Photo/File Photo [Purchase Licensing Rights](#) , opens new tab

- PepsiCo was accused of polluting Buffalo's water supply
- Judge criticizes Attorney General Letitia James for suing
- James disappointed with decision, reviewing options
- PepsiCo emphasizes commitment to plastics reduction

NEW YORK, Nov 1 (Reuters) - PepsiCo (PEP.O) , opens new tab won the dismissal of New York's lawsuit accusing the beverage and snack-food company of polluting the environment with single-use plastic packaging, as the judge criticized the state's attorney general, Letitia James, for bringing the case.

Justice Emilio Colaiacovo of the state Supreme Court in Buffalo said on Thursday that James failed to show PepsiCo created a public nuisance and should have warned consumers about the health and environmental risks of plastics in more than 100 of its brands , opens new tab.

James sued PepsiCo and its Frito-Lay unit last November, seeking to hold them liable for endangering Buffalo's water supply by generating 17% of the plastic waste found in and near the Buffalo River. She also said the defendants deceived the public about their efforts to fight plastics pollution.

But the judge ruled it would run "contrary to every norm of established jurisprudence" to punish PepsiCo, because it was people, not the company, who ignored laws prohibiting littering.

He also said James, a Democrat, ignored a 2003 appeals court's refusal , opens new tab to hold Sturm Ruger (RGR.N) , opens new tab liable when criminals use its handguns and risk opening the floodgates to public nuisance lawsuits. James' predecessor, Eliot Spitzer, brought that case.

"While I can think of no reasonable person who does not believe in the imperatives of recycling and being better stewards of our environment, this does not give rise to phantom assertions of liability that do nothing to solve the problem that exists," wrote Colaiacovo, a

Republican.

"The judicial system should not be burdened with predatory lawsuits that seek to impose punishment while searching for a crime," he added.

A spokeswoman for James said the attorney general's office is disappointed with the decision and reviewing its options, but was committed to protecting communities from plastic pollution, calling it "a major threat to our planet and our public health."

PepsiCo, based in Purchase, New York, said it is pleased with the decision, and "serious" about plastics reduction and effective recycling.

"Our time, attention and resources -- and those of other key stakeholders -- are best directed toward collaborative solutions," it added.

James' lawsuit is one of many by state and local governments and environmental groups against companies that use plastics.

Colaiacovo ruled one day after Los Angeles County filed a similar lawsuit against PepsiCo and Coca-Cola (KO.N) [link](#), opens new tab over their single-use plastic packaging.

PepsiCo's brands include Cheetos, Cracker Jack, Doritos, Fritos, Gatorade, Lay's, Lipton, Mountain Dew, Ocean Spray, Pepsi, Quaker, Ruffles and Tostitos.

The case is New York v. PepsiCo Inc et al, New York State Supreme Court, Erie County, No. 814682/2023.

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Reporting by Jonathan Stempel in New York; Additional reporting by Nate Raymond in Boston; Editing by Franklin Paul and Matthew Lewis

Our Standards: The Thomson Reuters Trust Principles. [link](#), opens new tab

Exxon says Bonta's case against its plastic recycling is pro-landfill

DJ [dailyjournal.com/articles/381642](https://www.dailyjournal.com/articles/381642)

Government,

Environmental & Energy

Nov. 1, 2024

Attorney General Rob Bonta's complaint claimed Exxon polluted, caused a public nuisance and engaged in false advertising "through its deceptive public messaging regarding plastic recycling." The company says his stance means more landfills.



Exxon Mobil Corp. accused California Attorney General Rob Bonta of hypocrisy regarding plastic waste but has, thus far, not made that accusation in court. Meanwhile, Bonta on Thursday denied news reports that the state had dropped its case that accused the oil company of misleading consumers about plastic recycling.

"That is not at all accurate," said an unsigned email from Bonta's office. "The lawsuit is ongoing."

The reports that Bonta had dropped the case appeared on at least two financial news websites. They came in the wake of comments from an Exxon spokeswoman quoted in the Wall Street Journal on Wednesday.

"The irony of all this is Bonta is apparently for bigger landfills," Exxon Vice President Karen McKee told the paper. "He's actually for more oil-and-gas extraction."

Bonta's complaint claimed the company polluted, caused a public nuisance and engaged in false advertising "through its deceptive public messaging regarding plastic recycling." He claimed the company tweeted that "advanced recycling ... could recycle plastics that traditional recycling methods cannot."

Exxon Mobile did not respond on the record on Thursday to a telephone call seeking comment. *California v. Exxon Mobile Corporation*, CGC24618323 (S.F. Super. Ct., filed Sept. 23, 2024).

McKee's comments implied that California's case could make it more difficult for recyclers to reuse plastic products. This could potentially provide a preview for arguments the company would make in court -- for instance, by challenging the state's understanding of what constitutes recycling. But as of Thursday afternoon, Exxon had not filed a reply to Bonta's complaint.

Judith Enck, founder and president of the advocacy group Beyond Plastics, said the comments misrepresent Bonta's case.

"It's a very uninformed statement and not particularly serious," said Enck, a former regional administrator at the U.S. Environmental Protection Agency under President Barack Obama. "It's about holding Exxon accountable for lying about plastics recycling. It does not equate to supporting more landfills. This is a very surgical lawsuit focused on what Exxon has said publicly and how they have misled the public and policymakers."

The case hinges on the definition of plastic recycling. Bonta's office argued the California Public Resources Code definition of recycling does not include "transformation" such as "incineration, pyrolysis, distillation, or biological conversion other than composting." This excludes the "advanced recycling" process touted by Exxon, which the state argues can be used to create a type of fuel but results in just a tiny fraction of material suitable to be used in new consumer products.

For the moment, the state government's understanding on what is -- and is not -- plastic recycling matches with the U.S. Environmental Protection Agency. That could change under a future Donald Trump presidency.

Enck said she does not think a new administration could easily undermine Bonta's lawsuit, at least in the short term. She noted that the EPA under Trump proposed a rule that would have contradicted the agency's current understanding of plastic recycling, but never finalized it before he left office. Even if new agency leaders tried again, the change would face litigation.

"I don't think it's going to affect this lawsuit," Enck said. "There's a lot of steps before California's ability to regulate this is tossed out."

But the plastics industry is also pursuing a legislative option. The American Chemistry Council touted the introduction in September of the "Accelerating a Circular Economy for Plastics and Recycling Innovation Act of 2024." This bipartisan House legislation would task the U.S. EPA with establishing national plastic recycling standards that would potentially supersede state laws.

The text of the bill, HR 9676, includes language calling for the new standards to "recognize advanced recycling technologies as a critical component" or recycling policy and "shall not be considered incineration." In a news release, council president and CEO Chris Jahn said "This bill would bring about transformational change to how we recycle plastics in this country."

Bonta's case closely followed another complaint brought by a coalition of environmental groups led by the Sierra Club. That complaint, filed by Cotchett, Pitre & McCarthy LLP partner Niall P. McCarthy argued, "ExxonMobil misleadingly promoted the safe disposal and recyclability of its products to sell more virgin plastic polymers."

On Oct. 18, Dawn Sestito, representing Exxon as a partner with O'Melveny & Meyers LLP in Los Angeles, moved to transfer that case to federal court. Sestito did not respond to an email seeking comment. *Sierra Club, Inc. v. Exxon Mobil Corporation*, 3:24-cv-07288-RS (N.D. Cal., filed Oct. 18, 2024).

McKee's comment drew a sharp response from a plaintiff in that case.

"While we can't comment on any of the legal arguments or Exxon's bid to remove the case to federal court at this time, it's clear to us via this quote that Exxon is intent on not taking any responsibility for the plastic waste crisis they helped create," Jasmine Vazin, deputy director for Sierra Club's Beyond Dirty Fuels campaign, said in an email.

"ExxonMobil's filing for removal is delaying the inevitable," said Grace Y. Park, counsel with McCarthy's firm. "The action filed by Sierra Club, The Surfrider Foundation, Heal the Bay, and San Francisco Baykeeper can prevail in any court. ExxonMobil's single-use plastic cannot be safely disposed, and it is that truth ExxonMobil buried from Californians."

#381642

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California refinery will cough up \$82 million to settle emissions charges

 [courthousenews.com/california-refinery-will-cough-up-82-million-to-settle-emissions-charges](https://www.courthousenews.com/california-refinery-will-cough-up-82-million-to-settle-emissions-charges)

Alan Riquelmy

A truck drives into the Valero Benicia Refinery, Wednesday, July 12, 2017, in Benicia, Calif. California Gov. Jerry Brown is racing to convince lawmakers to extend the state's cap-and-trade program which puts a price on carbon emitted by polluters, including oil refineries. The program has been closely watched around the world as a market-based way to reduce greenhouse gas emissions, but it expires in 2020. (AP Photo/Rich Pedroncelli)

SACRAMENTO, Calif. (CN) — Valero Refining Co. faces an \$82 million fine from California agencies for air pollution violations, the biggest penalty ever levied in the history of the Bay Area Air Quality Management District.

The fine is the result of a settlement agreement between Valero, the California Air Resources Board and the Bay Area district. It stems from a 2019 inspection that revealed unreported emissions from the Benicia refinery contained harmful compounds.

The Thursday announcement falls on the heels of an Oct. 24 conference call where Valero CEO Lane Riggs said “all options are on the table” for its two California refineries, one of which must pay the multimillion-dollar fine.

“Valero is committed to environmental compliance and has worked closely with the district to make progress in reducing emissions containing trace levels of organic compounds from the hydrogen vent well before this settlement was reached,” Valero said in a statement Thursday. “Valero endeavored to comply with federal rules associated with the hydrogen system; however, the district has much more stringent regulations.”

Philip Fine, executive officer of the Bay Area district, called Valero's emissions “egregious” in a statement and said the penalty highlights his district's commitment to safeguarding health and holding polluters accountable.

Over \$64 million of the fine will go to the Bay Area community impacted by the refinery and pay for projects that reduce exposure to air pollution, mitigate its impacts and improve public health. Public input from residents, community organizations and advocates will help pick the projects.

The rest of the money will pay for clean air projects in other Bay Area communities and help offset the costs of the case against Valero.

“This penalty sends a strong message — adherence to air quality standards is both necessary and expected, and failure to do so can lead to significant fines,” Steve Young, Benicia mayor and air district board member, said in a statement. “Benicia residents need to know that air quality violations are taken seriously. The use of these funds will help us address local air quality issues going forward.”

According to the state air resources board, the 2019 inspection led to the revelation that the refinery had known since 2003 that hydrogen system emissions had toxic contaminants. It didn’t report them or take steps to stop them. The refinery emitted some 8,400 tons of organic compounds over that period, averaging 2.7 tons each day a violation occurred — over 360 times the limit.

Further investigation revealed several other issues with the hydrogen system, the board said, including a failure to install emissions abatement equipment, inspect equipment for leaks or report certain information.

Valero in its statement pointed to 2022 air district health risk assessment, which stated that the chance of exposure to the emissions occurred during rare meteorological conditions. Those conditions existed for two hours over the previous five years.

In addition, Valero said the hydrogen system’s design occurred before it took ownership of the refinery. It wasn’t anticipated that it would emit organic compounds.

“Upon discovering the trace levels of organic compounds, we reported this discovery to the district and took immediate action to eliminate most emissions,” the company added.

Thursday’s announcement is the latest development in California’s struggle to regulate the oil industry while lowering prices at the pump.

Governor Gavin Newsom on Aug. 31 called for a special session for the Legislature to address gas prices. Meeting this month, the Legislature passed a bill supported by Newsom that gives the California Energy Commission power to enact regulations over refiners’ maintenance schedules and minimum gasoline inventory. However, certain criteria must be met before those mandates are issued.

Democrats argued that price spikes are linked to unintended maintenance, which affects supply, as well as inventory dipping below 15 days. Republicans said that more regulations in a state already facing high gas prices would only exacerbate the problem.

Days after Newsom signed the bill, petroleum company Phillips 66 announced it would stop operations at its Los Angeles-area refinery in late 2025. Its CEO later said the decision wasn’t a response to the new law, but instead based on the belief refining in California would become more difficult.

Valero's CEO then followed that last week with his statement about all options being on the table.

Another wrinkle in the gas price issue is that the state's air resources board is scheduled on Nov. 8 to vote on amending its low carbon fuel standard. The board has a mandate to reduce carbon intensity in state fuels. However, Republican detractors have said it will lead to higher gas prices.

Contacted Thursday by Courthouse News, state Senator Shannon Grove in a statement referred to the Valero CEO's statement. She said Newsom's "war on gasoline" will force California to become more reliant on foreign imports, which will lead to higher prices.

"These policies have made California one of the most unaffordable states in the nation," the Bakersfield Republican said. "It doesn't have to be this way!"

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McKesson Kickback Case's State Law Claims Axed by Federal Court

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- Jurisdiction ‘inappropriate’ after federal claims rejected
- Supreme Court denied whistleblower’s petition Oct. 7

A whistleblower’s state law claims alleging McKesson Corp. engaged in a cancer drug kickback scheme must be dismissed, a New York federal district court said.

Exercising supplemental jurisdiction over state False Claims Act claims would be “inappropriate” given how all federal FCA claims against McKesson have been dismissed, and the case is nowhere near trial, Judge Ronnie Abrams of the US District Court for the Southern District of New York said in a Thursday order to dismiss and close the case.

The state law claims are dismissed without prejudice to refiling in state court, Abrams said.

Adam Hart’s suit alleging violations of the federal FCA and state false claims statutes was dismissed in March 2023 for not adequately alleging facts to show McKesson acted willfully, as required by the federal Anti-Kickback Statute.

The US Court of Appeals for the Second Circuit affirmed dismissal of federal FCA claims. But dismissing the state law claims on the basis that they were premised solely on violations of the federal Anti-Kickback Statute was a mistake, Judge Gerard E. Lynch of the US Court of Appeals for the Second Circuit said.

The Second Circuit said Hart contends that many of the state anti-kickback laws have either no scienter requirement or a lesser requirement than willfulness.

Hart then filed a petition for a writ of certiorari to the US Supreme Court. Hart argued that the Second Circuit improperly adopted a rule that a bribe or kickback violates the AKS only if the payor or recipient intends to violate a known legal duty, which widened a circuit split.

The Supreme Court denied the petition Oct. 7. The parties then filed a letter urging the district court to decline to exercise supplemental jurisdiction over the state-law claims.

Abrams’ order said adjudicating the state-law claims would require interpreting “false claim statutes in 28 states, precisely the sort of ‘novel or complex issue of State law’ that counsels against exercising supplemental jurisdiction.”

Phillips & Cohen LLP; Kellogg, Hansen, Todd, Figel & Frederick PLLC; Mandel Bhandari LLP; and Constantine Cannon LLP represented Hart. Covington & Burling LLP represented McKesson.

The case is United States ex rel. Hart v. McKesson Corp. , S.D.N.Y., No. 15-cv-903, 10/31/24 .

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Matt Levine's Money Stuff: MicroStrategy Has Stock to Sell

By Matt Levine 2024-10-31T14:15:38054-04:00

Microstrategy

A good corporate finance rule of thumb is, “if you run a company, and people are paying much more for your stock than it is worth, you should sell them as much of it as you can.” This rule can be hard to implement, though, for a few reasons :

- 1. Companies are complicated and you might genuinely not be sure how much yours is worth, making it hard to know if people are overpaying.
- 2. You run the company and so are naturally optimistic about it; it would be odd — not unheard-of , but unusual — for you to think that the stock is overpriced.
- 3. It just doesn't come up that much? Like, public shareholders are not usually way more optimistic about a company's prospects than its managers are; it is rarely *obvious* to managers that their stock is overpriced.
- 4. Even if it does happen — even if investors want to pay way too much for your stock — that might change if *you* take advantage of it. If you go around selling loads of stock to meet investor demand, the investors might say “huh the company is selling, maybe management thinks it's overvalued, and they probably know better than we do,” and the stock might collapse.

These problems are significant enough that I never really used to think about this. Like, “if people want to overpay you for your stock, sell it to them” is nice if you can do it, but it just doesn't seem relevant to most companies' lives. But the rise of meme stocks in recent years has changed that, and now I constantly find myself writing “well if people want to pay crazy prices for your stock you should sell them the stock.” What distinguishes a meme stock is probably something like “retail investors enthusiastically buy it at prices that its own executives think are nuts.” When the meme-stock wave first happened, a lot of companies *didn't sell stock*, because the whole thing was too novel and nuts, but over time they adapted, and now GameStop is ready with an at-the-market stock offering whenever Keith Gill tweets.

Or a corollary of this rule is something like “if you are *in bankruptcy and your stock is worthless*, but people still want to buy it, sell it to them.” I don’t think this ever occurred to anyone in history before 2020, but now I talk about it with some frequency.

Or we talked earlier this year about the Destiny Tech100 fund, a publicly traded closed-end fund that (1) owned shares of hot private companies worth about \$52.6 million and (2) traded, for a while, at a market capitalization of about \$1.1 billion, almost a 2,000% premium to its net asset value. What is nice about an *investment fund*, as opposed to an *operating company*, is that everyone can see its “actual value”; nobody (I hope) thought that Destiny’s \$52.6 million pot of shares was actually worth \$1.1 billion. But Destiny was the way that retail investors could get access to those private shares, so they overpaid. “Sell stock,” I screamed through my computer at Destiny: selling more stock at a 2,000% premium, and using the money to buy more private shares, would be enormously accretive and also help push the stock to more reasonable levels. On the other hand, Destiny was a little limited by its ability to source more private shares; raising more money and not having anywhere to invest it would be kind of bad.

Whereas:

MicroStrategy Inc. has hired banks to help it raise \$42 billion through the sale of new shares and fixed income to buy more Bitcoin after a flurry of deals over the past year.

The enterprise software maker, co-founded by Chairman Michael Saylor, hired a handful of banks to sell stock through a so-called at-the-market offering that could net it \$21 billion while lining up potential sales of fixed-income securities that could bring in the same amount.

The company has been raising billions over the past year through the sale of convertible senior notes as well as shares that its bankers can sell into the market to add to its cryptocurrency stockpile. ...

The magnitude of a \$21 billion at-the-market program trumps recent offerings from the company and would make sales in recent months for meme stock GameStop Corp. look tame.

Yeah I mean Boeing Co. raised \$21 billion of equity this week and that was “one of the largest [stock offerings] ever by a public company.” Twenty-one billion dollars is a lot. But it’s not like it would be hard to *spend*: Bitcoin is pretty liquid and MicroStrategy can easily source as much of it as it wants.

I don't have the faintest idea how to explain this. MicroStrategy is primarily a pot of Bitcoins, though it also has a software business that is grudgingly acknowledged in its [earnings release](#). The pot of Bitcoins is worth about \$18 billion, according to that earnings release, and is funded partly with debt; MicroStrategy [reports](#) about \$4.2 billion of long-term debt. This suggests a net asset value of, you know, \$14 billion? Plus or minus 50%? Its market capitalization is about \$50 billion.

Would you say that MicroStrategy is a “listed closed-end investment fund that trades at a 300% premium to its net asset value”? Well, no, no, I would never say that. But on the other hand yesterday [it did announce](#) “a strategic goal of raising \$42 billion of capital over the next 3 years, comprised of \$21 billion of equity and \$21 billion of fixed income securities,” to invest in Bitcoin. And, yes, if I ran a company in ... these circumstances ... my main strategic goal would also be “sell tons of stock.” That's a good strategy!

Code is law

Broadly speaking the way the modern world works is:

- 1. People get together and agree on some rule for how something should work, and
- 2. Then somebody types this rule into a computer that will implement the thing.

So a bank will sign a derivative contract with a client, and someone at the bank will type the terms of the contract into the bank's computer systems, and those systems will send out cash to the client (or demand cash from the client) based on the terms of the derivative. And every so often the bank will type the terms in wrong and the client will get less money than it is supposed to. Sometimes it will notice and the error will get fixed, and sometimes it won't. And I suppose you could ask the metaphysical question “is the *actual trade* the contract they signed, or the representation that the bank put into its computers?”

Or we talked last month about a guy who exploited Spotify's streaming revenue calculations to extract millions of dollars in ways that Spotify did not intend. Spotify's deal with holders of music rights consists of (1) a long written document containing the terms of service, which no one reads, plus (2) the actual algorithm that it uses to allocate payments to those holders. Spotify, and US prosecutors, will tell you that both of those things are essential parts of the deal. But you can sort of understand

why the guy might have thought “no, the *real* deal with Spotify is what its computers *do*; this other stuff doesn't matter unless it is implemented in the code.”

Or: There are lots of off-by-one errors in the world. Some things have to be at least X, while other things have to be more than X. Some things have to happen on or after the one-year anniversary of some starting date, while other things have to happen after the one-year anniversary. If a contract or law specifies “after _____,” the computer program implementing it should also specify “after _____.” Do *some* of those programs instead say “on or after _____”? Why yes they do! Here's a story about [79 fake divorces in the UK](#):

Dozens of divorce applications were wrongly approved due to a computer error, the high court has heard.

A hearing in London on Wednesday was told that 79 divorces were incorrectly approved after the applications were submitted a day before the law allows. An online system failed to detect that the submissions came a year after marriage, when the law only permits divorces from a year and a day.

Lawyers for the justice secretary have asked the court to rule that the divorces are “voidable” as opposed to “void”, meaning they would still stand, claiming that voiding the divorces would have “highly unfortunate and highly unwelcome” consequences for the couples concerned.

The court was told that between April 2022, when the validation system of the online portal was introduced, and April 2024, a total of 96 divorce applications were made on the first anniversary of marriage. Of these, a final divorce order was granted in 79 cases.

The law says that you can get divorced *after* the one-year anniversary of your marriage, but the computer program said that you can get divorced *on* the one-year anniversary. People who were in a hurry submitted applications early, and rather than bouncing them according to the law, the computer granted them according to its own logic. But code is *not* actually law in the UK, so those people were not actually divorced, even though the computer said they were. Which is very inconvenient, because “some of the divorcees had either since remarried or were planning to.” They thought they were divorced! The computer said they were! Why would the computer be wrong?

Dividend adjustment

Not that this is all the computer programmers' fault. Sometimes the actual contract doesn't reflect the deal that you thought you had, in ways that seemed minor and technical at the time and turned out not to be.

If a company makes money, the stockholders can benefit in one of two ways. The company can give the stockholders the money, in the form of a dividend: Then the stockholders have cash, plus their stock. Or the company can keep the money and invest it itself, hopefully in something productive: Then the stockholders have no cash, but they have stock, which ought to be worth more by, in expectation, roughly the amount of the dividend. And so in theory a company could choose between, say, paying a \$10 dividend and being worth \$20 per share, or paying no dividend and being worth \$30 per share.

Shareholders ought to be [roughly indifferent](#) between these two choices, but holders of stock *options* will not be. A call option of the form "you can buy this stock at \$15 per share" is worth \$15, if the stock is worth \$30, but only \$5, if the stock is worth \$20. And the holder of the call option *doesn't get the dividend*, so she is not indifferent: She would much rather the company keep the money (and have a higher stock price) than pay out a dividend (that she doesn't get).

And so it is common for options contracts to contain dividend adjustments of roughly the form "if the company pays an \$X dividend, the strike price of the option is reduced by \$X," or some more complicated calculation. Common but not universal: Not every holder of every call option bargains for this protection, and in particular normal US listed options [do not generally adjust](#) for regular dividends.

But sometimes you just forget? Here's a strange [story from the Wall Street Journal](#):

When Unit Corp. was in bankruptcy, the oil-and-gas driller made a deal with employees who held its stock in their 401(k) retirement accounts. In return for supporting the company's restructuring plan, they would receive stock warrants to share in its future growth.

The warrants, designed like call options, were modified just as Unit's bankruptcy plan went into effect in September 2020 to remove a key protection for holders. The subtle modification wasn't made public until a week later. It went unnoticed for years among warrant holders, some of them said.

Unit has since recovered from its Covid-era doldrums and returned some \$400 million in capital to investors, including roughly \$145 million to a hedge fund affiliated with its chief executive, according to court records and securities filings. The warrants, however, are now nearly worthless after the last-

minute modification, touching off an ongoing legal battle for the company.

Basically the warrants in the original bankruptcy plan had an anti-dilution adjustment for dividends, but the final official version “eliminated the 17-word anti-dilution provision.” Starting in 2023, Unit has paid big cash dividends to shareholders, making the warrants almost worthless.

That is rough on the warrant holders. Also, though, I said above that in general shareholders should be indifferent between a \$10 cash dividend and \$10 re-invested in the company, but that does change if 12.5% of the company belongs to warrant holders who don't have an antidilution adjustment. With the warrants, \$10 invested back in the company is worth about \$8.75 to shareholders and about \$1.25 to warrant holders; \$10 paid out as dividends goes entirely to the shareholders. So that's where the money went.

Mongolia

“There is no place in Trafigura for wrongdoing,” Trafigura Group Chief Executive Officer Jeremy Weir [said in a statement](#) yesterday, but there was, and that place was Mongolia:

Trafigura Group is preparing to take a \$1.1 billion hit after discovering what it suspects was fraud involving employees in its Mongolian oil business. ...

The company found that some of its employees in Mongolia had manipulated data and documents to inflate the amount of money it paid out, as well as deliberately concealing overdue debts over a period of about five years, Trafigura said in a statement on Wednesday, confirming an earlier report by Bloomberg News.

If you are a global commodity trading firm, you will have a lot of employees in global trading hubs, and you will have reasonably good incentives and ability to keep an eye on them and make sure they're not just stealing your money. And then you will have tiny handfuls of employees in a lot of far-flung commodity-rich locations, and their incentives and monitoring will be different.

Death elasticity

Happy Halloween, here's a great sentence:

Wealthy Americans worried about who will win the White House are preparing to accelerate a huge transfer of wealth to their heirs by using large estate-tax breaks set to expire at the end of next year.

You know what that means, right? If you're a wealthy American, you've got 14 months to die cheaply; after that dying is more expensive. Presumably you're a wealthy American because you are good at optimizing your financial returns so, you know, something to think about.

I am kidding, I guess; it's also a gift tax, so you can pass on some of your estate while you're alive:

Those breaks came in the 2017 Republican tax law, which doubled the amount the wealthy could pass on without paying the estate and gift tax. Rich Americans can move about \$14 million out of their estate by next year to avoid a 40% tax when they die. The limit reverts to about \$7 million in 2026, creating a use-it-or-lose-it exemption as the "tax cliff" deadline nears.

Still. I like to quote Michael Graetz's two laws of tax, which are (1) it's better to make more money than less money and (2) it's better to die later than sooner. These laws are good rules of thumb, for taxes and life, but they are not *always* true. (For taxes.) Sometimes there are tax incentives to die sooner, and people respond to incentives. The classic 2001 paper is "[Dying to Save Taxes: Evidence from Estate Tax Returns on the Death Elasticity](#)," by Wojciech Kopczuk and Joel Slemrod, examining "the temporal pattern of deaths around the time of changes in the estate tax system periods when living longer, or dying sooner, could significantly affect estate tax liability" and finding "some evidence that there is a small death elasticity, although we cannot rule out that what we have uncovered is ex post doctoring of the reported date of death."

Here though I guess you just give your heirs \$14 million next year to minimize taxes when you die many, many years from now.

Truth and fiction

Did Elliott Management commission hackers in its bond fight against Argentina? No, says Elliott, but on the other hand Jay Newman, who led that fight for Elliott, did write a novel featuring a hedge fund manager who deals with hackers, [so who knows](#):

Prosecutors want to know what is fiction and what is reality. Their globe-spanning probe is scrutinizing, among other things, the relationship between [Israeli private investigator Amit] Forlit and Newman. At the heart of that part of the case: Did an alleged hacking operation set up by Forlit aid Elliott's victory over Argentina?

Well, if you retire from working at a hedge fund with a tough reputation, and then you write a global espionage thriller about a hedge fund manager, you are taking certain risks. I've read Newman's novel, *Undermoney*, and I have to say that getting suspected of hacking is not the biggest risk he was taking in writing it:

Newman has consistently denied any link between [Elliott manager Paul] Singer and the psychopathic hedge-fund manager in the novel, and told the New Yorker in an interview that the book further departed from reality when his editor suggested it needed to be much shorter—but include more sex. He said he reluctantly agreed on both counts. ...

The book sparked anger at Elliott, up to Singer himself, employees told people outside the firm. He made it clear: Staffers were not to bring the book into the office or discuss it with clients.

Yeah “the psychopathic hedge fund manager in my novel has no relation to my actual former boss at a hedge fund” is not an easy sell.

\$20 decillion

It seems implausible to me that Albert Einstein [ever said](#) “the most powerful force in the universe is compound interest,” but “ooh the magic of exponential compounding ooh ooh” is a staple of a certain sort of financial-literacy education, using examples both [relatable](#) (“if you save \$100 a month you’ll have enough to retire”) and [not](#) (doubling grains of rice on a chessboard). Here is [a new classic of the genre](#):

A Russian court has slapped a \$20 decillion fine on Google for blocking 17 YouTube channels belonging to local TV networks, RBC reports.

The issue dates back to 2020 when YouTube blocked Tsargrad TV after the US imposed sanctions against its owner. At the time, the court had ordered a daily fine of 100,000 rubles (\$1,025) per day,

with the total amount set to double every week the fine was unpaid.

Things escalated after YouTube blocked more channels following Russia's invasion of Ukraine in 2022. A total of 17 channels sued Google, and the court's latest order was passed after calculating the fines for each.

For fun I plugged "\$1,025 doubling every week for four years" into Excel and the answer is 4×10^{65} , which is way way more than \$20 decillion (2×10^{34}), so I guess they showed some mercy. Some of the headlines say that the fine is "[more than the entire world's GDP](#)," which is a weirdly inadequate comparison; [here's a better one](#):

In a post on X, Nigel Gould-Davies, senior fellow for Russia & Eurasia at the International Institute for Strategic Studies, described the sum as "an insane number," explaining it was equivalent to " 1.9×10 to the 15 times greater than current global GDP."

"About 5×10 to the 12 days have passed since the start of the universe," he wrote.

"So even if Google gave Russia everything the world produced this year, every day since the universe began, it would only have paid about 3% of this fine."

Yes but see Google's artificial intelligence research might be worth ... no I'm kidding this fine is purely for comic effect, just "get out of Russia and stay out." Apparently whatever assets Google has in Russia [have been seized](#), but they come to something like \$100 million, so I guess Google will end up paying 0.0000000000000000000000000005 cents on the dollar.

Things happen

TripAdvisor Corporate Relocation Case Hinges on Delaware's Value. "They were sort of the beta of alts." KKR, Capital Group Partner to Debut Funds for Wealthy Investors. KKR's \$20 Billion Goal Tests Investor Appetite for Buyout Funds. [Sotheby's](#) Gets a \$1 Billion Financial Lifeline in Deal With Abu Dhabi. Billionaire Wes Edens' One-of-a-Kind Gas Export Plan Hits Turbulence. [Kalshi's](#) daring bet on election betting is paying off — to the tune of \$100 million. \$2 billion marina development aims to turn Fort Lauderdale into 'mini Monaco.' Private Equity Hipsters Are Coming for Your Favorite Apps. "One of Silicon Valley's youngest—and poorest—[angel investors](#)." Starbucks Is Bringing Back the

[Condiment Bar](#). How 4 People Are Spending Their [Juul Settlement Money](#).

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- 1. Another reason, often important but not so relevant here, is that if people are paying much more for your stock than it is worth, there is a chance that you are somehow deceiving them, or at least that they will claim to have been deceived after the fact. There are sometimes legal risks to selling overpriced stock.
- 2. Famously there is a hard cap of 21 million Bitcoins that can ever be issued, making 21 sort of a magic number in Bitcoin circles.
- 3. [Byrne Hobart](#): "Microstrategy is the Harvard of public companies, with a small but useful operating business attached to a massive asset management business."
- 4. We have in the past discussed MicroStrategy's own argument that it is a good vehicle for holding Bitcoin because it has more flexibility to get safe, long-term, interesting leverage than (1) an exchange-traded fund or (2) you in your personal account. I find this to be a good argument in the abstract, but of course a \$50 billion equity value for a \$18 billion pot of Bitcoins is *the opposite* of a leveraged Bitcoin investment. By the way, in the linked column we also discussed MicroStrategy's related argument that "market attention" was a key part of its strategy, and, yes.
- 5. Don't take any of this seriously; I have seen some reports saying \$20 decillion and other \$2.5 decillion, some saying doubling every week and some every day, etc.

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Trump Media SPAC Officers Must Face Some Computer Fraud Claims

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Officers of a special purpose acquisition company created to acquire Trump Media & Technology Group Corp. weren't able to escape all the computer fraud claims brought against them by two investment companies, a federal court said.

Among the 10 federal and state claims brought against Eric Swider, Alexander Cano, and Renatus Advisors LLC, the Wiretap Act and Computer Fraud and Abuse Act claims were dismissed Thursday by Judge Rodolfo A. Ruiz II of the US District Court for the Southern District of Florida. But he allowed an Electronic Stored Communications Act and fiduciary duty claims to proceed.

ARC Global Investments II, a 19% share-owner of the SPAC, Digital World Acquisition Corp., and Benessere Investment Group, an ARC II advisor, alleged the SPAC officers engaged in a computer hacking scheme aiming to seize control of and enlarge their holdings in DWAC. Plaintiffs Swider and Cano allegedly used seized account information to lobby investors to approve DWAC's merger with Trump Media; the merger would allow Trump Media to go public without all the red tape associated with an initial public offering, Ruiz said.

Orlando, a non-party to the case, is the managing member of ARC II and substantially owns Benessere. Orlando was DWAC's chairman and chief executive officer prior to being removed, but he currently serves as one of DWAC's directors, Ruiz said.

Swider is currently DWAC's CEO and director. He owns and controls Renatus, Ruiz said. Cano served as Orlando's assistant at Beneserre, but when he left to work at DWAC, he brought confidential information about ARC II with him, including information held by Beneserre in a protected electronic storage account at Box.com, the judge said.

Cano allegedly used his credentials to access the Box account and lock Orlando out of it, Ruiz said. Swider and Cano then allegedly used the information from the account to lobby investors to approve DWAC's merger with Trump Media, the judge said.

The plaintiffs' claim under the Electronic Stored Communication Act survived the defendants' motion to dismiss because the statute prohibits unauthorized access to an "electronic communication service" that stores information, Ruiz said.

The defendants said that the plaintiffs didn't adequately allege that Box provides an "electronic communication service," but Ruiz said that Beneserre's allegation that Box allows users to transmit data through shared folders that transmit communications between users

over the internet in the form of files, plausibly alleged that Box is an electronic communication service.

A breach of fiduciary duty claim against Cano was also allowed to proceed, as was an aiding and abetting breach of fiduciary duty claim, but a civil conspiracy claim was dismissed by Ruiz.

The plaintiffs' claim under the Federal Wiretap Act was dismissed because the statute only applies to the interception of communications—obtaining the information contemporaneously with its transmission, Ruiz said. The plaintiffs didn't allege that the information obtained by the defendants from the Box account, which is a storage account, was intercepted, he said, dismissing the claim with prejudice. A claim under the Florida Security of Communications Act was dismissed for the same reason.

A claim under the Federal Computer Fraud and Abuse Act was also dismissed, but without prejudice. Ruiz explained that the claim was a shotgun pleading—it failed to give the defendants adequate notice of the claims and the grounds upon which they rested. A claim under the Florida Computer Abuse and Data Recovery Act suffered the same fate for the same reason.

The plaintiffs' tortious interference with business relations claim was dismissed because they didn't allege any interference with Beneserre's business, Ruiz said. Their tortious interference with contract claim was also dismissed because they didn't allege that the defendants induced any investors to breach their contracts with ARC II, he said.

Homer Bonner Jacobs PA represents the plaintiffs. DLA Piper LLP represents the defendants.

The case is *Benessere Invest. Grp. v. Swider*, 2024 BL 392429, S.D. Fla., No. 24-CV-21104-RAR, 10/31/24.

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JPMorgan Pays \$151 Million to Settle Slate of SEC Complaints (1)

By Nicola M. White

- Company 'violated various laws designed to protect investors'
- Largest penalty focuses on investments in early-stage ventures

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JPMorgan Pays \$151 Million to Settle Slate of SEC Complaints (1)

By Nicola M. White2024-10-31T19:24:24075-04:00

- Company 'violated various laws designed to protect investors'
- Largest penalty focuses on investments in early-stage ventures

Two JPMorgan Chase & Co. subsidiaries agreed to pay more than \$151 million to settle a series of Securities and Exchange Commission claims faulting how they handled clients' money, disclosed fees and allowed some prohibited transactions.

JPMorgan Securities and JPMorgan Investment Management agreed to make the payments — including penalties and relief paid to investors — to resolve four civil cases, the agency said in a statement Thursday. The securities unit also settled a fifth case — alleging it steered more than 10,000 retail customers into pricey mutual fund investments despite cheaper alternatives — without a financial sanction. The agency credited the bank's cooperation and that it reimbursed customers.

"JPMorgan's conduct across multiple business lines violated various laws designed to protect investors from the risks of self-dealing and conflicts of interest," Sanjay Wadhwa, acting director of the regulator's enforcement division, said in the statement. "JPMorgan is being held accountable for its regulatory failures."

The biggest punishment — a \$10 million fine plus \$90 million in reimbursements — was for allegedly misleading brokerage customers who invested indirectly in outside funds advised by private equity or hedge funds. The funds often bought shares in early stage, private companies that eventually became publicly traded. Fund managers held on to the stocks for prolonged periods, leaving JPMorgan customers exposed to "substantial market risk and material declines in value," the SEC said.

The agency also said JPMorgan or its staff misled customers about fees reaped from certain products and allowed some prohibited transactions that advantaged an affiliated foreign money market fund, in which JPMorgan served as a portfolio manager, over three money market mutual funds it advised.

The company didn't admit to or deny wrongdoing while settling.

The firm identified and fixed issues and worked with regulators to resolve concerns, a company spokesperson said in an emailed statement.

"JPMorgan Chase strives to uphold the highest standards in client service around the world," the spokesperson said. "We are pleased to have these matters resolved and remain dedicated to delivering an exceptional experience for our clients."

(Updates with additional descriptions of allegations from second paragraph.)

--With assistance from **Hannah Levitt**.

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US SEC says JPMorgan Chase settles five enforcement cases, to pay \$151 million

 [reuters.com/business/finance/jpmorgan-chase-reaches-100-million-settlement-with-sec-over-disclosures-2024-10-31](https://www.reuters.com/business/finance/jpmorgan-chase-reaches-100-million-settlement-with-sec-over-disclosures-2024-10-31)

Jonathan Stempel

A person enters the JPMorgan Chase & Co. New York headquarters in Manhattan, New York City, U.S., June 30, 2022. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, Oct 31 (Reuters) - JPMorgan Chase (JPM.N) , opens new tab will pay \$151 million to settle five U.S. Securities and Exchange Commission enforcement cases, including accusations that the largest U.S. bank made misleading disclosures to brokerage customers, the regulator said on Thursday.

The settlements include \$61 million of civil fines and \$90 million of reimbursements to customers. JPMorgan did not admit or deny wrongdoing in agreeing to the settlements.

"JPMorgan's conduct across multiple business lines violated various laws designed to protect investors from the risks of self-dealing and conflicts of interest," Sanjay Wadhwa, acting director of the SEC enforcement division, said in a statement.

In the largest settlement, JPMorgan will pay a \$10 million civil fine and reimburse \$90 million to customers who invested in "conduit" products.

These products pooled customer money to invest in private equity or hedge funds that would later distribute shares of companies that went public.

The SEC said JPMorgan did not disclose it had complete discretion over when to sell and the number of shares to be sold. It said this exposed customers to market risk, including when prices fell because the bank sometimes took months to sell shares.

JPMorgan was separately fined \$45 million for failing to fully disclose from July 2017 to October 2024 how the bank and its brokers could benefit financially by recommending some in-house investments over similar products managed by third parties.

In a statement, the New York-based bank said it was pleased to settle, fixes problems when they arise, and "strives to uphold the highest standards in client service."

The SEC also accused JPMorgan of recommending some mutual funds to 10,500 retail brokerage customers when materially less expensive but otherwise identical exchange-traded fund (ETF) products were available.

JPMorgan voluntarily repaid those customers \$15.2 million, and was not fined after reporting the issue, the SEC said.

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Oct. 31, 2024, 2:53 PM PDT

Capital One Says CFPB Probing Consumer Savings Account Rates

By Paige Smith

Bloomberg Law News 2024-11-01T09:54:14811674429-04:00

Capital One Says CFPB Probing Consumer Savings Account Rates

By Paige Smith2024-10-31T17:53:00575-04:00

Capital One Financial Corp. said it could face an enforcement action or litigation from the US Consumer Financial Protection Bureau over its savings accounts products and their associated interest rates.

- Inquiry is linked to the bank's introduction of a new savings account product with a higher interest rate than existing products, Capital One said Thursday in a quarterly filing
- The McLean, Virginia-based bank said it's responding to the regulator and that it's possible the CFPB could pursue an enforcement action or lawsuit
- The lender has been embroiled in separate class-action litigation over a similar issue since 2023

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2nd Circ. Draws BDO Back In Investor Suit In Revised Opinion

By Sarah Jarvis

Law360 (October 31, 2024, 10:53 PM EDT) -- The Second Circuit on Thursday reversed course in an amended opinion about an investor suit over financial restatements made by AmTrust Financial Services Inc., finding that auditor BDO USA LLP is not off the hook for certifying the insurer's financial statements.

U.S. Circuit Judge Raymond J. Lohier, writing the **opinion** for the panel, vacated a district court's **dismissal** of securities fraud claims against BDO — which the appellate court itself had **affirmed** in August 2023. While the district court had found that potential misstatements made in BDO's audit opinion of AmTrust's financials were immaterial, the Second Circuit said Thursday that they "subjected unknowing investors to the risk that AmTrust's financial statements were unreliable."

"For that reason, contrary to the district court's conclusion, the appellants were not required to allege a link between BDO's false certification and specific errors in AmTrust's financial statements to establish that BDO's false audit certification was material," Judge Lohier wrote.

Samuel Rudman of Robbins Geller Rudman & Dowd LLP, counsel for the investors, said in a statement that the amended opinion is "a sentinel decision for investor protection."

"Time after time, we've seen public companies collapse shortly after receiving clean audit opinions, and the investors end up crushed," Rudman said. "As the court recognized, investors rely on audited financial statements; they are essential to the integrity of our financial markets. The message here is simple, but increasingly important — auditors need to do their jobs and will be accountable to investors when they don't."

Timothy Hoeffner of McDermott Will & Emery LLP, counsel for BDO, said in a statement that the auditor is "pleased that the dismissal of all but one claim against it was once again reaffirmed by the court of appeals."

"With respect to the sole claim reinstated, we continue to believe that the [Second] Circuit's original decision on that claim was correct and are considering available remedies," Hoeffner said.

The Second Circuit's August 2023 ruling partially revived a proposed class action lawsuit accusing AmTrust of making a series of misstatements about its finances dating back to 2012 that required the insurer to restate its financials and ultimately sank the company's stock.

The three-judge panel had also previously ruled that BDO, AmTrust's outside auditor, was properly dismissed from the case, finding a certification that an audit performed in accordance with applicable standards was too generic to be material to investors.

BDO, in opposing a bid for a rehearing, **argued** the panel made the correct decision and pushed back against the U.S. Securities and Exchange Commission's "misdirected concern" that no auditor opinion can ever be found material to investors, which the auditor argued is not what the court said in this case.

Moreover, adopting the SEC's position could "drastically expand the federal securities fraud laws," by allowing investors to sue over any audit deficiency, "even those with no impact on financial reporting to investors, e.g., those relating to documentation and supervision," BDO said.

Despite not being a party to the private litigation, the SEC filed an amicus curiae brief in February at the behest of the Second Circuit, which urged the agency to weigh in after three former SEC chief accountants and deputy chief accountants filed a brief backing AmTrust investors' calls to revive the claims against BDO.

The agency urged the court to reconsider its materiality analysis on the BDO certification, arguing investors rely on such statements to make investment decisions and that the statements are not immaterial simply because the language is standardized.

"A false certification concealing a deficient audit has independent significance: it eliminates the basis for investors' reliance on the auditor and subjects investors to increased (and hidden) risk," the SEC said. "It thus matters to investors regardless of whether the specific deficiencies resulted in misstated financial statements."

In 2018, the SEC **temporarily barred** three former BDO accountants from auditing publicly traded companies for releasing an AmTrust audit report before the underlying auditing work was completed.

The appellate panel also found Thursday that certain investor claims against AmTrust, its officers and directors, and various underwriters should not have been dismissed, specifically where they concern AmTrust's accounting for revenue generated by its extended warranty contracts and the expenses associated with discretionary employee bonuses.

The Second Circuit remanded the case to the district court for further proceedings consistent with its opinion.

A representative of the SEC didn't immediately respond to a request for comment Thursday.

U.S. Circuit Judges Raymond J. Lohier and William J. Nardini and U.S. District Judge Rachel P. Kovner sat on the panel for the Second Circuit.

BDO is represented by Timothy Hoeffner, Jason Gerstein and Ludwig von Riga of McDermott Will & Emery LLP.

The SEC is represented in-house by Brooke Wagner, Megan Barbero, Michael Conley and Daniel Staroselsky.

The investors are represented by Samuel Rudman, Andrew Love, David Rosenfeld, Mark Millkey, William Geddish and Robert Gerson of Robbins Geller Rudman & Dowd LLP, Jeremy Lieberman of Pomerantz LLP, Thomas McKenna of Gainey McKenna & Egleston and Kim Miller of Kahn Swick & Foti LLC.

The case is New England Carpenters Guaranteed Annuity and Pension Funds et al. v. AmTrust Financial Services Inc. et al., case number 20-1643, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Jessica Corso and Aaron Keller. Editing by Michael Watanabe.



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Latham Hit With Sanctions In Banc Of California Securities Suit

By **Lauren Berg**

Law360 (October 31, 2024, 10:08 PM EDT) -- A California federal judge found Latham & Watkins LLP and its ex-client, former Banc of California CEO Steven A. Sugarman, in civil contempt for "flagrant violations" of a protective order covering discovery produced by investment firm Muddy Waters Capital in a securities fraud class action, according to an order unsealed this week.

U.S. District Judge Dolly M. Gee ordered Latham and Sugarman to pay Muddy Waters' reasonable costs and attorney fees, after finding that the law firm "clearly violated" a protective order when it designated an expert report as "confidential" and shared it with Sugarman, despite it containing information for "attorney's eyes only," according to the Sept. 30 **order** that was unsealed Tuesday.

The judge rejected Latham's argument that the expert report didn't contain any AEO information as "obviously wrong," noting that a " cursory review" shows multiple references to the substance of AEO-designated materials, including Muddy Waters' internal emails and transaction data.

"Latham gave its expert 255 pages of information stamped 'AEO,' then took the expert's report that repeatedly cited to information from that production as the basis for key conclusions, and effectively handed it to its client," Judge Gee said. "This is a serious violation of the protective order that could have been avoided by simply designating the report 'AEO.'"

However, the judge did emphasize that "there is insufficient evidence to suggest that Latham acted in bad faith as opposed to in serious error."

Muddy Waters — which is not a party to the underlying securities fraud action that accused Banc of California and Sugarman of hiding ties to the notorious white collar fraudster Jason Galanis — **moved for sanctions** against Latham and Sugarman in October 2023, claiming the law firm shared the sensitive report with its client, who then publicly disseminated the information to implicate the investment firm in a dip in Banc's stock price.

Sugarman, who is now represented by Michelman & Robinson LLP, and Latham filed **separate oppositions** to the motion, with the law firm arguing that the report is not "derived from" documents produced by Muddy Waters and did not need to be designated AEO. The firm said sanctions and contempt would not be appropriate, even if designating the report "confidential" fell short of compliance with the protective order.

Meanwhile, Sugarman argued in his filing that the motion is premised on unfounded claims made by a disgruntled former employee from his lending business, The Change Co.

Muddy Waters' claims "are fabricated and unsubstantiated, as Sugarman has never seen or received any AEO materials produced or designated by Muddy Waters and does not know what documents or information Muddy Waters produced," the opposition stated.

But in her order unsealed Tuesday, Judge Gee found both Latham and Sugarman in contempt, holding that the law firm's violation of the protective order was not "substantially justified."

"The court takes such flagrant violations of a protective order seriously and finds that an award of attorney's fees and costs is just under the circumstances," the judge said. "The evidence is clear and convincing that Latham violated the order and that the violation was not based on a good faith and

reasonable interpretation of the protective order."

As for Sugarman, Judge Gee found that he, too, violated the protective order when he shared the expert report with his employee, finding that he was required to return or destroy any material marked "confidential," according to the order.

The protective order specifically forbade Sugarman from using the information for anything other than the underlying litigation, the order stated. The judge found that his possession and distribution of the expert report "well after the conclusion of this litigation, at the very least, violated the protective order's provisions for 'confidential' information."

She also rejected Sugarman's argument that he didn't know the information came from Muddy Waters' production of AEO documents, calling the explanation "patently not credible," according to the order. For one thing, Sugarman told a reporter about the investment firm's AEO-designated document production, making it clear he did know of their significance, the order stated.

Judge Gee ordered Latham and Sugarman to pay "all reasonable fees and costs incurred to investigate and litigate the motion for contempt."

Muddy Waters told Law360 on Thursday evening, "For almost 15 years, Muddy Waters has had a front row seat to the hijacking of the U.S. legal system by plaintiffs and attorneys who have little concern for facts, law or ethics. It's refreshing to see that there are at least some lines they cannot cross with complete impunity."

A representative for Latham declined to comment Thursday evening. Counsel for Sugarman did not immediately respond to a request for comment.

The underlying litigation, launched in 2017, claimed Banc of California hurt investors by **concealing its connection** to Galanis. The fraudster is serving 14 years in prison for masterminding a \$63 million bond fraud against a Native American tribal entity and pension fund investors, a sentence that tacked on five years to the stretch he was already serving for a \$20 million pump-and-dump scheme involving reinsurer Gerova Financial Group Ltd.

When a blog post revealed the connection, investors said the price of the bank's inflated shares plummeted.

"The article alleged that Banc of California's senior-most officers and board members had ties to Galanis, who the article claims has a 'long history of secretly gaining control of banks and public companies via front men, looting assets, and leaving unsuspecting investors and taxpayers with hundreds of millions in losses,'" according to the suit.

Publication of the article caused the company's stock price to decline by \$4.61 per share, or 29%, to close at \$11.26 per share on Oct. 18, 2016, on unusually heavy trading volume.

Three months later, when the company said its CEO was leaving and the U.S. Securities and Exchange Commission was investigating in the wake of the report, the trading price fell again by \$1.50 per share, or nearly 10%, to close on Jan. 23, 2017, at \$14.65.

Iron Workers Local No. 25 Pension Fund was **appointed lead plaintiff** in June 2018.

In October 2019, the investors reached **a nearly \$20 million settlement** with Banc of California, after voluntarily dropping claims against Sugarman. The investors' attorneys at Robbins Geller Rudman & Dowd LLP in March 2020 were awarded more than **\$6.5 million in fees**.

Muddy Waters Capital is represented by Dilan A. Esper of Harder Stonerock LLP.

Sugarman is represented by Mona Z. Hanna, Marc R. Jacobs, Jesse J. Contreras and Samantha A. Drysdale of Michelman & Robinson LLP.

Latham & Watkins LLP is represented in-house by Manuel A. Abascal.

The case is In re: Banc of California Securities Litigation, case number 8:17-cv-00118, in the U.S. District Court for the Central District of California.

--Additional reporting by Emilie Ruscoe. Editing by Dave Trumbore.

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Scott + Scott Sues Robins Kaplan For \$5M In Swipe Deal Fees

By **Rachel Scharf**

Law360 (October 31, 2024, 9:05 PM EDT) -- Scott + Scott Attorneys at Law LLP alleged in a New York state court lawsuit that Robins Kaplan LLP, its co-counsel in antitrust litigation over Visa Inc. and Mastercard's interchange fees, is withholding \$5 million in promised payouts from the case's \$5.6 billion settlement.

Tuesday's complaint comes a year and a half after the **Second Circuit upheld** Visa and Mastercard's historic damages settlement over merchants' credit card transaction costs, including \$523 million in attorney fees to be shared among the various plaintiffs firms involved in the long-running suit.

Two of those firms were Scott + Scott and Robins Kaplan, which had previously been co-counsel in **another antitrust class action** accusing private equity firms of colluding to lower leveraged buyout prices. That case **settled for \$590 million** in 2015.

According to the complaint, Robins Kaplan was unhappy with its cut of the 2015 settlement and threatened to take the dispute to court. As a resolution, Scott + Scott allegedly handed over \$6 million from its share of the private equity deal in exchange for Robins Kaplan agreeing to make any extra allocations necessary to ensure Scott + Scott got \$20 million out of an eventual settlement in the then-ongoing swipe fee litigation, the suit says.

Scott + Scott says it found out in October 2023 that it had been allocated \$15 million from the \$5.6 billion credit card fee deal. The firm alleges that under the 2015 agreement, Robins Kaplan must pay it another \$5 million.

"Scott + Scott made demand on Robins pursuant to the 2015 Agreement, to pay \$4,997,234.75 to Scott + Scott so that Scott + Scott would receive a total of \$20,000,000.00 for the interchange fee litigation," the complaint says. "However, Robins refused to pay Scott + Scott in accordance with the 2015 Agreement."

Scott + Scott is now suing Robins Kaplan for that \$5 million amount, plus prejudgment interest.

Neither firm returned Law360's requests for comment Thursday.

The swipe fee litigation, dating back to 2005, stems from claims that Visa and Mastercard conspired with banks to overcharge retailers when customers paid by credit card.

While the \$5.6 billion damages settlement has been finalized, a New York federal judge **recently rejected** another injunctive relief deal that would have seen Visa and Mastercard slash their merchant fees by \$30 billion. The forward-looking swipe fee claims are now **headed towards trial** in 2025.

Scott + Scott and Robins Kaplan, two major players in the plaintiffs bar, are frequent collaborators in antitrust class actions. In addition to the private equity and swipe fee cases, they've been co-counsel in price-fixing litigation against **contact lens makers**, **meatpackers** and the **software company RealPage**.

Scott + Scott is represented by James T. Shearin of Pullman & Comley LLC.

Counsel information for Robins Kaplan was not immediately available.

The case is Scott & Scott Attorneys at Law LLP v. Robins Kaplan LLP, case number 655731/2024, in the Supreme Court of the State of New York, County of New York.

--Additional reporting by Matthew Perlman. Editing by Alanna Weissman.

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Purdue Gets More Time For Deal, 'Substantial' Progress Made

By Hilary Russ

Law360 (October 31, 2024, 8:14 PM EDT) -- Bankrupt OxyContin maker Purdue Pharma LP on Thursday won more time to continue mediating a new settlement with its owners — certain members of the Sackler family — and reported that it is nearing a deal, in a bid to avoid having one of the most complex Chapter 11 cases in U.S. history tumble into a litigation free-for-all.

There has been "very substantial and meaningful movement by key parties" who are "getting closer by the day," and the outstanding issues are "resolvable," co-mediator Shelley Chapman said during a remote hearing in New York bankruptcy court.

U.S. Bankruptcy Judge Sean H. Lane said he would grant an extension of the mediation deadline until just before midnight on Dec. 2, giving the Sacklers, creditors, Purdue and a host of other stakeholders another month to see if talks can produce a new deal. A temporary injunction holding back a deluge of litigation remains in place until that deadline.

It was the fourth extension granted since the U.S. Supreme Court threw out Purdue's previous bankruptcy plan in June, sending the case back to bankruptcy court without the nonconsensual third party releases that would have shielded Sackler family members from liability.

In exchange for those liability waivers, the Sacklers had agreed to contribute \$6 billion to help pay out claims from individual opioid victims, their families, and local, state, federal and tribal governments that have all suffered losses as a result of Purdue's alleged role in America's opioid epidemic.

U.S. states collectively filed proofs of claim for \$2.16 trillion in the case — far more than the Sacklers' roughly \$11.5 billion of known wealth, and that doesn't take into account additional claims from tens of thousands of individuals or other parties, said Marshall S. Huebner, an attorney for Purdue, during the hearing.

There are more than 1,188 actions currently on hold due to the injunction, and there are more than 100,000 other claimants against the company who would be ready to sue without the block in place, he said.

Waiting in the courtroom wings is the official committee of unsecured creditors, which has **drafted a complaint** against Sackler family members seeking to claw back billions of dollars it says were improperly transferred to Sackler-controlled trusts overseas out of Purdue before its 2019 bankruptcy.

On Tuesday, the committee **won standing** to exclusively pursue lawsuits on behalf of Purdue's estate, meaning the committee alone now has the right to start filing lawsuits against the Sacklers to try to recover assets for the company's bankruptcy coffers - once the injunction is lifted, unless there is a settlement first.

Until Thursday's hearing, it was not clear whether the committee would support the new deadline, but it did so after the timeframe was shortened by four days.

In a statement earlier this week, the committee said its intention remained to "seek resolution and not to begin the litigation process until it makes sense to do so. The termination of the Preliminary

Injunction, however, remains a trigger by which the Official Committee must file a complaint and begin pursuing full-scale litigation."

The states of Maryland, Washington and Rhode Island, and the county of Nassau in New York, objected to the extension.

"We have state law and a constitutional duty to protect our public from the problems that I don't need to repeat because everyone knows what this case is about," said Brian T. Edmunds, a Maryland Assistant Attorney General, at the hearing.

Edmunds said that Maryland will participate in mediation, but that "we have been stopped from enforcing our laws that protect our citizens for more than five years" while the case has been pending.

At the hearing, Chapman — herself a retired bankruptcy judge who helped mediate the previous Purdue settlement — provided some insight about the current status of negotiations.

"This is among the most complex cases ever filed," she said. "Our goal, our task, is to deliver a settlement that will be broadly supported by as many stakeholders as possible, including the Department of Justice."

The Justice Department's bankruptcy watchdog, the Office of the U.S. Trustee, objected to the kinds of waivers used in the original plan and contested them all the way to the Supreme Court.

Chapman said that the mediation team is "sequencing various building blocks of a settlement" in a step-by-step way. There have been hundreds of phone calls, virtual and in-person meetings and "probably thousands of hours of time" put towards mediation in both formal and small group discussions outside of the presence of the co-mediators, and countless calls with them, she said.

The absence of active litigation has been "crucial for the progress made to date" because it lets parties provide their "full, undistracted attention" on talks.

As mediators, their job is to direct "when and where and how and who should engage with us and on what issues," and without the injunction barring litigation "we would lose such power and authority as we have to keep folks organized and focused and marching in a straight line," Chapman said. "People say you can't make war and peace at the same time."

She said mediators plan to soon file a report with more details about the status of discussions.

Purdue is represented by Marshall S. Huebner, Benjamin S. Kaminetzky, Eli J. Vonnegut and Christopher S. Robertson of Davis Polk & Wardwell LLP.

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

Maryland is represented by Brian T. Edmunds and Sarah A. Zadrozny of the state's Office of the Attorney General.

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

--Editing by Alex Hubbard.



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Mineral Co. Execs Allegedly Misled Investors On Gov't Contract

By **Emilie Ruscoe**

Law360 (October 31, 2024, 5:37 PM EDT) -- Current and former directors and officers of minerals producer Compass Minerals International Inc. face a shareholder derivative action alleging they hid signs the company wouldn't be able to renew a lucrative supplier relationship with the U.S. Forest Service.

In a **complaint** filed Wednesday in Kansas City federal court, Fabrizio Morelli claimed the brass of Overland Park, Kansas-headquartered Compass Minerals breached their fiduciary duties over statements mischaracterizing the company's confidence in products it supplied to the government for use in fighting fires from planes.

Compass Minerals produces minerals such as those used to provide nutrients to agricultural crops and salt for de-icing roads, and in May 2023, it bought Fortress North America LLC, which makes fire retardants to fight wildfires.

Later in 2023, Morelli said, Fortress inked a deal to supply magnesium chloride-based aerial fire retardants to the U.S. Forest Service for the year's fire season. The federal agency was Fortress' "only primary client" for the season, the suit stated.

But according to Morelli, the company's testing didn't properly confirm that its proprietary magnesium chloride-based aerial fire retardants were safe — and the company ultimately failed to lock down a supplier contract with the Forest Service for the 2024 fire season.

In March 2024, the company told investors it hadn't gotten a contract to work with the U.S. Forest Service to provide fire retardants for its 2024 fire season. The investor referenced market records showing that over the next two trading days, the company saw trading prices for its shares fall from just under \$18 to under \$14.

Morelli added that those trading price declines were cited in a **proposed investor class action** naming the individual defendants, which has "has further subjected the company to the need to undertake internal investigations, the need to implement adequate internal controls, losses from the waste of corporate assets, and losses due to the unjust enrichment of the individual defendants."

The shareholders said the company would likely expend "many millions of dollars," asserting that the individual defendants left the company vulnerable to the suit because of their alleged misconduct.

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

Morelli is represented by R. Frederick Walters and Karen Wedel Renwick of Walters Renwick Richards Skeens & Vaughan PC and Timothy Brown of The Brown Law Firm PC.

Counsel information for the defendants wasn't immediately available Thursday.

The case is Morelli v. Crutchfield et al., case number 2:24-cv-02496, in the U.S. District Court for the District of Kansas.

--Editing by Rich Mills.



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10 Firms Vie To Lead, Consolidate Super Micro Investor Suits

By **Sydney Price**

Law360 (October 31, 2024, 9:53 PM EDT) -- Ten firms have submitted competing bids to lead and consolidate proposed class actions alleging that artificial intelligence server manufacturer Super Micro Computer Inc.'s shares fell roughly 20% after a short seller report accused it of violating its previous settlement with the U.S. Securities and Exchange Commission over accounting improprieties.

The firms seeking to lead the litigation include Hagens Berman Sobol Shapiro LLP, Glancy Prongay & Murray LLP, Levi & Korsinsky LLP, Kaplan Fox & Kilsheimer LLP, Pomerantz LLP and Motley Rice LLP.

Hagens Berman Sobol Shapiro client Crain Walnut Shelling LP — a walnut processing company — claims to have lost over \$49 million due to Super Micro's alleged misconduct, more than any of the other movants. Crain Walnut Shelling's motion filed on Tuesday also requested that the court consolidate two **similar actions** against Super Micro filed in August to "save all parties time, energy and expense."

The two suits seek damages following the publication of a Hindenburg Research report that allegedly revealed Super Micro's ongoing financial misconduct.

The report allegedly uncovered, among other things, that Super Micro failed to make meaningful changes to its policies following its 2020 settlement with the SEC over alleged accounting manipulation, including inflating revenue by prematurely reporting sales of goods.

Joseph Averza's suit, which has the longer class period of the two, says Super Micro's relevant misconduct began no later than Aug. 10, 2021, the day Super Micro issued financial results for the fourth quarter and full fiscal year 2021. In that filing, and in many others over the next several years, Super Micro "created the false impression" that it had information to reliably project revenue outlook and anticipated growth while also minimizing risk from seasonality and macroeconomic fluctuations, the suit claims.

The report claimed that Super Micro rehired some of the executives fired following the previous accounting scandal and that the company continued recognizing incomplete sales as revenue, making it a "serial recidivist."

The Hindenburg Research report also revealed, according to Averza, that Super Micro's exports to Russia rose to \$126.6 million in 2023 and made up about 5% of the company's worldwide sales, excluding the United States, despite the ongoing war with Ukraine.

From a closing market price of \$562.51 on Aug. 26, Super Micro shares fell \$119.02, about 21%, to close at \$443.49 per share on Aug. 28., Averza says.

Counsel for the parties and a representative of Super Micro did not immediately respond to requests for comment on Thursday.

The movants are represented by Hagens Berman Sobol Shapiro LLP, The Schall Law Firm, Levi & Korsinsky LLP, Glancy Prongay & Murray LLP, the Law Offices of Howard G. Smith, Kirby McInerney LLP, Grant & Eisenhofer PA, Kaplan Fox & Kilsheimer LLP, Bleichmar Fonti & Auld LLP, Pomerantz LLP, Bronstein, Gewirtz & Grossman LLC, Saxena White PA, Motley Rice LLC and Bernstein Litowitz Berger & Grossmann LLP.

Counsel information for Super Micro was not immediately available on Wednesday.

The cases are Averza v. Super Micro Computer Inc. et al., case number 5:24-cv-06147 and Menditto v. Super Micro Computer Inc. et al., case number 3:24-cv-06149, both in the U.S. District Court for the Northern District of California.

--Editing by Peter Rozovsky.

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NY Court Urged To Reject 'Audacious' Shareholder Test Cases

By **Jessica Corso**

Law360 (October 31, 2024, 9:48 PM EDT) -- Leading business groups have come to the aid of Bayer AG and Barclays PLC as the companies seek to fend off a pair of "audacious" test cases that have landed in New York's highest court, with the groups arguing that allowing the lawsuits to move forward would flood the state court with derivative lawsuits against foreign companies and overturn decades of precedent.

The U.S. Chamber of Commerce filed friend-of-the-court briefs Monday in a pair of cases testing the same issue: whether shareholders can file derivative suits against foreign-headquartered companies under New York law and in New York state court. The Securities Industry and Financial Markets Association and the Institute of International Bankers also teamed up to file briefs in the cases this week, arguing that the disputes belong in Europe.

The New York Court of Appeals, the state's highest court, agreed to hear the cases in February at the request of suing shareholders who say an appellate court's dismissal left New York-based investors "without a remedy" despite what they say were multibillion-dollar errors by the corporations' governance bodies.

But Bayer is headquartered in Germany and Barclays is headquartered in the U.K., and the laws of those jurisdictions should apply, the business groups said. SIFMA and the bankers' institute said no court in New York has ever held otherwise.

"This is an audacious lawsuit," the groups said in the briefs.

"Plaintiffs and their counsel have brought these 'test' lawsuits to try to turn New York's overburdened courts into a Shangri-La for the resolution of governance disputes involving non-U.S. companies that have long been litigated elsewhere," they said.

Robert Giuffra of Sullivan & Cromwell LLP, one of the lawyers representing SIFMA and the institute, told Law360 on Thursday that if New York's highest court rules in favor of the shareholders, "it will open the floodgates for more derivative litigation against foreign companies in New York courts."

That could leave global corporations hesitant to do business in New York and invite retaliatory actions against U.S.-based companies operating abroad, the business groups said in their briefs.

"New York's long history of respect for international companies organized under the rules of their chosen jurisdictions serves New York's position as a global finance and business center," according to one brief.

"Weakening the internal affairs doctrine and the predictability it has fostered would impair New York's attractiveness and competitiveness for foreign companies," the brief read.

The lawsuit against Bayer stems from its **\$62 billion purchase** of Monsanto, a transaction that suing shareholders Rebecca Haussmann and Jack Cattan said was "plagued by conflicted and inadequate due diligence" by the pharmaceutical giant's directors.

Meanwhile, shareholder Ezrasons Inc. is suing Barclays and its former and current directors over what it says is a series of "unending scandals" that have led to \$18 billion in regulatory fines against

the bank over a 10-year period. That includes \$2.4 billion that the bank **agreed to pay** in 2015 to end multiple investigations into the rigging of the foreign exchange markets.

Both cases are scheduled to be heard by the court of appeals on Jan. 7.

Attorneys for the suing shareholders didn't immediately respond to a request for comment.

SIFMA and the Institute of International Bankers are represented by Robert Giuffra, David Rein and Justin DeCamp of Sullivan & Cromwell LLP, Kevin Carroll of SIFMA and Stephanie Webster of the IIB.

The Chamber is represented by Michael Keats, Scott Luftglass and Alexis Casamassima of Fried Frank Harris Shriver & Jacobson LLP.

The investors are represented by Francis Bottini and Michelle Lerach of Bottini & Bottini Inc. and Michael Hutter of Powers & Santola LLP.

Bayer is represented by William Savitt, Noah Yavitz and Emily Barreca of Wachtell Lipton Rosen & Katz LLP.

Barclays is represented by Lara Flath, Scott Musoff, Boris Bershteyn and Michael Restey of Skadden Arps Slate Meagher & Flom LLP.

The cases are Ezrasons Inc. v. Rudd et al., case number APL-2024-00016, and Haussmann v. Baumann et al., case number APL-2024-00017, in the Court of Appeals of the State of New York.

--Editing by Rich Mills.



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Instacart Says Investors Based Pre-IPO Suit On Anecdotes

By **Katryna Perera**

Law360 (October 31, 2024, 11:10 PM EDT) -- Grocery delivery company Instacart has urged a California federal judge to toss a proposed class action suit claiming it misrepresented its growth potential in the lead-up to its initial public offering, saying investors are "attempting to conjure a securities fraud lawsuit out of thin air."

Instacart filed a dismissal **motion** Tuesday, arguing the suit lacks particularized facts to plead federal securities law claims and relies on anecdotes from former employees with "low-level and isolated roles."

Instacart says the complaint does not allege any actionable false statements and that the only statements that are challenged are "innocuous statements about Instacart's brand recognition, marketing efforts, and growth prospects," and the complaint fails to identify why the identified statements are false or misleading.

"[The investors] try to tether [their allegations] to [confidential witness'] subjective opinions about Instacart's internal forecasting processes and studies of the impact of a single advertising campaign. But the challenged statements are all either objective statements for which plaintiffs are unable to plead falsity, or inactionable subjective statements," the motion states.

The suit also fails to adequately plead that Instacart and the individual defendants did not believe their stated opinions about the company's brand awareness and marketing efforts, the motion argues, and that statements about Instacart's future marketing initiatives are forward-looking statements and therefore protected under the Private Securities Litigation Reform Act's safe harbor.

Additionally, Instacart argues that it "explicitly" disclosed that it did not expect its growth to continue at COVID-19 pandemic levels, and in certain instances, the company's disclosures directly accompany the challenged statements. Therefore, "there can be no argument that the market was deceived," the motion states.

The dismissal motion also claims that there was no evidence of scienter, or knowledge of wrongdoing, by the individual defendants. First, the claims of insider trading by Instacart's CEO Fidji Simo and Chief Financial Officer Nick Giovanni are "implausible and incorrect," according to the motion.

"The alleged sales were routine and perfunctory transactions by the company to cover taxes on [restricted stock units] granted to various officers. Second, there was a lock-up period in place that forbade any discretionary sales," the motion states.

Simo and Giovanni's roles as executive officers are also insufficient to plead scienter, and the investors "cannot make the blanket assertion that Instacart's 'core operation' is 'marketing and brand recognition' so 'knowledge of the fraud may be imputed' to defendants," the motion states.

Finally, Instacart argues the suit should be dismissed because the investors have failed to plead loss causation.

"The purported revelation of 'truth' consists of a few '[I]ukewarm' analyst reports, right after the IPO; not a financial restatement or any other substantive news at all. Moreover, Instacart's stock price rebounded quickly and remains well above the IPO share price," the motion states.

Shareholder Andy Dean Stephens **launched the suit** in January, alleging Instacart downplayed the competition it faces in the online grocery shopping and delivery market when it filed its registration statement with the U.S. Securities and Exchange Commission before its **September 2023 IPO**.

The offering documents included a letter from Simo, in which she told investors that Instacart demonstrated the ability to "help retail partners drive strong growth and stay competitive in a complex and increasingly digital industry," the suit states.

The company went public on Sept. 19, 2023, when its shares began trading on the Nasdaq for \$30 each, the investors noted.

But the truth regarding Instacart's business prospects emerged a few days later, on Sept. 22, when a news article with analyst commentary revealed Instacart faced major competition from DoorDash and Uber in the "slowly expanding" grocery delivery market, according to the investors.

Instacart's shares gained slightly after its IPO. But following the article, share prices fell 65 cents, or about 2%, to close back to the IPO price of \$30 per share on Sept. 22, according to the suit.

A couple of weeks later, on Oct. 2, investment research firm Gordon Haskett issued a "hold" rating for Instacart, saying decreased consumer spending and competition threatened the business, the investors noted.

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

The investors are represented by Adam M. Apton of Levi & Korsinsky LLP and Jennifer Pafiti, Jeremy A. Lieberman and Brian Calandra of Pomerantz LLP.

Instacart and the individual defendants are represented by Boris Feldman, Doru Gavril, Elise Lopez, Olivia Rosen and Abygail Krittta of Freshfields US LLP.

The case is Stephens v. Mapbear Inc. dba Instacart et al., case number 3:24-cv-00465, in the U.S. District Court for the Northern District of California.

--Additional reporting by Sydney Price. Editing by Jay Jackson Jr.

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Abbott, Mead Cleared In Baby Formula Trial

By **Cara Salvatore**

Law360 (October 31, 2024, 5:02 PM EDT) -- A St. Louis jury cleared Abbott Laboratories and Mead Johnson of liability Thursday in the companies' first joint trial over claims their baby formula causes a serious gut condition in preterm infants.



In the aftermath of a jury verdict clearing Abbott Laboratories of liability over claims that its baby formula sickens preterm infants, the company said it "stands by the vital role its preterm infant formula and human milk fortifiers serve in the hospital in nourishing premature babies." (AP Photo/Nam Y. Huh, File)

The jury found in favor of the formula makers and St. Louis Children's Hospital after a five-week trial over the necrotizing enterocolitis, or NEC, Kaine Whitfield developed in the weeks after he was born in August 2017.

Lawyers for the Whitfield family **had asked** for \$277 million in compensatory damages and \$6 billion in punitive damages for the now-7-year-old, born in August 2017 at 27 weeks and 5 days' gestation and weighing 1,140 grams. Kaine now has extreme and permanent challenges from short bowel syndrome, which prevents him from absorbing nutrients easily.

Jurors heard from the defense during trial that Kaine was a severely ill baby, and things like his antibiotics and his anemia were known risk factors for NEC.

Plaintiffs "must prove that without formula and still with everything working against him, he would not have gotten NEC" — and they simply "cannot prove that," Abbott lawyer Rebecca Fitzpatrick of Kirkland &

Ellis LLP said in closing arguments.

Kaine was in the NICU for 16 days before developing NEC, and for 13 of those days, he was on antibiotics. The defense expert Dr. Rachana Singh testified severe anemia was what pushed him over the edge for NEC, Fitzpatrick said.

The companies face thousands of baby formula injury suits and had lost initial trials. A Missouri **jury awarded** \$95 million in compensatory damages and \$400 million in punitive damages in a bellwether trial against Abbott earlier this year. Mead lost its first trial with a \$60 million verdict. The two also face multidistrict litigation in federal court, where bellwether cases are being worked up.

Abbott spokesperson Scott Stoffel said in a statement Thursday, "We are pleased with the jury's decision. The decision reinforces what we, the medical community and regulatory bodies have said: that preterm infant nutrition products are safe, and there is no reliable scientific evidence that they cause or contribute to cause NEC. Abbott stands by the vital role its preterm infant formula and human milk fortifiers serve in the hospital in nourishing premature babies."

Mead Johnson spokesperson Tom Maginnis said in a statement Thursday the company likewise "welcomes" the verdict.

"It demonstrates that the claims in this case were not supported by the science or experts in the medical community, and this case, like all the others brought by the plaintiff's bar, should be dismissed," the statement said.

Kaine and his mother Elizabeth Whitfield's lawyer, Timothy Cronin, had told jurors in closings that if it wasn't clear exactly why the preterm cow's-milk formulas result in worse outcomes, the cause of the mechanism does not need to be known.

Cronin said Abbott and Mead are desperate to get hospital patients onto their formulas, so that mothers become long-term customers when they leave the hospital and start buying nonpreterm formulas in the grocery store.

A representative for the plaintiffs was not immediately available for comment.

The Whitfields are represented by Timothy M. Cronin and Kevin M. Carnie Jr. of The Simon Law Firm PC.

Abbott is represented by James F. Hurst, Rebecca Fitzpatrick and Sierra Elizabeth of Kirkland & Ellis LLP.

Mead Johnson is represented by Phyllis A. Jones of Covington & Burling LLP.

St. Louis Children's Hospital is represented by Teresa Bartosiak of Bartosiak Makepeace.

The case is Whitfield v. Abbott et al., case number 2222-CC06214, in the 22nd Judicial Circuit of Missouri.

--Editing by Lakshna Mehta.

For more of this case, see Courtroom View Network.

Update: This article has been updated with additional information and statements.



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Meta Users Fight Uphill For Cert., But Advertisers Have A Shot

By **Bonnie Eslinger**

Law360 (October 31, 2024, 6:35 PM EDT) -- A California federal judge who was asked to certify two classes in a case alleging that Facebook parent Meta Platforms monopolized the social media advertising market and misused users' data said Thursday that the users' damage theory wasn't "plausible," but appeared open to the advertisers' claim they suffered the same alleged injury.

U.S. District Judge James Donato kicked off a hearing Thursday in San Francisco federal court by telling a lawyer for the Facebook users that he didn't see that they had established a classwide antitrust injury.

Kevin Teruya of Quinn Emanuel Urquhart & Sullivan LLP said the injury is the reduction in compensation that the users should have received for use of their data.

"Facebook paid zero monetary compensation to users, as the evidence shows," Teruya said. "Absent the conduct, with more competition, there would have been more compensation to users."

The judge disagreed.

"I don't find that plausible," Judge Donato said, adding that in his opinion the data social media sites collect from users for advertising purposes isn't much different from that gathered by TV programmers.

"We get free programs and they get some insight into who you are to sell these ads," the judge said.

Teruya said there are instances in which companies pay users for their data.

Judge Donato noted that the plaintiffs had suggested the users were owed about \$5 per month for their data.

"Are you aware of a single social media company at any time to ever offer a consumer any money to obtain their personal data?" the judge asked.

The judge said he found it "implausible" that other social media companies were going to compete on prices paid to users for their data.

"They don't want to shell out any cash," the judge said. "They all want to be like Meta. They want to get it for free."

A lawyer for Meta, Sonal Mehta of WilmerHale, said the users' damages theory is based on market research companies that are not comparable to Facebook.

"That's like saying Nielsen is a yardstick for Facebook," Mehta said.

There's no evidence that any social media company would pay a user to engage on Facebook, the lawyer told the court.

After Judge Donato repeated his concern about not seeing an antitrust injury, Teruya reminded the judge that at the **motion to dismiss** stage, the court found that they had stated a claim.

Judge Donato said that was then, this is now.

"We're past that," the judge said. "It's proof time and your proof is lacking."

The consumers claim that Facebook Inc., as Meta was then named, misrepresented its data privacy practices to lure users onto its platform. The company then used the users' data to identify potential competitors and buy them, as was evident in its purchases of Instagram and WhatsApp, per the suit.

The advertising consumers claim that strategy reduced competition and choice — and allowed Meta to repeatedly and substantially raise social media advertising prices without losing market share.

During Thursday's hearing, Judge Donato expressed less concern about the advertisers' bid for class certification.

While Meta had argued in its written filing to the court that individualized issues predominated over common concerns, particularly when it came to the plaintiffs' theory of ad over-payment, the judge brushed that aside.

"Every defendant says, 'Oh, every ad contract is a special, tailored contract ... there's no commonality,' and that is easily overcome," the judge said.

The judge noted that advertising prices usually follow certain lists or packages, and asked if the plaintiffs had that sort of baseline evidence.

A lawyer for the advertisers, Yavar Bathaee of Bathaee Dunne LLP, said yes.

"The overcharge is the result of market power," Bathaee said. "It's going to affect big and small, all the same."

Meta's lawyer argued that the advertisers' expert wrongly assumes that the company's excess profit is a result of the alleged anticompetitive conduct, without considering other factors that could impact the profit rate.

"This is complete guesswork," Mehta said. "It is a house of cards."

The proposed consumer class would consist of all persons in the U.S. who maintained a Facebook profile between Dec. 3, 2016, and Dec. 3, 2020. The advertiser class uses the same class period for all persons and entities who purchased advertising from Facebook during that time.

In its filed opposition, Meta said the users' attempt to certify a class relies on a "fantasy" speculating that without the alleged market power, Meta would have made monthly payments to everyone who used Facebook. That issue dooms the class certification bid, Meta said.

"Users have not shown — as they must, by a preponderance of the evidence — how class damages tied to the alleged deception could be reliably determined, let alone that the challenged statements are the reason that Meta did not pay its users 52 billion dollars to use Facebook over the relevant period," the opposition filing states.

With respect to the advertisers' motion for class certification, Meta asserted in its opposition that the claimed antitrust impact and damages are incompatible with class treatment.

The advertisers can't "side-step the individualized nature of advertising purchases" by calculating an average overcharge drawn from an analysis of Meta's profits and seek class certification "based on their contention that every class member was overcharged by that exact same, average amount," Meta tells the court

The suit, which was first filed at the tail end of 2020, accuses Meta of monopolizing online social media advertising. Meta made deals with other big internet players to essentially divide up territory, leaving advertisers with little choice but to comply with their terms, according to the suit.

"The plaintiffs and their lawyers have spent years trying to revive stale and baseless claims, and today was no different," a spokesperson for Meta told Law360 after Thursday's hearing.

The advertisers are represented by Scott + Scott Attorneys at Law LLP, Levin Sedran & Berman LLP, Bathaee Dunne LLP and Ahdoot & Wolfson PC.

The consumers are represented by Hagens Berman Sobol Shapiro LLP and Quinn Emanuel Urquhart & Sullivan LLP.

Meta is represented by WilmerHale.

The case is Maximilian Klein et al. v. Meta Platforms Inc., case number 3:20-cv-08570, in the U.S. District Court for the Northern District of California.

–Additional reporting by Bryan Koenig, Craig Clough and Nadia Dreid. Editing by Michael Watanabe.

Update: This article has been updated with comment from a Meta spokesperson.

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Fridge Owners Seek OK On Whirlpool Defect Suit Settlement

By **Mike Curley**

Law360 (October 31, 2024, 6:38 PM EDT) -- A proposed class of refrigerator owners is asking a California federal court to give the go-ahead to a settlement to resolve claims that Whirlpool Corp. sold refrigerators with a defect that caused food to spoil or go moldy.

In a **motion** for preliminary approval filed Wednesday, the proposed class, led by Nancy Paperno, said the deal would provide reimbursement for out-of-pocket repairs and replacements of the affected refrigerators.

Under the settlement, Whirlpool is offering reimbursements to fridge owners who saw the defect manifest within eight years of purchase, effectively creating an extended warranty beyond the standard one-year warranty.

For those who paid out of pocket for repairs within the first three years after manufacture, Whirlpool is offering reimbursement of up to \$300 per qualifying repair; \$225 for repairs within four to six years of manufacture; and \$150 for repairs in years seven and eight.

For those who experienced two or more defects within six years of manufacture and had to replace their refrigerators, Whirlpool will reimburse a percentage of the original purchase price of the affected fridge, according to the motion.

Whirlpool will provide 75% of the purchase price for replacements within the first three years after manufacturer if its records show that the class member requested replacement before paying out of pocket, and 50% of the price if not. The company will provide 45% of the price for replacements in years four through six if the records show the class member requested replacement before paying out of pocket, or 25% of the price if not.

According to the motion, the plaintiffs' experts have estimated the value of this extended purchase plan at \$54.1 million, and that Whirlpool's maximum estimated payout of repairs and replacements is between \$23.6 million and \$42.8 million, assuming 100% participation of class members.

However, the proposed settlement administrator has estimated that, based on projected claims rates and the rate of defect occurrence, Whirlpool could pay out between \$519,200 and \$4.7 million.

According to the motion, the class also intends to petition the court for attorney fees, costs and service awards for a combined total of \$1.16 million, with settlement class representatives seeking awards of \$5,000.

In addition, Paperno told the court that the class definition has changed between the initial complaint and the proposed settlement class. While the class proposed in the complaint was a California class that included claims for the three-, four- and five-door models, the class proposed in Wednesday's motion is nationwide, but only includes claims for the three-door models.

The suit was brought in October 2023, with the plaintiffs alleging they first noticed cooling issues in October 2020, namely that that milk was starting to spoil before its expiration date or was accumulating mold. They claimed the refrigerators contain a dual-evaporator cooling system with a heater that can't properly defrost the evaporator in the refrigeration compartment.

For the next three years, Paperno and co-plaintiff Robert Gibbany claimed they repeatedly contacted KitchenAid's service providers, who would come and fix the issues, as the problems continued on and off up to the summer of 2023. The plaintiffs asserted violations of California's Consumer Legal Remedies Act and Unfair Competition Law, as well as breaches of implied warranty.

In December, Whirlpool moved to dismiss the suit, but saw that bid **denied** in March, with U.S. District Judge Rita F. Lin finding the complaint sufficiently alleged it knew of the problem since it issued technical service pointers noting customers could experience such a buildup of frost.

As such, the claims for the four- and five-door models are not being released, according to the motion.

In a statement Thursday, Whirlpool said, "Whirlpool Corporation takes pride in its home appliances and in its tireless efforts to take care of consumers who may experience problems with their products. Whirlpool Corporation disagrees with the allegations in this lawsuit regarding certain refrigerators manufactured from 2012-2019, but appreciates the opportunity to put its resources toward supporting consumers through this settlement."

Representatives for the plaintiffs could not immediately be reached for comment Thursday.

The plaintiffs are represented by Alison E. Chase, Andrew N. Lindsay, Laura R. Gerber and Michael Woerner of Keller Rohrback LLP, Michael J. Brickman, James C. Bradley, Nina Fields Britt and Caleb M. Hodge of Rogers Patrick Westbrook & Brickman LLC, and Kenneth Behrman.

Whirlpool is represented by Andrew M. Unthank and Galen D. Bellamy of Wheeler Trigg O'Donnell LLP, and Troy M. Yoshino and Samantha K. Looker of Winston & Strawn LLP.

The case is Paperno et al. v. Whirlpool Corp., case number 3:23-cv-05114, in the U.S. District Court for the Northern District of California.

—Additional reporting by Gina Kim. Editing by Adam LoBelia.



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Crypto Lobby Says Members Spent \$426M Fighting SEC

By **Aislinn Keely**

Law360 (October 31, 2024, 9:30 PM EDT) -- The Blockchain Association, a cryptocurrency lobby, said in a report released Thursday that its members reported incurring \$426 million in legal costs so far defending actions from the U.S. Securities and Exchange Commission.

The lobby partnered with market research and data analytics firm HarrisX to highlight the effects of the SEC's alleged "regulation by enforcement" approach to the digital asset industry. The nearly half-billion-dollar figure is intended to represent a "snapshot" of industry spending on SEC enforcement litigation, said a Blockchain Association spokesperson. The group said 20% of its membership of nearly 100 responded via an anonymized poll, but it plans to update the figure as additional companies come forward with their own spending since the data's release.

The spending data was released as part of a broader election-focused report seeking public input about cryptocurrency regulation. The lobby said the survey was conducted online by HarrisX in the United States from Friday through Monday among 1,717 registered voters.

A breakdown of the spending wasn't available on Thursday. Ripple Labs, a Blockchain Association member, has publicly said it spent over \$100 million in 2022 on its **own battle** with the SEC over how securities laws could apply to its XRP token and expects its spending to top \$200 million before the matter is resolved.

Because the HarrisX data was anonymized, it's not clear whether Ripple's spending factors into the \$426 million figure. Ripple declined to comment on questions about its legal spending or whether it responded to the Blockchain Association's survey.

According to the Blockchain Association and HarrisX's data, the SEC has brought 104 actions against the digital asset industry under Chair Gary Gensler through 2023, though the report didn't specify whether that referred to the fiscal or calendar year.

A separate HarrisX memo shared with Law360 said the regulator brought 46 actions against digital asset firms in 2023, marking a 53% increase from the previous year. Of the 46 cases, 26 were litigated in courts while 20 were administrative proceedings.

While HarrisX's data noted that the rise of enforcement cases against crypto firms took off as Gensler took the helm of the agency, a notable increase in crypto actions began in 2017. While the number of total actions undertaken by the SEC has seen mild fluctuations from 2018 to 2023, there has been a 40% increase in the number of crypto cases in each of the last two fiscal years.

The SEC defended its enforcement posture toward crypto against concerns about legal defense costs.

"The costs to investors from fraud and other abuses in the crypto markets far exceed the costs paid by crypto firms to defend their noncompliance with the securities laws," said the SEC.

Other data shows significant public concern with cryptocurrencies. An FBI report released in September noted that its Internet Crime Complaint Center received 69,000 complaints involving crypto and over \$5.6 billion in reported losses for 2023.

A Pew Research Center report published last week also found that more than two-thirds of over

10,000 Americans surveyed said they had "little to no confidence that current ways to invest in, trade or use cryptocurrencies are reliable and safe."

Thursday's report on the public's view of the SEC's approach to crypto comes just days before a hotly contested election in which both candidates have made moves to court crypto voters.

While the Blockchain Association and HarrisX's data said voters appear to believe that the SEC has been "too heavy-handed" and favor clear Congress-set guidelines for crypto businesses, they also noted that "crypto is an up-for-grabs election issue."

Republican nominee Donald Trump has been outspoken about his newfound affinity for the industry, with his family going as far as to launch their own crypto project, to mixed results. While Democratic nominee Kamala Harris has said little on the topic, she has released a policy document that committed to encouraging "innovative technologies like AI and digital assets."

No party "currently 'owns' the issue, but voters say they are more likely to support and back candidates who support innovations in the digital asset space," said the report. "Crypto voters make up 18% of the electorate and are even more winnable on this issue."

The sampling margin of error for the survey is plus or minus 2.4 percentage points, the report said.

--Editing by Karin Roberts.